



**RIGHTS, REMEDIES, AND PRACTICE.**



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RIGHTS, REMEDIES,  
AND  
PRACTICE,  
AT LAW, IN EQUITY, AND UNDER THE CODES. 7-53  
P-20  
A TREATISE ON  
AMERICAN LAW P-167  
IN CIVIL CAUSES;  
WITH  
A DIGEST OF ILLUSTRATIVE CASES.

BY  
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USAGES AND CUSTOMS, DEFENSES TO CRIME, ETC.

IN SEVEN VOLUMES.

VOL. VII.

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## PREFACE.

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THIS volume, continuing the third division,—Property Rights and Remedies,—continues the title Remedies and Procedure, begun in the sixth volume. Commencing with a number of chapters upon the general subject of pleading and practice at common law and under the reformed codes of procedure, it concludes with chapters upon the different remedies and their form,—Attachment, Garnishment, Replevin, Trespass and Trover, Account Stated, Assumpsit, Injunction, and Ejectment. Then follows the title Conflict of Laws.

On page 5877 the final division of the work—Public Rights and Remedies (Division IV.)—begins. Under the general title of Constitutional Law, all questions of public as distinguished from private right are discussed in eight parts; viz., Part I., General Principles; Part II., Legislative Powers; Part III., Judicial Power; Part IV., Public Offices and Officers; Part V., Civil Rights; Part VI., Contracts and Property; Part VII., Eminent Domain; Part VIII., Police Power. The important title Municipal Corporations comes next in order, and the volume and work closes with an exhaustive chapter upon Public Remedies.

In the preface to the first volume I stated the object and intention of this work to be to present within the

compass of a single work a complete view of American case law on every species of action and defense; to cover the entire field of jurisprudence, except criminal law, logically, methodically, thoroughly, and yet in an abridged form; to treat the various branches of the civil law as a whole. The comprehensive digest (now in preparation) to every point of law contained in the seven volumes will be, I am assured, a permanent witness that this promise has been performed.

J. D. L.

SAN FRANCISCO, September, 1890.

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## PART II. — ACTIONS AND DEFENSES IN GENERAL.

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§ 3404. **General Principles and Definitions.** — The phrase "an action at law," as used among lawyers, is understood to mean a specified mode of proceeding, whereby a matter in dispute between parties is brought into a court of law to be tried, and for the recovery of damages by the plaintiff for the infringement of some right or neglect of some duty by the defendant. The word "suit" is strictly applicable to a proceeding in equity as distinguished from an action at law, where it is sought to specifically enforce a private right or prevent the commission of a private wrong. The word "prosecution" is used to designate the proceeding instituted for the punishment of a public offense. The ancient maxim of law was, that there is no wrong without a remedy, — *ubi jus ibi remedium*; but this must be understood with the qualification that those cases coming within the principle of *damnum absque injuria* are excepted; but whenever one is possessed of a right secured by law, the law furnishes a remedy for its infringement.<sup>1</sup> It may be laid down as a general proposition that all

<sup>1</sup> Broom's Legal Maxims, 191; 3 Bla. 515; *People v. Colborne*, 20 How. Pr. Com. 116; *Didier v. Davison*, 10 Paige, 378, 381, 382. See *ante*, Title VIII.

actions at law are founded upon some act or some omission in regard to private rights or duties in relation to person or property. Actions at law were formerly classified under numerous subdivisions, according to the nature of their subject-matter, such as actions in *assumpsit*, debt, detinue, trover, conversion, ejectment, and many others. With respect to the place in which they can be tried, actions at law are also divided into local and transitory actions; a local action being one in which the cause of action could have arisen only in some particular district, and in which alone the action can be brought; a transitory action, on the other hand, being one which may be brought wherever the defendant can be found. Actions are also divided into real, personal, and mixed; real actions being those which are brought for the recovery of land, without damages; and personal actions being those brought to recover damages arising from the breach of some contract between the plaintiff and defendant, or for the recovery of personal property or damages for its detention, or to recover damages for some injury to the person or to personal property. Mixed actions are those brought for the recovery of real estate and damages for its detention. Personal actions are also divided into two classes; viz., those arising *ex contractu* and those arising *ex delicto*, or in tort.<sup>1</sup> These two latter subdivisions are, also, themselves subdivided into a number of species of actions, some of which will be described hereafter under their various heads, though in most of the states the common-law form of action is now abolished. The abolition of the forms of pleading has, however, in many cases, not affected the general principles of pleading at common law; and codes of procedure, now generally adopted throughout the Union, have, as a rule, maintained the rules of pleading as established at the common law. These codes will be hereafter referred to in detail.

<sup>1</sup> Chitty's Pleading, 97.

§ 3405. **The Writ, or Summons.**—Civil actions in courts of record were formerly commenced by summons, writ (*capias ad respondendum*), or declaration. The summons was applicable only to actions against corporations; the writ of *capias* was used in actions against persons not privileged from arrest; and the declaration in most actions where bail was not required.<sup>1</sup> What was known as an "original writ" was in former times the mode of commencing every action at common law. Owing to the expense of suing out such a writ, other methods of beginning actions were devised, with the connivance of the courts, but they were all subsequently abolished in England, and the modern writ of summons was introduced.<sup>2</sup>

§ 3406. **The Pleadings.**—These are as follows: 1. The declaration, by plaintiff; 2. The plea, by defendant; 3. The replication, by plaintiff; 4. The rejoinder, by defendant; 5. The surrejoinder, by plaintiff; 6. The rebutter, by defendant; 7. The surrebutter, by plaintiff. Beyond these the pleadings have no distinctive names, and they seldom extend further. There is also the demurrer, which may be pleaded by either plaintiff or defendant to the last preceding pleading of his adversary. The object of a demurrer is, by admitting the facts as alleged in the pleading demurred to, to raise an issue of law, upon the determination of which will depend the sufficiency, or otherwise, of the pleading.<sup>3</sup>

§ 3407. **Office and Functions of Pleadings.**—In all common-law actions it devolved upon the plaintiff to take the initiative in the pleading, which was done, as we have just seen, by means of the declaration. Its office was to set forth the cause of action in proper technical and legal

<sup>1</sup> 1 Burrill's Practice, 86; O'Hara v. Brophy, 24 How. Pr. 379; Akin v. R. R. Co., 14 How. Pr. 337; Kendall v. Washburn, 14 How. Pr. 380; Dieffendorf v. Elwood, 3 How. Pr. 285.

<sup>2</sup> 2 & 3 Wm. IV., c. 39; 3 Stephen's Com. 489.

<sup>3</sup> 1 Chitty's Pleading, 16th Am. ed., 235; Stephen's Pleading, 24; Story's Eq. Pl., sec. 1.



form. It was necessary to adopt the particular form of declaration appertaining to the species of action which the special facts of the case consign it to. If defective in matter of form, the declaration is obnoxious to a special demurrer; if by reason of the want of some material allegation, the declaration is subject to a general demurrer, or one addressed to the particular defect complained of. If the declaration is well pleaded, the defendant's course is to plead to the merits of the action, which he may do by a joinder of issue, which is a denial of the facts as alleged in the declaration, and is termed a plea in bar; or he may admit the facts as alleged, and allege others, having the effect of obviating the effect of those alleged in the declaration, and of exonerating the defendant from the claims made against him by the declaration; this is termed pleading in confession and avoidance. The defendant may also plead in abatement, which is a plea alleging matter which does not go to the merits of the action, but rather to the want of capacity in the plaintiff to sue, or to the fact of the action being prematurely brought. If the declaration is demurred to, the plaintiff can either confess the demurrer and amend the declaration, or by replication join issue of law in the demurrer and take the opinion of the court on the point raised. The defendant may also plead specially in bar, and in the event of his so doing, the plaintiff can demur on the ground that such plea is not sufficient, as matter of law, to constitute a defense to the declaration, and the issue of law thus raised is disposed of in the same manner as a demurrer to the declaration; or the plaintiff, by means of the replication, may deny the truth of the facts to be as alleged in the plea, and go to trial on the issues of fact thus raised. In short, the main, if not the only, object of pleading is, in a technical and specific manner, to bring the parties to an issue, either of law or fact, and until that end has been attained, they may go on alternately

<sup>1</sup> Blyss  
<sup>2</sup> Atty.  
437; 3 L.  
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<sup>3</sup> True  
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alleging, objecting, denying, and avoiding, as they deem proper.

§ 3408. **The Judgment.**—This is the decision of the court upon the issues raised by the pleadings. It is theoretically the end of the law, or rather of the action.<sup>1</sup> A judgment is defined as "the decision or sentence of the law pronounced by a court or other competent tribunal upon the matter contained in the record,"<sup>2</sup> or as "the conclusion of the law upon facts found or admitted by the parties."<sup>3</sup> A judgment at law is yea or nay; for one party, and against the other. It recognizes no liens, awards no execution against specific property, unless when the proceeding is *in rem*, but contains simply the conclusion of the law upon the facts as proved, and leaves the party to his legal and appropriate writ to enforce it.<sup>4</sup>

§ 3409. **The Execution.**—The writ of execution is the prescribed mode of obtaining the fruits of the judgment. Every writ which authorizes the proper officer to carry a judgment into effect is an execution.<sup>5</sup> Every court having jurisdiction to pronounce judgment has authority to award execution. It would be idle to adjudicate what could not be executed, and the power to pronounce necessarily implies the power of executing.<sup>6</sup> The execution must follow the judgment. Judgment in a real action is executed by the writ of *habere facias possessionem*, which directs the sheriff to put the plaintiff into possession of the land in question.<sup>7</sup> Judgment in a personal action is enforced by the writ of *feri facias*, which directs the sheriff to cause

<sup>1</sup> Blystone v. Blystone, 51 Pa. St. 373.

<sup>2</sup> Aetna Ins. Co. v. Swift, 12 Minn. 437; 3 Bla. Com. 395; Bouvier's Law Dict.

<sup>3</sup> Truett v. Legg, 32 Md. 147; Tidd's Practice, 930.

<sup>4</sup> Gregory v. Nelson, 41 Cal. 278; Kramer v. Reibman, 9 Iowa, 114.

<sup>5</sup> United States v. Nourse, 9 Pet. 28; Pierson v. Hammond, 22 Tex. 585; Darby v. Carson, 9 Ohio, 149.

<sup>6</sup> United States v. Drennan, Hemp. 325.

<sup>7</sup> Com. Dig., tit. Execution, A, 2; 3 Bla. Com. 413.

to be made the amount of the judgment out of the goods and chattels of the defendant, or by the writ of *capias ad satisfaciendum*, which directed the sheriff to seize and keep the body of the defendant in satisfaction of the judgment debt,—a barbarous proceeding, now happily abolished.<sup>1</sup>

<sup>1</sup> Com. Dig., tit. Execution, C, 1; Tidd's Practice, 994.

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## CHAPTER CLXVI.

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- § 3411. Difference between actions at law and suits in equity.
- § 3412. Equity acts on the person individually.
- § 3413. Equity compels specific performance.
- § 3414. Trial by jury not necessary.

§ 3410. **Pleadings.**—The pleadings and proceedings were altogether different in equity. The jurisdiction in equity was devised for the purpose of affording relief in those cases where a strict adherence to the rules of the common law produced harshness and injustice, and where there was no adequate remedy at common law. The first proceeding by the plaintiff was styled the bill of complaint. This was addressed to the court or its judges, and contained the names and descriptions of the persons presenting it, a statement of the facts and circumstances of the case, the wrongs or grievances complained of, and the names of the defendants or persons from whom the relief was sought. The bill of complaint was divided into the following parts, viz., the address, the introduction, the stating part, the charging part, the jurisdictional clause, the interrogative part, and the prayer for the relief claimed, and for the issuance of the process of the court to compel the defendants to appear and plead.<sup>1</sup> In the event of the bill of complaint being deemed insufficient on its face to maintain the suit, the defect was availed of, as in an action at law, by demurrer or exceptions, which were the same thing as a demurrer at law. If the cause of the objection, however, was not apparent on the face of the bill, the objection could be taken only by a plea

<sup>1</sup> 1 Barbour's Chancery Practice, 2d ed., 34 et seq.; Smith v. Clark, 4 Paige, 368; Meth. Church v. Jaques, 1 Johns. Ch. 75; English v. Foxall, 2 Pet. 595.

which alleged facts which did not appear in the bill, and which, if they had so appeared, would have rendered it demurrable. If it was considered that the bill stated sufficient grounds to maintain the suit, then, instead of excepting or pleading, the defendant would answer. The answer consisted of a denial of the allegations of the bill, or a confession and avoidance, much the same in effect as at common law. The plaintiff, in the latter case, could demur to the new matter set up in the answer, or by replication could join issue on the answer, and thus raise an issue of fact to be heard.<sup>1</sup>

**§ 3411. Difference between Actions at Law and Suits in Equity.**—Originally, suits in equity were instituted and heard before different tribunals from those having jurisdiction over actions at law. No doubt the distinction between law and equity is an utterly fallacious and illogical one, and one which ought never to have been created. This is evidenced by the ease and completeness with which, in modern times, the same tribunal takes cognizance of both branches of procedure, and administers justice in each. The diversity of the disputes which arise between mankind necessitates different forms and methods of adjustment. The method of adjusting one group of such disputes is by an action at law in one form or another, and the mode of adjusting the other group is by a suit in equity. The necessity for separate tribunals did not arise from the diversity of the disputes, but from the fact that the courts of common law were not provided with the requisite powers and machinery for dealing out the relief and remedy in the cases over which equity acquired jurisdiction. Now that the same court is possessed of the needed attributes and functions, no difficulty is experienced in meting out the justice which was for-

<sup>1</sup> 1 Barbour's Chancery Practice, iell's Pleading and Practice, 4th ed., 249; Story's Eq. Pl., sec. 681; 1 Dan- 713.

merly considered to be so essentially different as to require a distinct tribunal for its administration. At common law, not only did every wrong have its remedy, but every class of wrongs had a separate form or mode of obtaining that remedy, and each form had technical rules peculiarly applicable to itself. In equity but one form of remedy was used to obtain any of the various and complex species of relief sued for, and the pleadings, from beginning to end, were marked by simplicity, and freedom from technicality and complexity. The main distinction, however, between an action at law and a suit in equity was not so much in the mode of obtaining the relief as in the nature of the relief itself which the plaintiff sought. The basis of an action at law was usually the infringement or violation of some private right, or the breach of some duty for which pecuniary damages were a suitable and sufficient compensation. The pleadings were technical and formal, and legal fictions were not only tolerated, but deemed necessary to arrive at the desired issue of law or fact. Where it was necessary to state facts, only the ultimate facts were permitted to be alleged, and the insertion of matter of evidence was always held to be bad pleading; and the pleader was not allowed to state more than one set of facts constituting a cause of action or defense. Cases also arose in which the plaintiff was ignorant of the facts which it might be essential for him to allege in a common-law action. His course then was to file his bill in equity to obtain the necessary knowledge and then pursue his remedy at law; or, instead of waiting until he had sustained injury, and then proceeding at law to recover damages, he might resort to the prophylactic treatment of a suit in equity to restrain the defendant from continuing his wrong-doing, or from carrying out his threats of violating the plaintiff's rights. All the facts and circumstances of the case, as well as a relation of the grievances suffered or feared by the plaintiff, might be

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detailed in the bill.<sup>1</sup> In addition to these distinctions, the common-law courts, in their administration of justice, were constrained to follow the rules and technical principles of positive law, which frequently led to injustice being suffered by the parties, and there were sometimes cases to which the rules and forms of the common law were not applicable, and the parties there found themselves without any remedy. At junctures of this kind, courts of equity stepped in, and by administering equity as distinguished from law were enabled to relieve the parties from the endurance of those wrongs which the common-law courts were powerless to remedy, or where such remedies as they had were inadequate to the purpose.<sup>2</sup> Instances of the cases above alluded to will be found in those branches of equity jurisdiction comprised under the heads of penalties and forfeitures, charities, trusts, imperfect consideration, specific performance, injunction, and forfeited and imperfect mortgages. Also, as instances where the common law gave a remedy, but which was inadequate to the demands of the case, there may be cited the cases of administration, legacies, contribution, fraud, accident, mistake, the rescission of contracts, and the cancellation or reformation of deeds or other instruments.

**§ 3412. Equity Acts on the Person Individually.**— This power is exercised by ordering the party personally to do the act required of him, or to abstain from doing the act complained of. This relief is of a positive character, granting the specific thing the party is entitled to, in lieu of the negative remedy of damages, which is, except in a very few cases, the only compensation obtainable at law. It is the constant care of equity that a right shall be actually enjoyed, and with this end in view, any viola-

<sup>1</sup> Adams's Equity, 207, 217; Mitford's Eq. Pl. 76.

<sup>2</sup> Pulteney v. Warren, 6 Ves. 73; Brown v. Newall, 2 Mylne & C. 572.

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tion of a right will be prevented. At law the aid of the court cannot be invoked until after injury has been sustained. Damages for a breach of covenant or contract may be obtained at law, but in equity a clearly intended breach will be prevented. Equity, in a suit in one state, will direct the conveyance of lands situate in another state;<sup>1</sup> but at law no action for damages for trespass to land in one state can be brought in any other state.<sup>2</sup> The application of this principle has had the effect of practically largely extending the jurisdiction in equity, as the court acts altogether independently of the locality where the act is to be done, but requires only that the person against whom the relief is sought should be within its jurisdiction. In so exerting its power the court does not claim to assume jurisdiction in a foreign country, but acts solely on the fact that the person against whom its order is directed is within the territorial limits of its jurisdiction.<sup>3</sup>

§ 3413. **Equity Compels Specific Performance.**—This is another branch of the positive relief not obtainable at law. Though, doubtless, the fear of having to pay damages may be a strong inducement to the fulfillment of a contract, yet there are many cases where damages are not an adequate compensation to the party aggrieved. Also, in many cases the claims of both parties may require modification, or some preliminary proceedings may be necessary to ascertain their rights, or some temporary or permanent conditions may require to be attached to the redress of injuries or the exercise of rights. Courts of common law cannot, in any of these cases, give the requisite relief, owing to their want of the necessary

<sup>1</sup> *Fenner v. Sanborn*, 37 Barb. 610; *Hill*, 82; *Hurd v. Miller*, 2 Hilt. Gardner v. Ogden, 22 N. Y. 327; 540.

*Bailey v. Ryder*, 10 N. Y. 363; *Newton v. Bronson*, 3 N. Y. 587.

<sup>2</sup> *Mott v. Coddington*, 1 Abb. Pr., N. S., 290; *Watts v. Kinney*, 6

<sup>3</sup> *Toller v. Carteret*, 2 Vern. 495; *Sutphen v. Fowler*, 9 Paige, 280; *Penn v. Lord Baltimore*, 1 Ves. Sen. 444; 2 Story's Eq. Jur., 13th ed., 60.



forms of remedy. They can render judgment only in a prescribed and limited manner for damages alone, and so are incapable of adapting their judgments to the exigencies of any case where an award of damages would not effect justice between the parties. Courts of equity, on the other hand, are subject to no such trammels; the forms of their proceedings are adaptable to the ever-varying requirements of justice, and they can adjust their decrees so as to mete out the remedy suitable to the occasion. If all the parties necessary to effect these objects are not before them, they have power to insist upon their presence, either at the instance of the original parties, or on their own motion, and thus make their decrees not only complete in themselves, but binding on all persons interested in the subject-matter of the suit.<sup>1</sup>

§ 3414. **Trial by Jury not Necessary.** — In equity, questions of fact must be decided by the court alone. This is a fundamental rule. In comparatively recent times statutory powers have been conferred upon these courts to call in the aid of a jury, where they consider it desirable. But the findings of the jury upon the questions of fact submitted to them are merely advisory, and in no way binding on the court. In a suit in equity the character of the issues to be tried, and the nature of the remedy to be applied, render trial by the court alone a more suitable mode of proceeding than with the addition of a jury, as preliminary decisions are frequently necessary, involving the investigation of numerous questions of fact before a final decree can be rendered.<sup>2</sup>

<sup>1</sup> Cooper's Eq. Pl., c. 1, p. 34; Mitford's Eq. Pl., 163, 164; West v. Randall, 2 Mason, 190-196; Story's Eq. Pl., secs. 72-238. See *ante*, Title XXIV., Chapter CXXIV.

<sup>2</sup> Verden v. Coleman, 18 How. 86; 584.

Ryan v. McLeod, 32 Gratt. 367; Wilhelm v. Caylor, 32 Md. 151; Teaff v. Hewitt, 1 Ohio St., N. S., 511; Dabbs v. Dabbs, 27 Ala. 646; Lea v. Beatty, 8 Dana, 207; Milk v. Moore, 39 Ill.

<sup>1</sup> N. Y. amended,

CHAPTER CLXVII.

CHANGES EFFECTED BY CODES OF PROCEDURE.

- § 3415. Different forms of action abolished.
- § 3416. Only one form of action.
- § 3417. Necessary variation in facts, circumstances, and relief.
- § 3418. Law and equity administered in same tribunal.
- § 3419. Object of the modern practice.
- § 3420. No changes in duties and liabilities.

§ 3415. **Different Forms of Action Abolished.**—By the recent adoption of codes of procedure and practice many states in the Union have terminated the artificial distinction between actions at law and suits in equity, and have abolished the various forms of such actions and suits by prescribing one universal form of action applicable to all, and styled an action, or civil action. The language of the statutes employed in the various states to effect these objects differs somewhat in form, but in substance follows to a large extent the provisions of the New York code, which are as follows: "The distinction between actions at law and suits in equity, and the forms of such actions and suits, heretofore existing, are abolished, and there shall be, in this state, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action."<sup>1</sup> The language of the codes of procedure of Missouri and Ohio is almost identical;<sup>2</sup> and the practice acts or codes of Arkansas, California, Colorado, Connecticut, Indiana, Iowa, Kentucky, Minnesota, Nebraska, Nevada, Oregon, and North and South Carolina are substantially the same, all having abolished the old forms of actions at law, and (with the exception of Arkansas, Iowa, Kentucky, and Oregon, where it is still retained) they

<sup>1</sup> N. Y. Code of Proc., sec. 69; Id., amended, sec. 3339.      <sup>2</sup> Wagner's Mo. Comp. Stats., c. 110, sec. 1; Ohio Rev. Stats., sec. 4971.

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have abolished the distinction between actions at law and suits in equity, terming them all civil actions.

§ 3416. **Only One Form of Action.**—Code practice provides for only one form of action, and furnishes the necessary machinery to obtain in such one form of action all the primary and substantive rights and all the civil remedies, whether of a legal or equitable nature, which could be granted in any of the various kinds of actions at law under the old practice, or by bill in a court of chancery.

The defendant is not confined to a defense formerly known as a legal one when sued for damages, or other claim which would formerly have come under the denomination of some action at law, but may raise an equitable defense to such claim, and *vice versa*. In *Crary v. Goodman*<sup>1</sup> it is stated by Johnson, J., that "the question is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defense against the plaintiff's claim, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for."<sup>2</sup>

The plaintiff, without giving any specific name to his proceeding, must state the facts which show the wrong; and if his statement entitles him to relief of any kind, he will have a good complaint or petition. But it is only the form and the name of the action which are abolished. The fundamental distinctions which arise from the character of the wrong suffered, and of the relief sought, must of necessity remain, and cannot be abolished.

§ 3417. **Necessary Variation in Facts, Circumstances, and Relief.**—The fact of there being but one form of ac-

<sup>1</sup> 12 N. Y. 266.

<sup>2</sup> *Dobson v. Pearce*, 12 N. Y. 156; 62 Am. Dec. 152; *Phillips v. Gorham*, 17 N. Y. 270; *Kramer v. Rebman*, 9 Iowa, 114; *White v. Lyons*, 42 Cal.

279; *Mowrey v. Hill*, 11 Wis. 146; *Troost v. Davis*, 31 Ind. 34; *Crosier v. McLaughlin*, 1 Nev. 348; *Rogers v. Penniston*, 16 Mo. 432.

<sup>1</sup> N. Co., 23 Ind. 34; 540; G. Am. Dec. 62; Bid. <sup>2</sup> Wh. Grain v. Dec. 423

tion in no wise affects the varying nature of the circumstances on which that action is based, or the relief sought by it; and if the complaint or petition states fact entitling the plaintiff to any remedy, the action will not be dismissed because the plaintiff has asked for a particular judgment to which he is not entitled.<sup>1</sup>

**§ 3418. Law and Equity Administered in Same Tribunal.**—Under the code practice, any kind of relief which formerly could be obtained in an action at law or in a suit in equity is now administered in the same court and under the same general plan of procedure; and a party cannot now be told that he has no case at law, or no case in equity, as he is in a court administering both law and equity; but only when, under the facts as proved, he is not entitled to any relief, whether of a legal or equitable nature, can his action be dismissed.<sup>2</sup> Where a plaintiff erroneously prays for relief to which he is not entitled on the facts as stated or proved, he may suffer the inconvenience of delay, and in some states his action will be transferred to another docket, but the action will not be dismissed if the plaintiff is entitled to any relief either at law or in equity.<sup>3</sup>

**§ 3419. Object of the Modern Practice.**—The practice of the law, as reformed by the American codes of procedure, is founded upon the idea of simplifying the means by which the members of a civilized community can obtain the enforcement of their rights or protection from wrongs and indemnification from injuries either actually sustained or definitely threatened. To effect this it has

<sup>1</sup> N. Y. Ice Co. v. Northwestern Ins. Co., 23 N. Y. 357; Troost v. Davis, 31 Ind. 34; Leonard v. Rogan, 20 Wis. 540; Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423; Emery v. Pease, 20 N. Y. 62; Bidwell v. Ins. Co., 16 N. Y. 263.  
<sup>2</sup> Whiting v. Root, 52 Iowa, 292; Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423.

<sup>3</sup> Dickson v. Cole, 34 Wis. 621; McCrory v. Parks, 18 Ohio St. 1; Davis v. Morris, 36 N. Y. 569; Richmond v. R. R. Co., 32 Iowa, 422; Henderson v. Dickey, 50 Mo. 161; Parker v. Laney, 58 N. Y. 469; Haral v. Gray, 10 Neb. 186; Lowber v. Connit, 36 Wis. 176.

been necessary to sweep away the technicalities, niceties, and pitfalls of the courts of common law, originally devised for the purpose of enabling the semi-barbarous barons of the Middle Ages to oppress and defraud those less wealthy and strong than themselves, and the scarcely less oppressive, but more delusive and dilatory, procedure of the courts of so-called equity, originally instituted for the aggrandizement of a crafty and designing priesthood, and subsequently improved upon by generations of scheming attorneys and solicitors, until the practice of the law became a by-word and a reproach; and to substitute in the place of the mass of rules, refinements, and complications, which had no other result than imperiling a just claim and assisting a fraudulent defense, a plain and simple statement of facts, and an equally plain and simple answer to such statement, and a court armed with all the necessary powers and means to carry out substantial justice between the litigants, based upon principles of law, as including equity, and in a speedy and effective manner.<sup>1</sup>

§ 3420. **No Changes in Duties and Liabilities.**—All duties and liabilities existing when the new system of procedure came into vogue remain unaffected thereby, and the principles upon which the rights of the parties are determined have undergone no change. The practice under the codes does not assume to abolish the distinctions between the various species of relief obtainable at law and in equity, but merely abolishes the various forms of obtaining them, and gives to the same tribunal the power to grant them all.<sup>2</sup> In *Meyers v. Field*,<sup>3</sup> Holmes, J.,

<sup>1</sup> *Bowen v. Aubrey*, 22 Cal. 566; *Ind.* 483; *Garret v. Gault*, 13 B. Wright v. Wright, 54 N. Y. 437; *Mon.* 378; *Lattin v. McCarty*, 41 Stevens v. Mayor etc., 84 N. Y. N. Y. 107; *Peck v. Newton*, 46 Barb. 296; *Williams v. Slote*, 70 N. Y. 601; 173; *Richardson v. Means*, 22 Mo. Chinn v. Prentiss, 32 Ohio St. 236; 495; *Klonne v. Bradstreet*, 7 Ohio St. Millikin v. Carey, 5 How. Pr. 272; 322; *Dickenson v. Cole*, 34 Wis. 621; *Gress v. Evans*, 1 Dak. 387; *Williams Mattock v. Todd*, 25 Ind. 128; *Goulet v. Haight*, 5 How. Pr. 470. *v. Asseler*, 22 N. Y. 228.

<sup>2</sup> *Grain v. Aldrich*, 38 Cal. 514; 99 Am. Dec. 423; *Emmons v. Kiger*, 23

<sup>3</sup> 37 Mo. 434.

says: "Equitable rights are still to be determined according to the doctrines of equity jurisprudence, and in the peculiar modes of proceeding which are sometimes required in such cases; and legal rights are to be ascertained and adjudged upon the principles of law; and the rules of proceeding at law are in many respects very different from those which are applicable to equity cases." Also, in *Bonesteel v. Bonesteel*,<sup>1</sup> Lyon, J., lays it down that "there are certain essential and inherent distinctions between actions at law and in equity, to abolish which is beyond the power of legislative enactment. The legislature may abolish old forms of action, and has done so; but the essential principles of equitable actions and equitable relief, as distinguished from legal actions and remedies, are as vital now, and as clearly marked and defined, as before the enactment of the code."<sup>2</sup>

<sup>1</sup> 28 Wis. 245.

*v. Gorham*, 17 N. Y. 270; *Mowrey v.*

<sup>2</sup> *Lattin v. McCarty*, 41 N. Y. 107; *Hill*, 11 Wis. 146; *Voorhis v. Childs*,  
*Reubens v. Joel*, 13 N. Y. 493; *Phillips* 17 N. Y. 354.

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## CHAPTER CLXVIII.

## JOINDER OF CAUSES OF ACTION.

§ 3421. Usual provisions.

§ 3422. On sufficiency of averments and proofs plaintiff may recover.

§ 3423. If averments insufficient, recovery cannot be had.

§ 3424. Allegations of fact indispensable under new practice.

§ 3425. Mode of trial, generally.

§ 3421. **Usual Provisions.**—The codes of procedure in the various states usually provide for a joinder in one complaint of several causes of action, whether of a legal or equitable nature. They generally provide, in substance, that the plaintiff may unite in the same complaint or petition several causes of action, whether previously classified as legal or equitable, or both, where they all arise out of the same transaction. The New York code at present provides in this respect as follows: "The plaintiff may unite in the same complaint two or more causes of action, whether they were formerly denominated legal or equitable, or both, where they are brought as follows: 1. Upon contract express or implied; 2. For personal injuries, except libel, slander, criminal conversation, or seduction; 3. For libel or slander; 4. For injuries to real property; 5. Real property in ejectment, with or without damages for the taking or detention thereof; 6. For injuries to personal property; 7. Chattels, with or without damages for the taking or detention thereof; 8. Upon claims against a trustee by virtue of a contract or by operation of law; 9. Upon claims arising out of the same transaction or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions. But it must appear from the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this section;

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that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint that they do not require different places of trial."<sup>1</sup> The provisions of codes of procedure in other states are substantially similar, some of them being even more liberal in regard to the joinder of different causes of action. The union of legal and equitable causes of action is, however, not without limit in any of the codes, and in New York, under the last subdivision (9) of the section above quoted, is confined to those cases in which the rights and remedies arise out of the same transaction or transactions connected with the same subject of action. If, therefore, in such a case, the plaintiff avers and proves his right to an equitable remedy, and to a legal remedy based thereon, he is entitled to both, and judgment should be granted accordingly.<sup>2</sup>

So a plaintiff having the legal title to land may sue for reformation of his conveyance, for possession of the land, and for damages for withholding possession, all in the same action.<sup>3</sup> And in an action by the holder of the equitable title for the cancellation of a deed made to the defendant, a conveyance to plaintiff, and for an injunction to restrain defendant from conveying away the property, the plaintiff may also claim possession and damages.<sup>4</sup> Also, it has been held that in an action by the grantor of land to have a deed corrected by inserting an exception of growing timber, he may recover damages

<sup>1</sup> N. Y. Code, sec. 484 (amended 1877, 1879); *Burroughs v. Tostevan*, 19 Alb. L. J. 115; *Hay v. Hay*, 13 Hun, 315; *Beck v. Ruggles*, 6 Abb. N. C. 69. That the New York code has not abrogated the rules of equity pleading as regards multifariousness, see *Garner v. Thorn*, 56 How. Pr. 452.

<sup>2</sup> *Madison Avenue Baptist Church v. Oliver Street Baptist Church*, 73 N. Y. 83; *Lattin v. McCarty*, 41 N. Y. 107; *Stevens v. Mayor etc.*, 84 N. Y. 296; *Walker v. Sedgwick*, 8 Cal.

398; *Henderson v. Dickey*, 50 Mo. 161; *Weinland v. Cochran*, 9 Neb. 480; *Gurnsey v. American Ins. Co.*, 17 Minn. 104; *Wa Ching v. Constantine*, 1 Iowa, 266; *Landersdorf v. Flint*, 50 Wis. 401; *Kahn v. Kahn*, 17 Fla. 400; *Cone v. Niagara Fire Ins. Co.*, 60 Wis. 619; *Wheelock v. Lee*, 74 N. Y. 495.

<sup>3</sup> *Laub v. Buckmiller*, 17 N. Y. 620.

<sup>4</sup> *Lattin v. McCarty*, 41 N. Y. 107; *Henderson v. Dickey*, 50 Mo. 161.



for trees included in the exemption, but which have been wrongfully cut by the defendant.' So in an action by the vendor of land to recover on notes given for the price, he may unite a claim to foreclose his lien on the land.<sup>3</sup> And in an action to abate a nuisance, the plaintiff may unite a claim for damages sustained thereby.<sup>3</sup> And damages may also be claimed in an action for the assignment of dower, and for possession of the land.<sup>4</sup> The decisions of the supreme court of the state of Wisconsin, however, form an exception to the liberal interpretation of the statutes which has obtained in most other states, as above indicated, and evince a tendency to adhere to the old practice in this particular.<sup>5</sup> Thus where an action was brought in that state to compel the specific performance of an agreement to grant a lease, and a claim for damages for breach of a covenant which was to have been contained in the lease was joined therewith, it was held that such joinder was improper, and that the plaintiff must first obtain the lease, and then sue for damages for the breach of covenant.<sup>6</sup> The tendency of the New York courts is, however, quite in the opposite direction, they having gone so far in carrying out the spirit of the code in this respect that in cases where the legal right was dependent upon the prior grant of equitable relief, such as specific performance, cancellation, or reformation, instead of merely granting the relief they have at the same time given damages, which was the real object of the action.<sup>7</sup> So where suit was brought to recover damages on a policy of insurance against fire, united with a claim to have the policy reformed on account of an alleged mistake, which reformation would enable the plaintiff to recover a larger

<sup>1</sup> Welles v. Yates, 44 N. Y. 525.

<sup>2</sup> Walker v. Sedgwick, 8 Cal. 398.

<sup>3</sup> Davis v. Lambertson, 56 Barb. 480.

<sup>4</sup> Brown v. Brown, 4 Rob. (N. Y.) 688; Henderson v. Dickey, 50 Mo. 161.

<sup>5</sup> Horn v. Ludington, 32 Wis. 73; Supervisors v. Decker, 30 Wis. 620.

<sup>6</sup> Noonan v. Orton, 21 Wis. 283;

Lawe v. Hyde, 39 Wis. 345.

<sup>7</sup> Maher v. Hibernia Ins. Co., 67 N. Y. 283; Cone v. Niagara Fire Ins. Co., 60 N. Y. 619; Phillips v. Gorham, 17 N. Y. 270; Bidwell v. Astor Ins. Co., 16 N. Y. 363; Caswell v. West, 3 Thomp. & C. 383.

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amount, it was held that although the evidence did not establish the mistake and justify a reformation, yet the plaintiff was entitled to recover on the legal cause of action for the amount mentioned in the policy.<sup>1</sup>

**§ 3422. On Sufficiency of Averments and Proofs Plaintiff may Recover.**—Where the same complaint contains both an equitable and a legal cause of action, but equitable relief only is demanded, and at the trial the right to such relief is not established, but the right to a legal relief is made out, the plaintiff is entitled to have judgment in accordance with his rights as proved.<sup>2</sup>

**§ 3423. If Averments Insufficient, Recovery cannot be had.**—If the allegations of the complaint are sufficient only to support a case for equitable relief, and there are no sufficient averments to authorize legal relief, where the proofs do not sustain the former cause of action, the plaintiff cannot recover even the legal remedy, although he succeeds in proving acts which would authorize it.<sup>3</sup>

**§ 3424. Allegations of Fact Indispensable under New Practice.**—As shown in the preceding sections, the necessity of averments in the complaint showing the right to relief, either at law or in equity, is by no means dispensed with, although a prayer for the specific remedy to which the evidence may entitle the plaintiff may not be necessary. In this respect the old practice has not under-

<sup>1</sup> *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357. See *Davis v. Morris*, 35 N. Y. 569; *Graves v. Spier*, 58 Barb. 349.

<sup>2</sup> *White v. Lyons*, 42 Cal. 279; *Cuff v. Dorland*, 53 Barb. 481; *Harrall v. Gray*, 10 Neb. 186; *Herrington v. Robertson*, 71 N. Y. 280; *Foster v. Watson*, 16 B. Mon. 377; *Marquat v. Marquat*, 12 N. Y. 336; *Whitney v. Root*, 52 Iowa, 292; *Emery v. Pease*, 20 N. Y. 62; *Lewis v. Soule*, 52 Iowa, 11; *Hamill v. Thompson*, 3 Col. 518. In Wisconsin the later decisions are in conflict with this practice: See *Wrigglesworth v. Wrigglesworth*, 45 Wis.

255; *Deery v. McClintock*, 31 Wis. 195; *Dickson v. Cole*, 34 Wis. 621. In Missouri the reformed practice prevails: See *Henderson v. Dickey*, 50 Mo. 161; *Meyer v. Field*, 37 Mo. 434; *Richardson v. Means*, 22 Mo. 495.

<sup>3</sup> *Stevens v. Mayor etc.*, 84 N. Y. 296; *Bockes v. Lansing*, 74 N. Y. 437; *People's Bank v. Mitchell*, 73 N. Y. 406; *Wintermute v. Cooke*, 73 N. Y. 107; *Arnold v. Angell*, 62 N. Y. 508; *Bradley v. Aldrich*, 40 N. Y. 504; 100 Am. Dec. 528; *Schilling v. Rominger*, 4 Col. 100; *Meyer v. County of Dubuque*, 43 Iowa, 592; *Hamill v. Thompson*, 3 Col. 518.

gone any material alteration; and the foregoing remarks regarding the necessity of averring proper facts in order to recover a legal remedy, where the action is for equitable relief, but which is unsustained by the proofs, is equally applicable where the action is to obtain a legal remedy, but the allegations of the complaint are insufficient. Both the allegations and the proofs must be sufficient, in order to obtain relief.<sup>1</sup>

§ 3425. **Mode of Trial, Generally.**—In those states which have adopted the new practice, the mode of trial, owing to the want of statutory provisions, where legal and equitable causes of action are united in the same complaint, has not maintained a uniform character. The constitution of the state usually preserves the right of trial by jury in common-law cases, while it is one of the fundamental rules of equity practice that the facts are to be found by the court, which, owing to the nature of many of the issues presented, is considered to be a desirable method of determining questions of fact as well as of law.<sup>2</sup> Where an issue of fact arises in a case where a legal remedy is sought, the defendant could insist upon a trial by jury of the issue involved; and if legal and equitable causes of action are united, it has sometimes been held necessary for the whole case to be submitted to a jury, if so demanded by the defendant, where there is no statutory provision providing for a separate trial of the issues under the different causes of actions.<sup>3</sup> In several of the states, however, there are statutes providing for the separate trial of the issues thus arising, and that the nature of the case shall regulate the order of the trial.<sup>4</sup>

<sup>1</sup> *Arthur v. Homestead Ins. Co.*, 78 N. Y. 462; 34 Am. Rep. 550; *Emery v. Pease*, 20 N. Y. 62; *Drew v. Ferson*, 22 Wis. 651; *Sheehan v. Hamilton*, 2 Keyes, 304.

<sup>2</sup> *Adams's Equity*, 475; 1 *Story's Eq. Jur.*, secs. 31, 72.

<sup>3</sup> *Foster v. Watson*, 16 B. Mon. 377; *Trustees etc. v. Forrest*, 15 B. Mon.

168; *People v. R. R. Co.*, 57 N. Y. 161; 82 Am. Dec. 295; *Davis v. Morris*, 36 N. Y. 569.

<sup>4</sup> *Bennett v. Titherington*, 6 Bush, 192; *Du Pont v. Davis*, 35 Wis. 631; *Harrison v. Juneau Bank*, 17 Wis. 340; *Richmond v. R. R. Co.*, 33 Iowa, 422; *Massie v. Stradford*, 17 Ohio St. 596; *Guernsey v. Ins. Co.*, 17 Minn. 104.

## CHAPTER CLXIX.

## PARTIES TO ACTIONS UNDER CODE PRACTICE.

- § 3426. Who must be plaintiff.
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§ 3426. **Who must be Plaintiff.**—Provision is made in the various codes defining who must be and who may be parties plaintiff, and such provisions are substantially uniform throughout those states which have adopted the code practice. It is usually provided that "every action

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6 Bush,  
Wis. 631;  
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must be prosecuted in the name of the real party in interest, except as otherwise provided," etc.; and the assignment of a chose in action not arising out of contract is, as a rule, not permitted.<sup>1</sup> The exception above referred to sometimes provides that "an action may be maintained by the grantee of land in the name of the grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts, to bring the case within this provision."<sup>2</sup>

And it is also frequently provided that "all persons having an interest in the subject-matter of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided," etc.<sup>3</sup>

A very common provision, also, is, that any person in a fiduciary capacity, or a person expressly authorized by statute, may sue without joining his beneficiary.<sup>4</sup> And a provision substantially the same is contained in the codes of some other states.<sup>5</sup> Again, in other states, there are statutory provisions authorizing actions to be brought in the names of persons who would not be entitled to sue under the general principles of the common law.

<sup>1</sup> Cal. Code Civ. Proc., sec. 367; Fla. Code Civ. Proc., sec. 62; Ida. Code Civ. Proc., sec. 4; Ind. Code Civ. Proc., sec. 5; Iowa Code Civ. Proc., sec. 2543; Ky. Code Civ. Proc., sec. 30; Kan. Code Civ. Proc., sec. 26; Minn. Code Civ. Proc., sec. 26; Mo. Code Civ. Proc., art. 1, sec. 2; Mont. Code Civ. Proc., sec. 4; Neb. Code Civ. Proc., sec. 78; Nev. Code Civ. Proc., sec. 4; Or. Code Civ. Proc., secs. 27, 379; Wash. Code Civ. Proc., sec. 3; Wyo. Code Civ. Proc., sec. 31.

<sup>2</sup> Cal. Code Civ. Proc., secs. 367, 369; Dak. Code Civ. Proc., sec. 64; N. Y. Code Civ. Proc., sec. 111; N. C. Code Civ. Proc., sec. 55; S. C. Code Civ. Proc., sec. 134.

<sup>3</sup> See following codes of civil procedure: Cal., secs. 378, 381; Iowa, sec. 2545; Ind., sec. 17; Ky., sec. 34; Kan., sec. 35; Miss., art. 1, sec. 4; Neb., sec. 37; N. Y., sec. 117; Or., sec. 380; Wis., c. 122, sec. 18. But in some states this right is confined to equitable actions: Dak., sec. 70, Ida., sec. 12; Mont., sec. 12; Nev., sec. 12; N. C., sec. 60; Wash., sec. 8; Wyo., sec. 40.

<sup>4</sup> See codes of civil procedure of Cal., sec. 369; Dak., sec. 66; Ida., sec. 6; Fla., sec. 64; Minn., sec. 28; Mont., sec. 6; Miss., art. 1, sec. 3; Nev., sec. 6; Or., sec. 29; S. C., sec. 136; Wis., c. 122; Wyo., sec. 34.

<sup>5</sup> Iowa, sec. 2544; Kan., sec. 28; Ky., sec. 33; Neb., sec. 30; Ohio, sec. 27.

§ 3427. **Necessary and Proper Parties Plaintiff.** — It is usually provided in the reformed practice that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided, and that those parties who are united in interest must be joined either as plaintiffs or defendants; but if the consent of any one who should be joined as plaintiff cannot be obtained, he may be made defendant, the reason being stated in the complaint. The common-law rule is varied by these provisions. It was required by it that in all suits upon contract, all persons jointly interested therein should be made plaintiffs, and that if the interest were several, a separate action must be brought in respect of each interest.<sup>1</sup> At common law, where the interest in the contract was joint, the right of action was joint; and where the interest was several, the right of action was several; and where there was a promise to pay to two or more parties, it was necessary to join them all in an action thereon.<sup>2</sup> The law presumes in such cases that the contract is joint; but where it is manifest that the interest is several, separate actions must be brought, although the promise is joint in its terms.<sup>3</sup> All persons jointly interested in property affected by a tort were at common law required to be joined in an action to recover damages therefor; but if the interests and damages were several, each party must sue separately in respect of his separate interest.<sup>4</sup> The application of the provision that all persons having an interest in the subject of the action and in the relief demanded may be joined as plaintiffs

<sup>1</sup> 1 Chitty's Pleading, 8; Robinson v. Comm'rs, 37 Ind. 333; Hunt v. Haven, 52 N. H. 170; Lipscomb v. Postell, 38 Miss. 489.

<sup>2</sup> Yorks v. Peck, 14 Barb. 644; Hopkinson v. Lee, 6 Q. B. 971; Withers v. Bircham, 3 Barn. & C. 254; Hill v. Tucker, 1 Taunt. 7; King v. Hoare, 13 Mees. & W. 499; Anderson v. Martindale, 1 East, 497.

<sup>3</sup> Ford v. Bronaugh, 11 B. Mon. 14;

Slingsby's Case, 5 Rep. 18; Servante v. James, 10 Barn. & C. 410; James v. Emery, 8 Taunt. 245; Gould v. Gould, 6 Wend. 263; Sorsbie v. Park, 12 Mees. & W. 146; Dunham v. Gillis, 8 Mass. 462; Mills v. Ladbroke, 7 Man. & G. 218; Baker v. Jewell, 6 Mass. 460; 4 Am. Dec. 162; Bradburne v. Botfield, 14 Mees. & W. 559.

<sup>4</sup> 1 Chitty's Pleading, ed. 1840, 65.

has received numerous illustrations, showing the change of the common-law rule affected thereby. For instance, in an action brought by three obligees on an injunction bond conditioned to indemnify them, their interests, which had been interfered with by the injunction, were separate and distinct, it was objected that they were improperly joined as plaintiffs, but the objection was overruled, though at the common law separate actions would have been necessary.<sup>1</sup> Where, however, it is clear that the rights and liabilities of the parties are several, the one interested can alone maintain the action.<sup>2</sup> In Kentucky and Missouri the rule adopted elsewhere does not appear to have been sustained.<sup>3</sup> With regard to parties plaintiff generally, the rules formerly obtaining in courts of equity only are now applicable to the form of civil action established by the codes.<sup>4</sup>

**§ 3428. Necessary and Proper Parties Defendant.**—

The codes frequently provide that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.<sup>5</sup> But in some states this provision is limited to equitable actions only.<sup>6</sup> When the question involved is one of a common or general interest

<sup>1</sup> *Loomis v. Brown*, 16 Barb. 325; the court, Gridley, J., observing as follows: "With the view of embracing all cases, whether of law or equity, and of making them conform to one general rule, the code provides . . . that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs. . . . This is now the rule in all cases, . . . and we are to administer it according to its spirit and true intent, however the practice may differ from the rule that heretofore has prevailed in actions at law"; *Rutledge v. Corbin*, 10 Ohio St. 478; *Hill v. Marsh*, 46 Ind. 216; *Cummings v. Morris*, 25 N. Y.

625; *Tate v. R. R.*, 10 Ind. 174; 71 Am. Dec. 309; *McKinzie v. L'Amoureux*, 11 Barb. 516; *Cole v. Reynolds*, 18 N. Y. 74.

<sup>2</sup> *Goodnight v. Goar*, 30 Ind. 418.

<sup>3</sup> *Pelly v. Bowyer*, 7 Bush, 513; *Rainey v. Smiizer*, 28 Mo. 310.

<sup>4</sup> *Story's Eq. Pl.*, sec. 539; 1 *Daniell's Pleading and Practice*, 4th Am. ed., 192, 206, 208, 216.

<sup>5</sup> Cal., sec. 379; Ind., sec. 18; Iowa, sec. 2547; Kan., sec. 36; Ky., sec. 35; Miss., art. 1, sec. 5; Neb., sec. 38; Nev., sec. 13; Ohio, sec. 35; Wis., c. 122, sec. 19.

<sup>6</sup> Dak., sec. 71; Or., sec. 380; Wash., sec. 8.

of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.<sup>1</sup> When two or more persons are bound by contract, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the deceased, or against any or all of such representatives. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against others.<sup>2</sup> In New York the code provides, and a similar provision has been generally adopted in most of the other states, that persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff.<sup>3</sup> In California, Montana, and Wyoming, the rule extends to sureties on the same or a separate instrument.<sup>4</sup> Any controversy between the parties before it may be determined by the court, when it can do so without prejudice to the rights of others; but when the matter of dispute cannot be completely determined without the presence of other parties, the court must cause them to be brought in before adjudicating on their rights. A person not a party to an action for the recovery of property, but who has an interest in its subject-matter, may apply to the court to be made a party, and it may order him to be brought in. A defendant against whom an action is pending upon a contract, or for specific real or personal property, may, at any time before an-

<sup>1</sup> See *post*, § 3457.

<sup>2</sup> Iowa, sec. 2550; Ky., sec. 39; 1 Wagner's Comp. Stats. Miss., p. 269, secs. 1-4.

<sup>3</sup> N. Y., sec. 120; Fla., sec. 71; Ind., sec. 20; Kan., sec. 39; Neb., sec. 41; Wis., c. 122.

<sup>4</sup> Cal., sec. 383; Mont., sec. 15; Wyo., sec. 43. But in Minnesota it is confined to sureties on the same instrument only. See also Dak., sec. 73; Ida., sec. 15; Nev., sec. 15; N. C., sec. 63; Wash., sec. 10.



swer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person or adverse party, apply to the court for an order to substitute such person in his place and to discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property, or its value, to such person as the court may direct.<sup>1</sup>

§ 3429. **Real Party in Interest.**—The action must be brought by the real party in interest. So the assignee of a chose in action must sue in his own name under the new practice, while at the common law it was necessary that the suit should be brought in the name of the assignor, owing to the rule prohibiting the assignment of a chose in action, except in the case of negotiable instruments, which by the law merchant might be sued on in the name of the holder.<sup>2</sup> Under the California code, even part of a claim may be assigned,<sup>3</sup> and an action maintained upon such assignment, where the defendant had notice thereof. Where an assignment is absolute on its face, though in fact only partial, the assignee may maintain an action thereon, although in such a case the assignor may intervene and secure a judgment for such part of the claim as is payable to him. Thus where the assignee sued on a contract for the payment of money, and the assignors intervened, alleging and proving that though the assignment was absolute on its face, it was in fact only for one fourth of the demand, it was held that the intervention was proper, and judgment was given for

<sup>1</sup> Cal., secs. 386, 389; Dak., sec. 75; Fla., sec. 73; Ida., sec. 17; Ind., secs. 22, 23; Iowa, sec. 2551; Kan., secs. 41, 42, 43; Ky., secs. 40, 41; N. C., sec. 65; N. Y., sec. 122; Ohio, secs. 40-42; Or., secs. 40, 382.

<sup>2</sup> Long v. Heinrich, 46 Mo. 603;

Utley v. Foy, 70 N. C. 303; Knadler v. Sharp, 36 Iowa, 232; Schnier v. Fay, 12 Kan. 184; Canefox v. Anderson, 22 Mo. 347.

<sup>3</sup> Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423.

<sup>1</sup> Gr. Wetm. 294; 349; Boyle v. Hi. Hall v. tor v.

the plaintiff for the one fourth, and for the intervenors for the remaining three fourths, of the demand.<sup>1</sup>

§ 3430. **Who is a Real Party in Interest.**—Where a contract is entered into by an agent in his own name, the undisclosed principal may sue on it, although the defendant may have supposed at the time that the agent was acting in his own behalf.<sup>2</sup> In such a case, however, the agent may also sue; and if on the face of the contract the agent appears as a principal, he may maintain an action on it in his own name, although the principal was disclosed at the time the contract was entered into, and it was known that the agent was acting for him.<sup>3</sup>

§ 3431. **Holder of Negotiable Paper.**—At common law, bills of exchange, promissory notes, and other negotiable instruments formed an exception to the rule against the assignability of a chose in action, and possession of such paper, properly indorsed, or payable to bearer, was *prima facie* evidence of ownership, and the holder could maintain an action on it in his own name, even though he was not beneficially interested in the whole or any part of the proceeds. Since the introduction of the reformed practice, the question has frequently arisen, whether the common-law doctrines in this respect have been changed. Inasmuch as the code practice requires that the action be brought in the name of the real party in interest, the question presented is, whether, in an action by the holder of a negotiable instrument, the defendant may plead that the plaintiff is not the real party in interest, but that the instrument was assigned or transferred for

<sup>1</sup> Gradwohl v. Harris, 29 Cal. 150; Dec. 618; Silliman v. Tuttle, 45 Barb. Wetmore v. San Francisco, 44 Cal. 171; St. John v. Griffith, 2 Abb. Pr. 294; Meeker v. Claghorn, 44 N. Y. 349; Lapping v. Duffy, 47 Ind. 56; Boyle v. Robbins, 71 N. C. 130.

<sup>2</sup> Ruckman v. Pitcher, 20 N. Y. 9; Buffan v. Chadwick, 8 Mass. 103; Tyler v. Freeman, 3 Cush. 261; Fairfield v. Adams, 16 Pick. 381; Fear v. Jones, 6 Iowa, 169.

<sup>3</sup> Hicks v. Whitmore, 12 Wend. 548; Hall v. Plain, 14 Ohio St. 417; Taintor v. Pendergast, 3 Hill, 72; 38 Am.

the benefit of the assignor. This point has given rise to much controversy and many conflicting decisions. In New York it was at first held that the right of the holder of a negotiable instrument to maintain an action on it might be controverted, and that the defendant might show that the plaintiff had no beneficial interest in the action.<sup>1</sup> These decisions have, however, been overruled in New York, though followed in some other states.<sup>2</sup> The practice as finally established in New York has been followed in California and Iowa, Missouri and Minnesota.<sup>3</sup> In Kentucky and Indiana, on the other hand, it is held that the letter of the codes, as well as the spirit, demands that the plaintiff should be the real party in interest, whether the action is brought upon a negotiable or non-negotiable chose in action.<sup>4</sup> Wherever the defense of want of interest is set up, the facts constituting it must be specially pleaded; otherwise it will be considered as waived.<sup>5</sup>

**§ 3432. Collateral Agreement does not Affect Assignment.**—Where the legal title to a chose in action is, on the face of the assignment, vested in the assignee, he may maintain an action on it as the real party in interest, although in fact there may have been a contemporaneous collateral agreement, by the terms of which the assignee is to receive only a portion of the thing assigned, and account to the assignor for the balance, or even by which

<sup>1</sup> *Eaton v. Alger*, 57 Barb. 179; *Edwards v. Campbell*, 23 Barb. 423; *Killmore v. Culver*, 24 Barb. 656; *James v. Chalmers*, 6 N. Y. 209.

<sup>2</sup> *Hayes v. Hathorne*, 74 N. Y. 486; *Sheridan v. Mayor etc.*, 68 N. Y. 30; *Eaton v. Alger*, 47 N. Y. 345; *Brown v. Penfield*, 36 N. Y. 473; *City Bank v. Perkins*, 29 N. Y. 554; 86 Am. Dec. 332; *Devol v. Barnes*, 7 Hun, 342; *Davis v. Reynolds*, 5 Hun, 651; *Green v. Niagara Ins. Co.*, 6 Hun, 128.

<sup>3</sup> *Wheatley v. Strobe*, 12 Cal. 92; 73

Am. Dec. 522; *Cottle v. Cole*, 20 Iowa, 481; *Walker v. Munro*, 18 Mo. 564; *McDonald v. Kneeland*, 6 Minn. 352.

<sup>4</sup> *Carpenter v. Miles*, 17 B. Mon. 598; *Lamson v. Falls*, 6 Ind. 309; *Swift v. Elsworth*, 10 Ind. 205; 71 Am. Dec. 316; *Newhitzer v. Price*, 11 Ind. 199; *Gillispie v. R. R. Co.*, 12 Ind. 398; *Garrison v. Clark*, 11 Ind. 369; *Herth v. Smith*, 33 Ind. 514.

<sup>5</sup> *Savage v. Corn Exchange Ins. Co.*, 4 Bosw. 2.

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the assignor is entitled to all proceeds.<sup>1</sup> This principle is applicable to all cases of assignments of choses in action as collateral security, the assignee being regarded as the real party in interest,<sup>2</sup> and especially where by the terms of the collateral agreement the assignee is under no obligation to pay the consideration of the assignment until the debt is recovered.<sup>3</sup> The general doctrine has, however, been subjected to a qualification in Wisconsin, where, in a case in which the entire demand had been assigned upon an implied trust, it was held that the assignee was neither the real party in interest nor the trustee of an express trust.<sup>4</sup>

§ 3433. **Where Assignee Party in Interest.**—In the following cases assignments of a chose in action were held valid under the old practice, and to vest in the assignee the right to sue on the thing assigned, viz.: Where a bond or note was assigned by a separate instrument;<sup>5</sup> where the assigned claim was for damages sustained by the wrongful conversion of chattels;<sup>6</sup> where the assignment was by a foreign executor of a debt due the estate from a debtor residing in the state where the suit was brought;<sup>7</sup> where there was a verbal assignment of a bond and mortgage delivered;<sup>8</sup> where the assigned debt was evidenced by a note which was lost;<sup>9</sup> where the assignment was of a promissory note payable to order, without any indorsement;<sup>10</sup> where the assignment was a receipt for the deliv-

<sup>1</sup> *Castner v. Sumner*, 2 Minn. 44; *Durgin v. Ireland*, 14 N. Y. 322; *Mecker v. Claghorn*, 44 N. Y. 349; *Wetmore v. San Francisco*, 44 Cal. 294. *Contra*, *Cable v. R. R. Co.*, 21 Mo. 133; *Boyle v. Robins*, 71 N. C. 130; *Leese v. Sherwood*, 21 Cal. 151.  
<sup>2</sup> *Curtis v. Moir*, 18 Wis. 615; *Gradwohl v. Harris*, 29 Cal. 150; *Wilson v. Clark*, 11 Ind. 385; *Williams v. Norton*, 3 Kan. 295.

<sup>3</sup> *Cummings v. Morris*, 25 N. Y. 625.

<sup>4</sup> *Robins v. Deverill*, 20 Wis. 142.

<sup>5</sup> *Peters v. R. R. Co.*, 24 Mo. 586; *Thornton v. Crawther*, 24 Mo. 164.

<sup>6</sup> *Lazard v. Wheeler*, 22 Cal. 139; *Smith v. Kennett*, 18 Mo. 154.

<sup>7</sup> *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298.

<sup>8</sup> *Conyngham v. Smith*, 16 Iowa, 471; *Green v. Marble*, 37 Iowa, 95; *Andrew v. McDaniel*, 98 N. C. 385; *Barthol v. Blakin*, 34 Iowa, 452.

<sup>9</sup> *Long v. Constant*, 19 Mo. 320; 61 Am. Dec. 559.

<sup>10</sup> *Gardner v. Cook*, 30 Ind. 331; *Carpenter v. Miles*, 17 B. Mon. 598; *Compton v. Davidson*, 31 Ind. 62; *White v. Phelps*, 14 Minn. 27; 100 Am. Dec. 190.

ery of coin;<sup>1</sup> where the assignment was of a judgment obtained against an officer for official misconduct, and the action was by the assignee upon the officer's bond;<sup>2</sup> where the assignment was by a surviving partner of a debt due the firm.<sup>3</sup>

**§ 3434. Where Third Party Advances Consideration.**

—Where a promise is made for the benefit of a third person, who is a stranger to the consideration, and not a party to the contract, the general rule under the code practice is, that such third person who is the real party in interest may sue on the contract alone in his own name.<sup>4</sup> Thus where the purchaser of property from a firm agreed with the firm to pay the firm debts, it was held that any creditor of the partnership could sue on the agreement to recover the debt owing him by the firm.<sup>5</sup> And in such a case a creditor may sue any sureties there may be, in addition to the principal promisor.<sup>6</sup> Also, where money is deposited with one person to be paid over to another, the same principle is applicable, and the latter may maintain an action against the deposittee.<sup>7</sup> And this doctrine, though entirely at variance with the common law, is now generally recognized, and is applicable whether the contracts be oral or in writing, or under seal.<sup>8</sup> The

<sup>1</sup> Merchants' and Mechanics' Bank v. Hewitt, 3 Iowa, 93; 66 Am. Dec. 49.

<sup>2</sup> Whitman v. Keith, 1 Ohio St. 134; Boudoin v. Coleman, 3 Abb. Pr. 431; Charles v. Haskins, 11 Iowa, 329; 77 Am. Dec. 148.

<sup>3</sup> Roy v. Vilas, 18 Wis. 169.

<sup>4</sup> Wiggins v. McDonald, 18 Cal. 126; Johnson v. Knapp, 36 Iowa, 616; Rogers v. Gosnell, 55 Mo. 589; Glen v. Hope Mutual Ins. Co., 56 N. Y. 379; Meyer v. Lowell, 44 Mo. 328; Jordan v. White, 20 Minn. 91; Cross v. Truesdale, 28 Ind. 44; Miller & Co. v. Florer, 15 Ohio St. 148; Ricard v. Sanderson, 41 N. Y. 179; Barker v. Bradley, 42 N. Y. 319; Van Schaick v. R. R. Co., 38 N. Y. 346.

<sup>5</sup> Sanders v. Clason, 13 Minn. 379;

Barlow v. Myers, 6 Thomp. & C. 183; Meyer v. Lowell, 44 Mo. 328.

<sup>6</sup> Clafin v. Ostrom, 54 N. Y. 581; Devol v. McIntosh, 23 Ind. 529; Kimball v. Noyes, 17 Wis. 695.

<sup>7</sup> Wiggins v. McDonald, 18 Cal. 126; Rice v. Savery, 22 Iowa, 470; Newman v. Springfield Ins. Co., 17 Minn. 123; Allen v. Thomas, 3 Met. (Ky.) 198; 77 Am. Dec. 169; Hall v. Robbins, 61 Barb. 33; Lawrence v. Fox, 20 N. Y. 268; Thorp v. Keokuk Coal Co., 48 N. Y. 258; Cone v. Niagara Fire Ins. Co., 3 Thomp. & C. 33.

<sup>8</sup> Dunning v. Leavitt, 85 N. Y. 30; 39 Am. Rep. 617; Pardee v. Treat, 82 N. Y. 385; Lake Ontario R. R. Co. v. Curtiss, 80 N. Y. 219; McKinnon v. McKinnon, 81 N. C. 201; Coster v.

courts of Massachusetts, however, have not, as yet, departed from the old rule.<sup>1</sup> The question as to who is the real party in interest will be found illustrated in the cases below.<sup>2</sup> A citizen, tax-payer, or freeholder may now, in general, maintain an action to restrain unlawful acts by public officers of a town, city, or county, or to set aside unlawful proceedings by such officers, if the proceedings would result in injury to the plaintiff. This is frequently resorted to to restrain the levy and collection of taxes, and the issuing of bonds in aid of railroad or other corporations.<sup>3</sup>

**§ 3435. Cases of Joint Rights and Several Rights Founded in Tort.**—There has been no change in the common-law rule with respect to parties plaintiff in actions for injuries sustained by a personal tort, if the injury is joint; but when several, although committed upon more than one, each one must sue separately.<sup>4</sup>

Mayor of Albany, 43 N. Y. 411; Kimball v. Noyes, 17 Wis. 695; Merrill v. Green, 55 N. Y. 270; Secor v. Lord, 3 Keyes, 525; Phillips v. Van Schaick, 37 Iowa, 229; McDowell v. Law, 35 Wis. 171.

<sup>1</sup> Exchange Bank v. Rice, 107 Mass. 37; 9 Am. Rep. 1.

<sup>2</sup> Kellogg v. Adam, 51 Wis. 138; Mann v. Aetna Ins. Co., 38 Wis. 114; Winona etc. R. R. Co. v. R. R. Co., 23 Minn. 359; Lafayette Co. v. Hixon, 69 Mo. 581; Olmstead v. Keyes, 85 N. Y. 593; Kohnweiler v. Anderson, 78 N. C. 133; School Directors v. Coe, 40 Wis. 103.

<sup>3</sup> Metzger v. R. R. Co., 79 N. Y. 171; Douglas v. Placerville, 18 Cal. 643; Ayers v. Lawrence, 59 N. Y. 192; Bucknall v. Story, 36 Cal. 67; Normand v. Board of Commissioners, 8 Neb. 18; Andrews v. Pratt, 44 Cal. 360; Moses v. Kearney, 31 Ark. 261; Rice v. Smith, 9 Iowa, 570; Hogeman v. R. R. Co., 28 Minn. 48; State v. Bailey, 7 Iowa, 390; Zorger v. Township of Rapids, 36 Iowa, 175; State v. Co. Judge, 7 Iowa, 186; Doves v. Chicago, 11 Wall. 108; Litchfield v. Polk Co., 18 Iowa, 70; Bordnax v. Groom,

64 N. C. 244; Olmstead v. Supervisors, 24 Iowa, 33; Vanover v. Justices etc., 27 Ga. 354; Williams v. Peinny, 25 Iowa, 436; Clark v. Supervisors, 27 Ill. 505; Stokes v. Scott Co., 10 Iowa, 166; Supervisors v. Hubbard, 45 Ill. 139; Chamberlain v. Burlington, 19 Iowa, 395; Merrill v. Plainfield, 45 N. H. 126; Hanson v. Vernon, 27 Iowa, 28; 1 Am. Rep. 215; Turret v. Saron, 34 Conn. 105; Scribner v. Allen, 12 Minn. 148; Schofield v. Eighth School District, 27 Conn. 499; Howes v. Racine, 21 Wis. 514; New London v. Brainard, 22 Conn. 552; Mitchell v. Milwaukee, 18 Wis. 92; Lane v. Schomp, 20 N. J. Eq. 82; Veeder v. Town of Lima, 19 Wis. 280; Harney v. Charles, 45 Mo. 157; Baltimore v. Gill, 31 Md. 375; Hill v. Jenkinson, 15 Ind. 425; Bull v. Read, 13 Gratt. 78; Lafayette v. Fowler, 34 Ind. 140; White Sulphur Springs Co. v. Holly, 4 W. Va. 597; Mobile v. Waring, 41 Ala. 139; Gilmer v. Hill, 22 La. Ann. 465.

<sup>4</sup> Hinkle v. Davenport, 38 Iowa, 355; Stepanck v. Kula, 36 Iowa, 563; Zabriskie v. Smith, 13 N. Y. 322; Giraud v. Beach, 3 E. D. Smith, 337.

§ 3436. **Common-law Doctrine as to Surviving Rights of Action.**—Causes of action founded in tort did not, as a general rule, at the common law, survive to the personal representatives of a deceased person as assets, and did not constitute a legal claim against the representatives. The contrary was the rule with regard to rights of action arising out of contract, unless the contract was purely personal to the deceased, or the injury resulting from its breach consisted entirely of personal suffering. The common-law doctrine has now been greatly extended, and all rights of action founded in tort to property now survive, and pass as assets to the personal representative of the deceased. The test of assignability was the element of survival, and the right of survival being extended, the right of assignability is also enlarged.<sup>1</sup> A right of action arising out of breach of contract was an exception to the common-law maxim, *Actio personalis moritur cum persona*, and the incident of survival and the power to assign are co-extensive.<sup>2</sup> The right to assign causes of action has been greatly extended by the codes of procedure, and many of such causes are now assignable which were not so at the common law.<sup>3</sup>

§ 3437. **What Assignable—General Rule.**—All contracts, and all rights of action arising out of breach of contract, are, as a general rule, assignable, and under the new practice the assignee is the proper party plaintiff.<sup>4</sup> Where, however, the cause of action is the breach of a promise to marry, or a mere personal tort, or is one arising from want of care or skill of physicians, surgeons, or

<sup>1</sup> *People v. Tioga County*, 19 Wend. 73; *Byxhie v. Wood*, 24 N. Y. 607; *Graves v. Spier*, 58 Barb. 349; *Haight v. Hoyt*, 19 N. Y. 464; *Tyson v. McGuineas*, 25 Wis. 656; *Butler v. R. R. Co.*, 22 Barb. 110; *Jordan v. Gillen*, 44 N. H. 426.

<sup>2</sup> *Graves v. Spier*, 58 Barb. 349; *Zabriskie v. Smith*, 13 N. Y. 322.

<sup>3</sup> *Tyson v. McGuineas*, 25 Wis. 656;

*Blair v. Hamilton*, 48 Ind. 32; *Chapman v. Plummer*, 36 Wis. 262; *Wollock v. Lee*, 64 N. Y. 242; *Mayor*, 63 N. Y. 14.

<sup>4</sup> *Field v. Mayor etc.*, 6 N. Y. 179; 57 Am. Dec. 435; *Bliss v. Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273; *Horn v. Wood*, 23 N. Y. 350; *Moorman v. Collier*, 32 Iowa, 138; *Small v. Sloan*, 1 Bosw. 352.

attorneys at law, and others, contrary to their implied undertaking,<sup>1</sup> such are not assignable, as the maxim, *Actio personalis*, etc., is still held to apply to them. But a right of action founded on want of care, skill, or diligence, under a contract relating to real or personal property, is assignable. For instance, a right of action against a common carrier or other bailee for damages occasioned by breach of duty under their respective contracts may be assigned.<sup>2</sup>

§ 3438. **Injuries to Real or Personal Property.**—Rights of action based upon torts to real or personal property are assignable;<sup>3</sup> and whether the injury was occasioned by negligence, or was the result of direct force, is immaterial.<sup>4</sup> Also where injuries arise from the negligent acts of railroad and other corporations in setting fire to buildings, fences, grain, or grass, the right of action accruing thereon may be assigned.<sup>5</sup> So where money or property has been obtained by fraud, or upon false or fraudulent representations made on the sale of land or other property, and inducing the sale, and resulting in loss, the right of action therefor may be assigned.<sup>6</sup> Also the usual statutory right of action given to those sustaining damage by the negligent or wrongful killing of a person, or to recover money lost in gambling, are assignable.<sup>7</sup> And as a judg-

<sup>1</sup> Wade v. Kalbfleisch, 58 N. Y. 282; 17 Am. Rep. 250; Chamberlain v. Williamson, 2 Maule & S. 408.

<sup>2</sup> Merrick v. Brainard, 38 Barb. 574; Waldron v. Willard, 17 N. Y. 466; Stanton v. Leland, 4 E. D. Smith, 88; Merrill v. Grinnell, 30 N. Y. 594; Ayrault v. Pacific Bank, 6 Rob. (N. Y.) 337.

<sup>3</sup> Lazard v. Wheeler, 20 Cal. 139; People v. Tioga County, 19 Wend. 73; Tyson v. McGuineas, 25 Wis. 656; Weire v. Davenport, 11 Iowa, 49; 77 Am. Dec. 132; Hoyt v. Thompson, 5 N. Y. 320; Blair v. Hamilton, 48 Ind. 32; McKee v. Judd, 18 N. Y. 622; 64 Am. Dec. 515; Smith v. Kennett, 18 Mo. 154.

<sup>4</sup> Moore v. Massini, 32 Cal. 590;

Hall v. R. R. Co., 1 Disn. 58; Haight v. Green, 19 Cal. 113; Weire v. Davenport, 11 Iowa, 49; 77 Am. Dec. 132; McArthur v. Green Bay etc. Canal Co., 34 Wis. 139; Dinney v. Fay, 38 Barb. 18; Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648; Rutherford v. Aiken, 3 Thomp. & C. 60.

<sup>5</sup> Fried v. R. R. Co., 25 How. Pr. 285.

<sup>6</sup> Woodbury v. Deloss, 65 Barb. 501; Graves v. Spier, 58 Barb. 349; Grocers' Nat. Bank v. Clark, 48 Barb. 26; Price v. Price, 75 N. Y. 244; Byxbie v. Wood, 24 N. Y. 607; Haight v. Hoyt, 19 N. Y. 464.

<sup>7</sup> Hendrickson v. Beers, 6 Bosw. 639; Meech v. Stoner, 19 N. Y. 26; Quin v. Moore, 15 N. Y. 432; Dougal v. Walling, 48 Barb. 364.



ment is regarded as a contract of record, it may be assigned, and whether founded in contract or tort, and even if rendered for damages of an unassignable nature.<sup>1</sup>

§ 3439. **What not Assignable.**—Rights of action in respect of injuries to the person or reputation only, arising out of tort, or for fraud, in the absence of statutory permission, are not assignable, nor are rights of action founded on purely personal contracts, as, for instance, actions for libel, slander, assault and battery, malicious prosecution, fraudulent representation, or seduction, or personal injury, none of which are assignable.<sup>2</sup> Express provision is made by statute in some of the states as to what rights of action founded in tort are assignable and what are not.<sup>3</sup> The right of assignment does not attach to a special power conferred upon parties by statute, such as that of avoiding an instrument on the ground of usury.<sup>4</sup> And the right of a grantor to have a deed annulled on the ground of fraud cannot be assigned.<sup>5</sup>

§ 3440. **Defenses to Assigned Rights of Action.**—The codes of procedure usually specify the defenses which may be set up to an action on an assigned right of action. A common provision is, that "in the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any defense existing at the time of or before notice of the assignment; but this section shall not apply to negotiable promissory notes and bills of exchange transferred in good faith, and upon good consideration, before due."<sup>6</sup> In other cases it is provided

<sup>1</sup> Couch v. Gridley, 6 Hill, 250; Brooks v. Hanford, 15 Abb. Pr. 342; Charles v. Haskins, 11 Iowa, 329; 83 Am. Dec. 378.

<sup>2</sup> Wade v. Kalbfleisch, 58 N. Y. 282; 17 Am. Rep. 250; Zabriskie v. Smith, 13 N. Y. 322; Butler v. R. R. Co., 22 Barb. 110; Purple v. R. R. Co., 4 Duer, 74; Lawrence v. Martin, 22 Cal. 176; Cornegy v. Vasse, 1 Pet. 193.

<sup>3</sup> Graves v. Spier, 58 Barb. 349; Byxbie v. Smith, 24 N. Y. 610; Haight v. Hoyt, 19 N. Y. 464.

<sup>4</sup> Bullard v. Raynor, 30 N. Y. 197; Boughtel v. Smith, 26 Barb. 635.

<sup>5</sup> Smith v. Harris, 43 Mo. 557; McMahon v. Allen, 24 Barb. 56; Milwaukee etc. R. R. Co. v. R. R. Co., 20 Wis. 174; 88 Am. Dec. 740.

<sup>6</sup> Codes of procedure of Arizona, California, Dakota, Florida, Iowa, In-

that "the action of the assignee shall be without prejudice to any set-off or other defense now allowed."<sup>1</sup> These statutory provisions apply to the subsequent as well as to the first assignee of a non-negotiable chose in action; and any defense or equities subsisting between the original assignor and his immediate assignee may be set up against the plaintiff who may have purchased the right in good faith and for full value.<sup>2</sup>

**§ 3441. Estoppel as Applicable to Assignments of Quasi-negotiable Paper.**—By virtue of the usage among commercial men, it has now become part of the law merchant that certificates of corporate stock may be transferred by an assignment in blank indorsed thereon, accompanied by a power of attorney to transfer the same in the usual form, and a delivery to the purchaser. The effect of this process is to clothe the assignee with the *indicia* of title and the apparent rights of ownership, and so to confer upon him full power of disposition. When this is done, in New York, and the assignee executes another similar transfer in good faith and for value, the original owner is estopped from asserting against the holder any equities which may have existed between himself and his assignee.<sup>3</sup> With reference to assignments of non-negotiable choses in action, the rule is, that the assignee, even for value and in good faith, acquires no

diana, Kentucky, Minnesota, Montana, New York, Nevada, South Carolina, Wisconsin, Wyoming.

<sup>1</sup> Codes of Kansas, Nebraska, Ohio, and Washington; Western Bank v. Sherwood, 29 Barb. 383; Commercial Bank v. Colt, 15 Barb. 506; Andrews v. Gillespie, 47 N. Y. 487; Ingraham v. Disborough, 47 N. Y. 421; Reeves v. Kimball, 40 N. Y. 299; Callanan v. Edwards, 32 N. Y. 483; Meyers v. Davis, 22 N. Y. 489; Beckwith v. Union Bank, 9 N. Y. 211.

<sup>2</sup> Reid v. Sprague, 72 N. Y. 457; Greene v. Warnick, 64 N. Y. 220; Barry v. Equitable Life Ins. Soc., 59

N. Y. 587; Trustees of Union College v. Wheeler, 61 N. Y. 88; Cutts v. Guild, 57 N. Y. 229; Schafer v. Reilly, 50 N. Y. 67; Mason v. Lord, 40 N. Y. 476; Ballard v. Burgett, 40 N. Y. 314; Reeves v. Kimball, 40 N. Y. 311; Bush v. Lathrop, 22 N. Y. 535; Combes v. Chandler, 33 Ohio St. 178; Farmers' National Bank v. Fletcher, 44 Iowa, 252; McNeil v. Tenth National Bank, 55 Barb. 59; 46 N. Y. 325; 7 Am. Rep. 341.

<sup>3</sup> Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Leitch v. Wells, 48 N. Y. 585; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; 7 Am. Rep. 341.

better title than his assignor had; and if such assignor received them for some special purpose, no subsequent assignee obtains any better title than the original assignee had. The exception with regard to the assignment of certificates of corporate stock arises from the fact that, owing to the usages of commercial men, they have acquired a negotiable character similar to that possessed by bills of exchange and promissory notes. The doctrine is now broadly laid down, at least in New York, that an assignment, absolute on its face, of non-negotiable securities, duly transferred for value and in good faith, works an estoppel, as against the original owner, to set up any equities existing between him and his immediate assignee;<sup>1</sup> this rule, however, has no foundation in any provisions of the code, but rests upon an extended application of the doctrine of estoppel.

**§ 3442. Equitable Defenses and Set-off to Assigned Claims.**—The general principles of the common law with respect to equitable defenses and set-off have not been changed by the reformed practice relating to assigned non-negotiable choses in action.<sup>2</sup> The modern statutes relating to the assignability of non-negotiable choses in action provide that any offset or other defense existing prior to notice of the assignment is not to be prejudiced by the assignment.<sup>3</sup> The demand, however, must be an

<sup>1</sup> *Moore v. Metropolitan Nat Bank*, 55 N. Y. 41; 14 Am. Rep. 173.

<sup>2</sup> *Dunning v. Leavitt*, 85 N. Y. 30; 39 Am. Rep. 617; *Barlow v. Myers*, 64 N. Y. 41; 21 Am. Rep. 582; *Myers v. Davis*, 22 N. Y. 489; *Roberts v. Carter*, 38 N. Y. 107; *Beckwith v. Union Bank*, 9 N. Y. 211; *Robinson v. Howes*, 20 N. Y. 84; *Merrill v. Green*, 55 N. Y. 270; *Turner v. Campbell*, 59 Ind. 279; *Hart v. Hinchin*, 50 Ind. 327; *Heavenridge v. Mondy*, 49 Ind. 434; *Morrow's Assignees v. Bright*, 20 Mo. 298; *Downing v. Gibson*, 53 Iowa, 517; *Davis v. Neligh*, 7 Neb. 84; *Chapman v. Plummer*, 36 Wis. 262; *Walker v. McKay*, 2 Met.

(Ky.) 294; *Martin v. Pilsbury*, 23 Minn. 175; *Davis v. Sutton*, 23 Minn. 307.

<sup>3</sup> *Myers v. Davis*, 22 N. Y. 489; where Denio, J., observes: "An assignee of a chose in action not negotiable, who has given notice of the assignment, is not liable to be prejudiced by any new dealings between the original parties to the contract; but he takes the contract assigned subject to all the rights which the debtor had acquired prior to the assignment, or to the time notice was given of it, where there is an interval between the execution of the transfer and the notice."

existing one, and not a possible claim, or a claim *in futuro*.<sup>1</sup>

§ 3443. **Defect of Parties.**—Among the grounds of demurrer to a complaint given in the codes there is usually included that of defect of parties plaintiff or defendant. By the expression “defect of parties” is meant a want of parties, not a superfluity; and a demurrer can be pleaded only on the ground of non-joinder, not misjoinder, of parties, either plaintiff or defendant.<sup>2</sup> In order that any such defect may be taken advantage of by demurrer, it must appear on the face of the complaint, otherwise it must be availed of by answer; and if not raised by either of these methods, it is deemed to be waived. But if the defect is apparent on the face of the complaint, it is obnoxious to a demurrer only, and cannot be set up by answer, and if not demurred to, is waived.<sup>3</sup> The mode of taking the objection prescribed by the statute must be strictly followed, whether the defect is in want of parties plaintiff or defendant.<sup>4</sup> If the plaintiff proves a case against any one or more of the defendants, he may have judgment against such, and dismiss or be nonsuited as to the others.<sup>5</sup> The question of want of parties is not

<sup>1</sup> *Chance v. Isaacs*, 5 Paige, 592; *Martin v. Kunzmüller*, 37 N. Y. 396; *Bradley v. Angel*, 3 N. Y. 475; *Adams v. Rodannel*, 19 Ind. 339; *Ogden v. Prentice*, 33 Barb. 160; *Watt v. Mayor* etc., 1 Sand. 23.

<sup>2</sup> *Great West. etc. Co. v. Aetna Ins. Co.*, 40 Wis. 373; *Marsh v. Board of Supervisors*, 38 Wis. 250; *Willard v. Reas*, 26 Wis. 540; *Case v. Carroll*, 35 N. Y. 385; *Palmer v. Davis*, 28 N. Y. 242; *Bank of Havana v. Magee*, 20 N. Y. 355; *Richtmyer v. Richtmyer*, 50 Barb. 55; *Peabody v. Washington etc. Ins. Co.*, 20 Barb. 339; *Voorhees v. Baxter*, 18 Barb. 592; *Powers v. Bumeratz*, 12 Ohio St. 273; *Hill v. Marsh*, 46 Ind. 218; *Berkshire v. Schultz*, 25 Ind. 523; *Bennett v. Preston*, 17 Ind. 291.

<sup>3</sup> *Patchin v. Peck*, 38 N. Y. 39; *Zabriskie v. Smith*, 13 N. Y. 322; *Wells v. Cone*, 55 Barb. 585; *Tennant*

*v. Pfister*, 45 Cal. 270; *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330; *Daily v. Huston*, 58 Mo. 361; *Justice v. Phillips*, 3 Bush, 200; *McRoberts v. R. R. Co.*, 18 Minn. 108; *Alexander v. Gaar*, 15 Ind. 89.

<sup>4</sup> *Dorman v. Intelligencer Co.*, 70 Mo. 168; *McConnell v. Brayner*, 63 Mo. 463; *Gunbel v. Pignero*, 62 Mo. 240; *Davis v. Bechstein*, 69 N. Y. 440; 25 Am. Rep. 218; *Lillie v. Case*, 54 Iowa, 177; *Banton v. Orr*, 51 Iowa, 473; *McKenzie v. Board etc. of Edinburgh*, 72 Ind. 191; *Cox v. Bird*, 65 Ind. 277; *Thomas v. Wood*, 61 Ind. 132; *Baldwin v. Canfield*, 26 Minn. 43; *Porter v. Fletcher*, 25 Minn. 493; *Blakeley v. Le Duc*, 22 Minn. 476; *Ross v. Linder*, 12 S. C. 592.

<sup>5</sup> *Rutenberg v. Main*, 47 Cal. 213; *McIntosh v. Ensign*, 28 N. Y. 169; *Territory v. Hildebrand*, 2 Mont. 426;

raised by a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.<sup>1</sup>

§ 3444. **Parties to Equitable Actions, Generally.** — As previously remarked, the practice and procedure introduced by the codes have not changed the general rules of equity with regard to parties.<sup>2</sup> It is a general rule that in actions concerning trust property both the trustee and *cestui que trust* must be joined as plaintiff.<sup>3</sup> The assignee of a non-negotiable chose in action could not, according to the practice of the common law, maintain an action thereon in his own name, but had to sue for his own benefit in the name of the assignee. In equity, however, he could maintain his suit by joining the assignor with him as plaintiff, or making him a defendant, and so obtain a decree settling all the rights of the assignor in the matter; but this practice does not obtain where the code procedure has been established.<sup>4</sup> Where a suit in equity is brought for partition, all parties interested must be joined, either as plaintiffs or defendants.<sup>5</sup> And the rule is equally applicable to actions relating to personal as well as to real

Harrington v. Higham, 15 Barb. 524; Ryan v. State Bank, 10 Neb. 524; Parker v. Jackson, 16 Barb. 33; Stafford v. Nutt, 51 Ind. 535; Marquat v. Marquat, 12 N. Y. 336; District Township v. District Township, 44 Iowa, 512; Fort Stanwix Bank v. Leggett, 51 N. Y. 552; Aucker v. Adams, 23 Ohio St. 543; Truesdell v. Rhodes, 26 Wis. 215; Brown v. Woods, 48 Mo. 330; McConigal v. Colter, 32 Wis. 614; Gillam v. Sigman, 29 Cal. 637.

<sup>1</sup> Frenon v. R. R. Co., 50 Cal. 222; People v. Crooks, 53 N. Y. 648; Allen v. Buffalo, 38 N. Y. 280; Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648; Donnell v. Walsh, 33 N. Y. 43; 88 Am. Dec. 361; Merritt v. Walsh, 32 N. Y. 685; Gock v. Keneda, 29 Barb. 120; De Bolt v. Carter, 31 Ind. 355; Berkshire v. Shultz, 25 Ind. 523; Umsted v. Buskirk, 17 Ohio St. 113.

<sup>2</sup> *Ante*, § 3427.

<sup>3</sup> Holden v. New York etc. Bank, 72 N. Y. 286; Fox v. Moyer, 54 N. Y. 125; Fort Stanwix Bank v. Leggett, 51 N. Y. 552; Western R. R. Co. v. Nolan, 48 N. Y. 513; McCotter v. Lawrence, 6 Thomp. & C. 392; Covington etc. R. R. Co. v. Bowler's Heirs, 9 Bush, 468; Cassiday v. McDaniel, 8 B. Mon. 519; Wood v. Williams, 4 Mad. 186; Hichens v. Kelly, 2 Smale & G. 264; Eldridge v. Putnam, 46 Wis. 205; Cope v. Parry, 2 Jacob & W. 538; Fish v. Howard, 1 Paige, 20; Story's Eq. Pl., secs. 201, 209.

<sup>4</sup> *Ante*, §§ 3426 et seq.

<sup>5</sup> Braker v. Devereaux, 8 Paige, 513; Woodworth v. Campbell, 5 Paige, 518; Striker v. Mott, 2 Paige, 387; 22 Am. Dec. 646; Rosekrans v. White, 7 Lans. 486; Borah v. Archers, 7 Dana, 176; Brashear v. Macey, 3 J. J. Marsh. 90; Walten v. Copeland, 7 Johns. Ch. 140; Gaskell v. Gaskell, 6 Sim. 643.

property.<sup>1</sup> With regard to parties defendant, it is provided by the codes that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. This was the equity rule before the codes.<sup>2</sup>

§ 3445. **Parties to Foreclosure or Redemption of Mortgage.** — All persons jointly interested in the debt secured must be parties;<sup>3</sup> and when the action is to foreclose a vendor's lien, a similar rule applies.<sup>4</sup> Also, where the notes or lien have been assigned, the assignees must be made parties.<sup>5</sup> So in a suit for redemption, not only the mortgagor should be plaintiff, but all others having a common interest in the mortgage must be parties, either plaintiff or defendant.<sup>6</sup> In an action of foreclosure, the mortgagor and all persons to whom any interest in any part of the land has been conveyed should be defendants; otherwise they would not be bound by the proceedings.<sup>7</sup> If the wife of the mortgagor joined in the execution of the mortgage, she should also be joined as a defendant.<sup>8</sup> Where the mortgagor has conveyed the prop-

<sup>1</sup> Story's Eq. Pl., sec. 201.

<sup>2</sup> Williams v. Bankhead, 19 Wall. 563; State v. R. R. Co., 15 Fla. 201; Hamill v. Thompson, 3 Cal. 518; Greenwood v. Atkinson, 5 Sim. 419; Wiser v. Blachly, 1 Johns. Ch. 437; New England etc. Bank v. Newport Steam Factory, 6 R. I. 154; 75 Am. Dec. 688; James v. Williams, 31 Ark. 175; Board of Supervisors v. Walbridge, 38 Wis. 179; Satterthwaite v. Board of Commissioners, 76 N. C. 153.

<sup>3</sup> Simson v. Satterlee, 64 N. Y. 657; Ferris v. Dickerson, 47 Ind. 382; Goodall v. Mopley, 45 Ind. 355; Wing v. Davis, 7 Greenl. 31; Woodward v. Wood, 19 Ala. 213; Noyce v. Sawyer, 3 Vt. 160.

<sup>4</sup> Thomson v. Smith, 63 N. Y. 301; Church v. Smith, 39 Wis. 492.

<sup>5</sup> Jenkins v. Smith, 4 Met. (Ky.)

380; Meritt v. Wells, 18 Ind. 171; Pettibone v. Edwards, 15 Wis. 95. But see Rankin v. Major, 9 Iowa, 297.

<sup>6</sup> Story's Eq. Pl., sec. 201; Beach v. Shaw, 57 Ill. 19; Thorpe v. Ricks, 1 Dev. & B. 63; Woodward v. Fitzpatrick, 9 Dana, 118; Lennon v. Porter, 2 Gray, 475; Smith v. Murphy, 58 Ala. 634; Platt v. Squire, 12 Met. 499; Suavely v. Pickle, 29 Gratt. 42.

<sup>7</sup> Hall v. Nelson, 23 Barb. 88; Peto v. Hammond, 29 Beav. 91; Green v. Dixon, 9 Wis. 532; Drury v. Clark, 16 How. Pr. 424; Crenshaw v. Thackston, 14 S. C. 441; Goodenow v. Ewer, 16 Cal. 465; Kunkel v. Markell, 26 Md. 404.

<sup>8</sup> Mills v. Van Voorhies, 20 N. Y. 415; Foster v. Hickox, 38 Wis. 411; Byrne v. Taylor, 46 Mich. 97.

erty to a trustee for the benefit of creditors, such trustee is a proper party, as also are any creditors who may have recovered judgment subsequent to the assignment.<sup>1</sup> And even where he has parted with all his interest in the equity, he is still a proper party, where only a decree of sale is prayed for; but he is a necessary party where it is sought to obtain a personal judgment against him for any deficiency.<sup>2</sup> If the mortgagor owned the land at the time of his death, his executor or administrator, and his heirs or devisees, should all be made parties.<sup>3</sup> In some of the states there are statutory provisions prescribing who are proper parties, particularly with regard to when the husband or wife may or may not be joined.<sup>4</sup> A junior encumbrancer is not a necessary party, except to bar his right of redemption.<sup>5</sup> And a decree in foreclosure to which she is not a party does not affect a wife's right to dower.<sup>6</sup> Inasmuch as the foreclosure of a junior mortgage cannot affect a prior encumbrancer, he is not a necessary party.<sup>7</sup>

§ 3446. **Parties in Suit for Accounting.**—All persons interested in having the account taken must be parties.<sup>8</sup> And all the beneficiaries must be parties to an action against a trustee for an accounting.<sup>9</sup> But an attorney

<sup>1</sup> *Union Bank v. Bell*, 19 Ohio St. 200; *McGraw v. Bayard*, 96 Ill. 153.

<sup>2</sup> *McArthur v. Franklin*, 16 Ohio St. 193; *Powell v. Ross*, 4 Cal. 197; *Williams v. Meeker*, 29 Iowa, 292; *Cord v. Hirsh*, 17 Wis. 403; *Delaplane v. Lewis*, 19 Wis. 476; *Bigelow v. Bush*, 6 Paige, 343; *Shaw v. Hoadley*, 8 Blackf. 165; *Van Nest v. Latson*, 19 Barb. 604; *Stevens v. Campbell*, 21 Ind. 471; *Burkham v. Beaver*, 17 Ind. 367.

<sup>3</sup> *Zorger v. Custer*, 51 Wis. 32; *Etheridge v. Vernoy*, 71 N. C. 184; *Miles v. Smith*, 22 Mo. 502; *Renshaw v. Taylor*, 7 Or. 315; *Hayward v. Stears*, 39 Cal. 58; *Morris v. Wheeler*, 45 N. Y. 708; *Bigelow v. Bush*, 6 Paige, 345; *King v. Seals*, 45 Ala. 419; *Dooley v. Villalonga*, 61 Ala. 133; *Belloe v. Rogers*, 9 Cal. 125.

<sup>4</sup> *Schadt v. Heppe*, 45 Cal. 433; *Davenport v. Turpin*, 43 Cal. 597; *Thornton v. Pigg*, 24 Mo. 249; *Chambers v. Nicholson*, 30 Ind. 349.

<sup>5</sup> *Newcomb v. Dewey*, 27 Iowa, 381.

<sup>6</sup> *Merchants' Bank v. Thomson*, 55 N. Y. 7; *Mooney v. Maas*, 22 Iowa, 380; *Byrne v. Taylor*, 46 Mich. 97; *Thornton v. Pigg*, 24 Mo. 251.

<sup>7</sup> *Chase v. Abbott*, 20 Iowa, 154; *Standish v. Dow*, 21 Iowa, 363.

<sup>8</sup> *Getty v. Devlin*, 70 N. Y. 504; *Dart v. Palmer*, 1 Barb. Ch. 97; *Petrie v. Petrie*, 7 Lans. 95.

<sup>9</sup> *Hughes v. Boone*, 81 N. C. 204; *Eldridge v. Putnam*, 46 Wis. 205; *Hammond v. Pennock*, 61 N. Y. 145; *Attorney-General v. Parker*, 126 Mass. 221.

in fact is not a trustee, and is not a necessary party to represent the rights of his principal.<sup>1</sup> The assignor of property for the benefit of creditors is a necessary party to a suit brought by the *cestui que trust* against the assignee for an account.<sup>2</sup> But where the trust deed is made to a trustee for the payment of creditors in classes, creditors of the second class are not necessary parties to a suit by those of the first class for an account.<sup>3</sup> When the trustee holds in naked trust, and the beneficiaries are before the court, it is not material that the heirs of some of the deceased trustees are not parties.<sup>4</sup> Where the executor of a deceased trustee holding under a will applies to have a trustee of the fund appointed, to whom petitioner may account, for an accounting, etc., all persons entitled to life estates and remainders under the original will should be made parties.<sup>5</sup>

§ 3447. **Defendants in Suits to Set Aside Deeds of Trust.**—Where the trustee has absolute power of disposition, he is the only necessary party defendant in an action to set aside the trust deed.<sup>6</sup> But in any action which recognizes the trust, and seeks to enforce it, all the beneficiaries or creditors must be parties, either plaintiff or defendant.<sup>7</sup>

§ 3448. **Defendants in Actions for Specific Performance.**—Under the former practice, the rule in equity was, that the only proper parties were the parties to the contract, their heirs or personal representatives; but the

<sup>1</sup> Powell v. Ross, 4 Cal. 197.

<sup>2</sup> Geisse v. Beall, 3 Wis. 352.

<sup>3</sup> Smith v. Turrentine, 8 Ired. Eq. 190; Rountree v. McKay, 6 Jones Eq. 88.

<sup>4</sup> Newport etc. Bridge Co. v. Douglass, 12 Bush, 719; Gibbs v. R. R. Co., 13 S. C. 240.

<sup>5</sup> Bolling v. Stokes, 7 S. C. 368.

<sup>6</sup> Hill v. Durand, 50 Wis. 354; Mitchel v. Bank, 7 Minn. 252;

French v. Gifford, 30 Iowa, 148; Paul v. Fulton, 25 Mo. 156; Dewey v. Moyer, 9 Hun, 473; Trustees v. Gleason, 15 Fla. 384; Ridenour v. Wherritt, 30 Ind. 485; Benjamin v. Loughborough, 31 Ark. 210.

<sup>7</sup> Garner v. Wright, 28 How. Pr. 92; Dillon v. Bates, 39 Mo. 292; Clemons v. Elder, 9 Iowa, 272; Van Doren v. Robinson, 16 N. J. Eq. 256; Helm v. Hardin, 2 B. Mon. 232.



codes have effected a change in this procedure. The rule now is, that all persons interested in the subject-matter of the action, in any capacity or manner, should be made defendants.<sup>1</sup> Where lands were held by a deceased partner in trust for the firm, his heirs are proper parties in a suit for a conveyance by a person claiming title derived from the firm.<sup>2</sup> If the widow of a deceased vendor claims dower in the premises, she is properly joined.<sup>3</sup> The purchaser, or in case of his death his heirs, should be made parties to a suit by his assignee, when only an equitable interest in the contract has been transferred by the assignment.<sup>4</sup> When both vendor and vendee are dead, and the administrator of the vendor seeks to enforce the contract, the administrator and heirs of the vendee are necessary parties.<sup>5</sup>

**§ 3449. Defendants in Actions to Quiet Title, etc.—**

In this kind of action, all persons having any interest in the subject-matter should be parties.<sup>6</sup> A similar rule is applicable to actions to reform deeds or other instruments.<sup>7</sup> And in a case where certificates of corporation stock, which had been illegally issued, but which appeared genuine on their face, were held *bona fide* by several hundred persons separately, most of whom had brought actions against the corporation to have the stock declared valid, the corporation was permitted to join all the holders of such stock in one suit to have the stock declared spuri-

<sup>1</sup> Thomson v. Smith, 63 N. Y. 301; Potter v. Ellice, 48 N. Y. 321; Agard v. Valencia, 39 Cal. 292; Reuir v. Roper, 15 Fla. 121; Sieger v. Burns, 4 Minn. 141; Judd v. Moseley, 30 Iowa, 423; House v. Dexter, 9 Mich. 246; Sutton v. Hayden, 62 Mo. 107; Express Co. v. R. R. Co., 99 U. S. 191.

<sup>2</sup> Ind. Pot. Co. v. Bates, 14 Ind. 9; Platt v. Vattien, 1 McLean, 146.

<sup>3</sup> Armstrong v. Wyandotte B. Co., 1 McCahon, 170; Hill v. Smith, 32 N. J. Eq. 473; Cock v. Evans, 9 Yerg. 294.

<sup>4</sup> Miller v. Bear, 3 Paige, 468; Alexander v. Hoffman, 70 Ill. 114; Knott v. Steppins, 3 Or. 269; Eureka Marble Co. v. W. Mfg. Co., 47 Vt. 448.

<sup>5</sup> Anshutz's Appeal, 34 Pa. St. 376.

<sup>6</sup> Flanders v. McClanahan, 24 Iowa, 486; St. John Mfg. Co. v. Daggett, 84 Ill. 557; Peralta v. Simon, 5 Cal. 313.

<sup>7</sup> Mills v. Buttrick, 4 Cal. 123; Bush v. Hicks, 60 N. Y. 298; Fisher v. Hepburn, 48 N. Y. 41; Durham v. Bischoff, 47 Ind. 211; Haley v. Bagley, 37 Mo. 363; Newman v. Home Ins. Co., 20 Minn. 422.

ous.<sup>1</sup> The codes of the various states generally provide who must be made defendants in actions of partition, and it is usually provided that all holders of mortgages or other liens must be joined.

§ 3450. **Parties Defendant at Common Law.**—Where in actions *ex contractu* the liability is joint, all the joint debtors must be joined as defendants, and the presumption is that the liability is joint, unless the contrary appears.<sup>2</sup> Under the common-law practice, if there were too many defendants, or if they were sued jointly, when only severally liable on the face of the pleading, a demurrer would lie, or a motion in arrest of judgment, or a writ of error; but if the defect was not apparent, and the plaintiff failed to prove a joint liability, he would be nonsuited. But where the defect was non-joinder in contract, a plea in abatement was the proper remedy.<sup>3</sup> With respect to actions *ex delicto*, the liability of tort-feasors being joint and several, the action might be against all or any of them.<sup>4</sup> In cases where, from the nature of the tort, it cannot be of a joint character, as where the same slanderous words are uttered by different persons either simultaneously or successively, they must not be joined as defendants, and a demurrer will lie if they are, but the plaintiff may dismiss as against one, and have a verdict against the other.<sup>5</sup>

§ 3451. **Joint Liability upon Contracts.**—The judicial construction placed upon the provisions of the codes in some of the states has resulted in retaining the common-law rules relative to the joint liability of parties on con-

<sup>1</sup> New York etc. *R. R. Co. v. Schuyler*, 17 N. Y. 502; *Osgood v. Laytin*, 5 Abb. Pr., N. S., 1.

<sup>2</sup> *Van Alstyne v. Van Slyck*, 20 Barb. 383; *Ehle v. Purdy*, 6 Wend. 629; *Hemmenway v. Stone*, 7 Mass. 58; 5 Am. Dec. 27; *Peckham v. North Parish*, 16 Pick. 274.

<sup>3</sup> See, *contra*, *Foster v. Hooper*, 2 Mass. 572; *Yorks v. Peck*, 14 Barb. 614.

<sup>4</sup> *Russell v. Tomlinson*, 2 Conn. 206; *Van Steenburgh v. Tobias*, 17 Wend. 562; 31 Am. Dec. 310; *Adams v. Hall*, 2 Vt. 9; 19 Am. Dec. 690.

<sup>5</sup> *Thomas v. Rumsay*, 6 Johns. 32.

tracts and the necessary defendants in an action thereon.<sup>1</sup> Similar statutes, as interpreted by the courts in other states, have altered those rules, and the former joint liability is now held to be joint and several in all cases, and that all the obligors are liable to be sued on such contracts.<sup>2</sup> As, for instance, an action in Kansas on a joint note may be brought against all or any one or more of the makers, or one or more may be dismissed, and judgment taken against the others.<sup>3</sup> In Arkansas and Kentucky, also, one or more joint debtors may be sued, and in the latter state even a judgment against some is no bar to an action against the others.<sup>4</sup>

**§ 3452. Invalidity of Joint Contract as to One Party.**

— Where a joint contract is invalid as to one of the joint obligors, the action may be brought against all, and judgment rendered against those who are found liable, or the party not liable may be omitted.<sup>5</sup>

**§ 3453. In Case of Death of One or More Joint Obligors.** — At common law, the survivors, only, on a joint obligation could be sued, and this rule still prevails in some states; but in an equitable action the personal representative can generally be sued in those states where the survivors are insolvent, or after the remedy at law against them has been exhausted without satisfaction.<sup>6</sup>

<sup>1</sup> *Shafer v. Moriarty*, 46 Ind. 9; *Bledsoe v. Irvin*, 35 Ind. 293; *Aylesworth v. Brown*, 31 Ind. 270; *Tinkum v. O'Neale*, 5 Nev. 93; *Keller v. Blasdel*, 1 Nev. 491; *Lane v. Salter*, 51 N. Y. 1; *Wooster v. Chamberlain*, 28 Barb. 602; *Bridge v. Payson*, 5 Sand. 210; *Kamm v. Harker*, 3 Or. 208.

<sup>2</sup> *Silvers v. Foster*, 9 Kan. 56; *Rose v. Williams*, 5 Kan. 483; *Board of Commissioners v. Swain*, 5 Kan. 376; *Ryerson v. Hendrie*, 22 Iowa, 480; *Gosson v. Badgett*, 6 Bush, 97; 99 Am. Dec. 658; *Nichols v. Burton*, 5 Bush, 320.

<sup>3</sup> *Whittenhall v. Korber*, 12 Kan. 618.

<sup>4</sup> *Williams v. Rogers*, 14 Bush, 776; *Bradford v. Toney*, 30 Ark. 763. The contrary is held in Indiana: See *Lin-genfelter v. Simms*, 49 Ind. 92.

<sup>5</sup> *Brumskill v. James*, 11 N. Y. 294; *Groat v. Phillips*, 6 Thomp. & C. 42.

<sup>6</sup> *Scholey v. Halsey*, 72 N. Y. 578; *Pope v. Cole*, 55 N. Y. 124; 14 Am. Rep. 198; *Richter v. Poppenhausen*, 42 N. Y. 373; *Voorhees v. Childs's Executors*, 17 N. Y. 354; *People v. Jenkins*, 17 Cal. 500; *Moorehouse v. Ballou*, 16 Barb. 289; *Maples v. Geller*, 1 Nev. 233; *Cairnes v. O'Brien*, 40 Wis. 469; *Kimball v. Whitney*, 15 Ind. 280; *Trustees etc. v. Lawrence*, 11 Paige, 80.

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In other states, however, under statutes differing somewhat in their language, the surviving obligors and the representatives of the deceased may be sued together in the same action.<sup>1</sup> But when a note is executed to two joint payees, upon the death of one the right of suit thereon vests in the survivor, and upon his death in his administrator.<sup>2</sup>

§ 3454. **Defendants, where Liability Joint and Several.**—The code provisions have not changed the obligations of the parties under these circumstances. So if a joint and several note is made by a firm, and is signed in the firm name, an action will lie against all the partners, or one or more of them.<sup>3</sup>

§ 3455. **Where Several only.**—The practice in cases where the liability is several only has not been changed by the codes, except where the statutes expressly provide that the several obligors may all, or any of them, be joined in the same action. On the question whether guarantors may be joined with the principal debtor, the decisions are not harmonious. In New York and Indiana and Missouri it is held that the guarantor cannot be joined.<sup>4</sup> But in Iowa the contrary is held.<sup>5</sup>

§ 3456. **Defendants in Actions ex Delicto.**—No change has been made in respect to the practice relative to the

<sup>1</sup> Hayes v. Crutcher, 54 Ind. 260; Myers v. State, 47 Ind. 293; Voors v. State, 47 Ind. 345; Eaton v. Burns, 31 Ind. 390; Braxton v. State, 25 Ind. 82; Selden v. Braden, 13 Iowa, 365; Burgoyne v. Ohio Life Ins. & T. Co., 5 Ohio St. 586.

<sup>2</sup> Bostwick v. Williams, 40 Ill. 114; Sleeper v. Union Ins. Co., 65 Me. 393; Adams v. Hackett, 27 N. H. 292.

<sup>3</sup> Morrell v. Irving Fire Ins. Co., 33 N. Y. 429; 88 Am. Dec. 396; Gillian v. Norton, 6 Rob. (N. Y.) 546; Snow v. Howard, 35 Barb. 55; Trabue v. McAdams, 8 Bush, 74; O'Gorman

v. Lindeke, 26 Minn. 93; Ryerson v. Hendrie, 22 Iowa, 480; Clapp v. Preston, 15 Wis. 543.

<sup>4</sup> De Ridder v. Schermerhorn, 10 Barb. 638; Phalen v. Dingee, 4 E. D. Smith, 379; Le Roy v. Shaw, 2 Duer, 626; Barton v. Spier, 5 Hun, 60; McMillan v. Bank, 32 Ind. 11; Viriden v. Ellsworth, 15 Ind. 144; Graham v. Ringo, 67 Mo. 324; Central Bank v. Shine, 48 Mo. 463.

<sup>5</sup> Stout v. Noteman, 30 Iowa, 414; Tucker v. Shiner, 24 Iowa, 334; Mix v. Fairchild, 12 Iowa, 351; Marvin v. Adamson, 11 Iowa, 371.

joint and several liability of joint tort-feasors,<sup>1</sup> and the principal and agent may both be joined in an action for damages for the negligence of the agent within the scope of his authority;<sup>2</sup> and one partner may be sued for the negligence of the firm.<sup>3</sup> So all or any of the joint owners of trespassing animals may be sued in an action for damages.<sup>4</sup> But though joint tort-feasors may be sued separately, and successive actions brought against them in respect of the same tort, yet the damages can be recovered only once,<sup>5</sup> and payment of one judgment is a bar to the other actions,<sup>6</sup> under the familiar principle that a discharge of one wrong-doer discharges all.<sup>7</sup>

**§ 3457. Defendants, where Question of Common Interest, and Parties Numerous.** — It is now provided by statute in many of the states that in cases of this kind one or more of the parties may sue or defend for the benefit of the rest, where it would be impracticable to join them all; but the facts showing the community of the interest and the number of the parties must be averred.<sup>8</sup> These statutory provisions are only declaratory of the rule previously obtaining in equity, and the decisions under that rule may be applied to the new procedure. It must, however, appear that the action could be maintained by or against all the parties, if actually joined; for if their join-

<sup>1</sup> See *ante*, § 3435.

<sup>2</sup> *Kasson v. People*, 44 Barb. 347.

<sup>3</sup> *Chester v. Dickerson*, 52 Barb. 349; 54 N. Y. 1; 13 Am. Rep. 550; *Wood v. Luscomb*, 23 Wis. 287; *Mandelbaum v. Russell*, 4 Neb. 551; *McReady v. Rogers*, 1 Neb. 124; 93 Am. Dec. 333; *Phelps v. Wait*, 30 N. Y. 78; *Murphy v. Wilson*, 44 Mo. 313; 100 Am. Dec. 290; *Alfred v. Bray*, 41 Mo. 484; *Fay v. Davidson*, 13 Minn. 523.

<sup>4</sup> *Hillman v. Newington*, 57 Cal. 56; *Wehle v. Butler*, 61 N. Y. 245; *Union Bank v. Mott*, 27 N. Y. 633; *Bullis v. Montgomery*, 50 N. Y. 352; *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546; *Fleming v. McDonald*, 50 Ind. 278; 19 Am. Rep. 711; *Brady v. Ball*, 14 Ind.

317; *Vary v. R. R. Co.*, 42 Iowa, 246; *Turner v. Hitchcock*, 20 Iowa, 310; *Lohmiller v. Indian Water Co.*, 51 Wis. 683; *Cobb v. Smith*, 38 Wis. 21; *Greene v. Minnemaker*, 36 Wis. 50.

<sup>5</sup> *Fleming v. McDonald*, 50 Ind. 278; 19 Am. Rep. 711.

<sup>6</sup> *König v. Steckel*, 58 N. Y. 475; *First Nat. Bank v. Indianapolis etc. Co.*, 45 Ind. 5.

<sup>7</sup> *Turner v. Hitchcock*, 20 Iowa, 310; *Mitchell v. Allen*, 25 Hun, 543. See *ante*, Division II., Personal Rights, § 1041.

<sup>8</sup> *Towner v. Tooley*, 38 Barb. 598; *McKenzie v. L'Amoureux*, 11 Barb. 516; *Bardstown etc. R. R. Co. v. Metcalf*, 4 Met. (Ky.) 199; 81 Am. Dec. 541.

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der, if practicable, would be inadmissible, the rule is inapplicable.<sup>1</sup> The most usual instance of the application of the rule permitting one or more parties to sue or defend for the benefit of the others arises, perhaps, in the case of actions by members or share-holders of unincorporated associations for obtaining a winding up of the business, and a division of the property; but in these as well as in all other cases, the facts showing the right so to sue or defend must appear on the face of the complaint.<sup>2</sup> In such a case the action cannot be brought on behalf of the corporation or association itself, but must be brought on behalf of its members; though such an objection must be raised on the pleadings, or it will be deemed to have been waived.<sup>3</sup> The rule is also applied in cases of actions by one creditor, on behalf of himself and all other creditors, to enforce the terms of an assignment, in trust, for their benefit, and for an accounting, or to set aside an assignment on the ground of fraud.<sup>4</sup> And in like manner a suit will lie at the instance of one bond-holder on behalf of all to foreclose a mortgage given to secure a large number of bonds held by a number of different persons, and in such case the ground of community of interest would arise, as well as that of numbers.<sup>5</sup> Also, in actions by legatees or distributees for their legacies or shares, and by heirs to set aside a deed or will.<sup>6</sup> In an action brought under this rule the persons not individually named are not considered as actual

<sup>1</sup> *Gorman v. Russell*, 14 Cal. 531; *Hallett v. Hallett*, 2 Paige, 18; *Fish v. Howland*, 1 Paige, 20; *Brown v. Ricketts*, 3 Johns. Ch. 553; *Reid v. The Evergreens*, 21 How. Pr. 319.

<sup>2</sup> *Dausman v. Wisconsin etc. Co.*, 40 Wis. 418; *Stewart v. Erie and Western Trans. Co.*, 17 Minn. 372; *Habicht v. Pemberton*, 4 Sand. 657; *Warth v. Radde*, 18 Abb. Pr. 396; *Gorman v. Russell*, 14 Cal. 531; *Schmidt v. Huntington*, 1 Cal. 55.

<sup>3</sup> *Stewart v. Erie etc. Co.*, 17 Minn. 372; *Keller v. Tracy*, 11 Iowa, 530.

<sup>4</sup> *Brooks v. Peck*, 38 Barb. 519; *Greene v. Breck*, 10 Abb. Pr. 42.

<sup>5</sup> *Coe v. Beckwith*, 10 Abb. Pr. 296; *Blair v. Shelby Co. Agr. Soc.*, 28 Ind. 175; *Reid v. The Evergreens*, 21 How. Pr. 319; *Bardstown etc. R. R. Co. v. Metcalf*, 4 Met. (Ky.) 199; 81 Am. Dec. 541.

<sup>6</sup> *Brown v. Ricketts*, 3 Johns. Ch. 553; *Hallett v. Hallett*, 2 Paige, 18; *Towner v. Tooley*, 38 Barb. 598; *McKenzie v. L'Amoureux*, 11 Barb. 516.

parties, unless a proper application for that purpose is granted by the court; but they are deemed to be before the court, even prior to such an order being made.<sup>1</sup> In Kentucky, however, it is held that the assent of parties having a common interest will be presumed until the contrary appears.<sup>2</sup>

§ 3458. **Adding Parties.**—Where a complete determination of all the issues before the court cannot be arrived at without bringing in other parties, the court, as we have seen,<sup>3</sup> has power which it is its duty to exercise, and to have them added on its own motion, if necessary.<sup>4</sup> But such action of the court is not required until the hearing of the cause.<sup>5</sup> The general rule under the codes is, that the court should not order new parties defendant to be brought in against the will of the plaintiff, unless the presence of such new party is necessary to the determination of the action.<sup>6</sup> After final judgment rendered, it is too late for third persons to come in and ask to be made parties, that they may prosecute an appeal.<sup>7</sup>

§ 3459. **Intervention.**—Under the modern practice a person not a party to an action for the recovery of real or personal property, but having an interest therein, may apply to the court to be made a party, and in certain cases a third party may be substituted for one already defendant. In California and Iowa it is provided that any person really interested in the result of pending litigation

<sup>1</sup> *Stevens v. Brooks*, 22 Wis. 695; *Hallett v. Hallett*, 2 Paige, 18.

<sup>2</sup> *Flint v. Spurr*, 17 B. Mon. 499.

<sup>3</sup> *Ante*, § 3428.

<sup>4</sup> *Isler v. Koonce*, 83 N. C. 55; *Sonthal v. Shields*, 81 N. C. 28; *Judy v. Farmers' and Traders' Bank*, 70 Mo. 407; *Dows v. Kidder*, 84 N. Y. 121; *Baass v. R. R. Co.*, 39 Wis. 296; *Hodges v. Kimball*, 49 Iowa, 577; *Clamp v. McGillicuddy*, 10 Iowa, 201; *Wiser v. Blachly*, 1 Johns. Ch. 437; *Penfield v.*

*Wheeler*, 27 Minn. 358; *Clark v. Stanton*, 24 Minn. 232.

<sup>5</sup> *Williams v. Hall*, 7 B. Mon. 295.

<sup>6</sup> *Hillier v. Stewart*, 26 Ohio St. 656; *Fagan v. Barnes*, 14 Fla. 58; *Burke v. Wilkins*, 49 Ga. 261; *Ex parte Proskauer*, 59 Ala. 195.

<sup>7</sup> *Johnson v. Williams*, 28 Ark. 479; *Files v. Watt*, 28 Ark. 151; *Foley v. Whitaker*, 26 Ark. 99; *Ex parte Brown*, 58 Ala. 543.

may at any time intervene therein.<sup>1</sup> In California leave to intervene must be obtained, but in Iowa the right is exercised as a matter of course. In this respect the code of the state of Washington is similar to that of California.<sup>2</sup> Instances of the application of the provisions of the New York code, and of those of states having similar provisions, will be found in the cases cited below.<sup>3</sup> The more liberal rule of California and Iowa is also illustrated in the decisions cited below.<sup>4</sup> This statutory right of intervention exists only in actions which are purely civil in their nature; it does not exist in proceedings in *quo warranto*,<sup>5</sup> but it does in prohibition<sup>6</sup> and *mandamus*.<sup>7</sup> The application may be made at any time prior to the final submission of the cause, provided the suit is not delayed to the prejudice of the other parties.<sup>8</sup> But the original parties are not affected by it until served with notice, and if, prior thereto, the original cause is settled, the application must be dismissed.<sup>9</sup>

<sup>1</sup> Cal. Code Civ. Proc., sec. 387; Iowa, secs. 2683-2685.

<sup>2</sup> Wash. Code, secs. 13, 14.

<sup>3</sup> *People v. R. R. Co.*, 77 N. Y. 232; *Godfrey v. Townsend*, 8 How. Pr. 398; *Scheidt v. Sturgis*, 10 Bosw. 606; *Hornby v. Gordon*, 9 Bosw. 656; *Conklin v. Bishop*, 3 Duer, 646; *Caswell v. Neville*, 12 How. Pr. 445; *Sims v. Gottle*, 82 N. C. 268; *Carter v. Mills*, 30 Mo. 432; *Conant v. Frary*, 49 Ind. 530; *Summers v. Hudson*, 48 Ind. 228; *Baker v. Riley*, 16 Ind. 479.

<sup>4</sup> *Coburn v. Smart*, 53 Cal. 742; *Poehlmann v. Kennedy*, 43 Cal. 201; *Stich v. Dickinson*, 38 Cal. 608; *People v. Sexton*, 37 Cal. 532; *Gradwohl v. Harris*, 29 Cal. 150; *Horn v. Vol-*

*cano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569; *Joliet Iron etc. Co. v. R. R. Co.*, 51 Iowa, 300; *Daniels v. Clark*, 38 Iowa, 556; *Taylor v. Adair*, 22 Iowa, 279; *Cattel v. Cole*, 20 Iowa, 451.

<sup>5</sup> *People v. Greene*, 1 Idaho, 235.

<sup>6</sup> *Ah Goon v. Superior Court*, 61 Cal. 555.

<sup>7</sup> *State v. Pilsbury*, 31 La. Ann. 8.

<sup>8</sup> *Coburn v. Smart*, 53 Cal. 744; *Hocker v. Kelley*, 14 Cal. 165; *Van Gordon v. Ormsby*, 55 Iowa, 664; *Smalley v. Taylor*, 33 Tex. 669; *Chism v. Ong*, 33 La. Ann. 702.

<sup>9</sup> *Nat. Bank v. Gill*, 50 Iowa, 427; *Van Bibber v. Geve*, 12 Tex. 15; *Cass v. Rouark*, 25 La. Ann. 354.



## CHAPTER CLXX.

## PLEADING.

- § 3460. General principles of common-law pleading.
- § 3461. Under the code practice.
- § 3462. Necessity for statement of facts.
- § 3463. Use of the common counts retained.
- § 3464. Where complaint defective in form.
- § 3465. Variance between *allegata* and *probata*.
- § 3466. Fatal variance, or want of proof.
- § 3467. Choice of remedies preserved.

**§ 3460. General Principles of Common-law Pleading.**

—As a consequence of the many kinds of actions which existed under the common-law practice, the pleadings in each of such actions differed materially in form, and it was absolutely necessary for the plaintiff to select the form adapted to the particular circumstances of the action he wished to bring. For instance, if the facts of the case would support an action of trover, and he had used the form of declaration adapted to an action of conversion, he would fail, or would have to submit to a nonsuit on account of the variance which would arise between the allegations or counts of his declaration and the evidence adduced at the trial. There was no such practice known as that of amending the pleading to make it conform to the proofs. Sometimes the plaintiff had the option of selecting between two or more forms of action; but it was incumbent upon him to produce evidence which would support the form selected, and if he did not do so, he would fail, even though the evidence would have supported one of the other forms of action which he might have selected, but did not. Sometimes the curious anomaly existed, that where a plaintiff had a choice of forms of remedy on the same facts, the amount of damages he could recover varied according to the form he chose.

Thus in an action in trover the measure of damages was the value of the property at the time of the conversion; while in trespass he could also recover damages for its detention, and even exemplary damages where the taking was accompanied by circumstances of outrage, insult, or oppression. The facts in each case might be the same, and yet the damages recoverable different. Neither could these several causes of action be united, and the plaintiff succeed on whichever he proved.<sup>1</sup> It was a fundamental principle of common-law pleading that only the material issuable facts constituting the particular form of action adopted could be alleged in the declaration, and it was required that they should be stated in technical language, with accuracy and precision. The facts so required to be alleged were not always primary ones, but sometimes the allegations took the form of the legal effect of the facts, or an admixture of law and fact, and even the allegation of absolute fictions was sometimes not only permitted, but even required, in some forms of action. The action of trover furnishes a striking instance of this. In that form of action the technical allegations were, substantially, that the plaintiff possessed as his own property certain specified chattels; that he had lost them; that the defendant had found them, and converted them to his own use. The gist of the action was the conversion, which was a conclusion of law alleged as a fact, and the averments of losing and finding were almost invariably purely fictitious.<sup>2</sup>

§ 3461. **Under the Code Practice.**—Instead of the various forms of pleadings enumerated in a previous section,<sup>3</sup> the codes of the various states have substituted the

<sup>1</sup> Field on Damages, secs. 14, 781, 783, 792-807, 826.

<sup>2</sup> Chitty's Pleading, 163; Goshen Turnp. Co. v. Sears, 7 Conn. 92; Fidler v. Delavan, 20 Wend. 57; Clark v. Lineberger, 44 Ind. 223; Hester v.

McNeille, 6 Phill. Ch. 263; Carpenter v. Alexander, 9 Johns. 291; Posey v. Hair, 12 Ala. 567; Murdock v. Caldwell, 8 Allen, 309.

<sup>3</sup> See § 3406, *ante*.

following: 1. The complaint or petition, by plaintiff; 2. The answer or demurrer, by defendant; 3. The demurrer or reply, by plaintiff; 4. The demurrer to the reply, by defendant.<sup>1</sup> The form of the complaint or petition, as regards its contents, is generally prescribed by the statutes, that of New York having, as a rule, been adopted as a model. The provisions of the New York code are as follows: "The complaint shall contain,— 1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant; 2. A plain and concise statement of the facts constituting the cause of action, without unnecessary repetition; 3. A demand of the relief to which the plaintiff supposes himself entitled. If a recovery of money be demanded, the amount thereof shall be stated."<sup>2</sup> The grounds upon which the complaint may be demurred to are also specified, and are the following: 1. That the court has no jurisdiction of the person of the defendant, or of the subject of the action; 2. That the plaintiff has not the legal capacity to sue; 3. That there is another action pending between the same parties for the same cause; 4. That there is a defect of parties plaintiff or defendant; 5. That several causes of action have been improperly united; 6. That the complaint does not state facts sufficient to constitute a cause of action.<sup>3</sup> Any or all of these grounds of demurrer may be taken together, and must, as was the case at common law, appear upon the face of the complaint. When they do not do so, the objection must be taken by answer; and if not so taken, is deemed to be waived, unless the objection is to the juris-

<sup>1</sup> Cal. Code Civ. Proc., sec. 422; Neb., sec. 91; N. C., sec. 92; N. Y., but in this state there is now no reply, sec. 141; Or., sec. 65; S. C., sec. 164; the allegations of the answer being deemed to be denied; Dak., sec. 93; Wis., c. 125, sec. 2.  
<sup>2</sup> N. Y. Code, sec. 132, as amended 1877, sec. 481.  
<sup>3</sup> N. Y. Code, sec. 144, as amended 1877.  
Fla., sec. 92; Iowa, sec. 2645; Ind., sec. 48; Kan., sec. 86; Ky., sec. 117; Minn., sec. 77; Mo., art. 5, sec. 3;

diction of the court, or that the complaint or petition does not state facts sufficient to constitute a cause of action.<sup>1</sup> The specified grounds are the only ones which can be taken.<sup>2</sup>

§ 3462. **Necessity for Statement of Facts.**—It is a *sine qua non* under code pleading that the complaint or petition must contain a statement of the facts constituting the cause of action.<sup>3</sup> It is the ultimate facts which must be stated, not the evidence of facts, or probative facts, or the legal conclusions based on the facts.<sup>4</sup> And the same rule is equally applicable whether the action is legal or equitable in its nature.<sup>5</sup> Indeed, the manner of stating the facts much more resembles that used under the former rules of equity pleading than that adopted at common law; but neither system can now be resorted to when the method is prescribed by the code.<sup>6</sup> The following are in-

<sup>1</sup> N. Y. Code, secs. 147, 148, as amended 1877, sec. 88. In California there is the further ground that the complaint is ambiguous, unintelligible, or uncertain: Cal. Code Civ. Proc., sec. 444, subd. 3; and the demurrer must specify the particulars of such ambiguity, etc.: Chase v. Evoy, 58 Cal. 348; Lorenzana v. Camarilla, 45 Cal. 125; Yolo v. Sacramento, 36 Cal. 195; Blane v. Klumpke, 29 Cal. 157.

<sup>2</sup> Richards v. Edick, 17 Barb. 261; De Witt v. Swift, 3 How. Pr. 280; Bushey v. Reynolds, 31 Ark. 662; Amira v. Cobb, 21 Ind. 492; Dunn v. Remington, 9 Neb. 82; Trustees etc. v. Ollin, 8 Ohio St. 293.

<sup>3</sup> Gates v. Salmon, 46 Cal. 361; White v. Lyons, 42 Cal. 279; Bowen v. Aubery, 22 Cal. 566; Coryell v. Cain, 16 Cal. 567; Green v. Palmer, 15 Cal. 411; 76 Am. Dec. 492; Corwin v. Toole, 31 Iowa, 516; Pfiffner v. Krapnel, 28 Iowa, 27; King v. Enterprise Ins. Co., 45 Ind. 43; Lytle v. Lytle, 37 Ind. 281; Willis v. Willis, 34 Ind. 306; Van Shack v. Farrow, 25 Ind. 310; Wright v. Wright, 54 N. Y. 437; Degraw v. Elmore, 50 N. Y. 1; People v. Ryder, 12 N. Y. 433; Briggs v.

Cent. Nat. Bank, 61 How. Pr. 250; Hill v. Barrett, 14 B. Mon. 83; Horn v. Ludington, 28 Wis. 81; Rogers v. Milwaukee, 13 Wis. 610; Cline v. Cline, 3 Or. 355; Oates v. Gray, 66 N. C. 442; McNabb v. Leckhart, 18 Ga. 495; Pier v. Heinrochen, 52 Mo. 333.

<sup>4</sup> Scott v. Robards, 67 Mo. 289; People v. Comm'rs etc., 54 N. Y. 276; Scott v. R. R. Co., 52 Iowa, 18; Ingle v. Jones, 43 Iowa, 286; Louisville Canal Co. v. Murphy, 9 Bush, 522; Commonwealth v. Cook, 8 Bush, 220; 8 Am. Rep. 456; Tonson v. Union Lumber Co., 38 Wis. 202; North Kansas etc. Co. v. Oswald, 18 Kan. 336; Pittsburgh etc. R. R. Co. v. Keeler, 49 Ind. 211; Clark v. Lineberger, 44 Ind. 223; Dunn v. Remington, 9 Neb. 82; Peterson v. Roach, 32 Ohio St. 374; 30 Am. Rep. 607; Suringer v. Paddock, 51 Ark. 528; Morrison v. Ins. Co., 69 Tex. 353; 5 Am. St. Rep. 63.

<sup>5</sup> White v. Lyons, 42 Cal. 279; People v. Ryder, 12 N. Y. 433; Horn v. Ludington, 28 Wis. 81.

<sup>6</sup> Moore v. Edmiston, 70 N. C. 510; Trustees etc. v. Ollin, 8 Ohio St. 293. In England the judicature acts since 1875 have effected a complete revolu-

stances of allegations being held to be conclusions of law, and therefore badly pleaded: In an action to dissolve a partnership, it was held that an averment that the plaintiffs and defendants "were partners doing business under the firm name of," etc., was a mere conclusion of law, or a compound conclusion of law and "probative facts," and that the partnership agreement should have been set forth;<sup>1</sup> and in an action to restrain the collection of taxes on the plaintiff's land it was held that an averment that the land "is by the laws of the state exempt from taxation" was a conclusion of law only.<sup>2</sup> Also, where suit was brought on a contract containing conditions precedent to be performed by a third party before the plaintiff's right of action accrued thereon, and it was averred that "the defendant neglected and refused" to perform the stipulated act on his part, "according to the terms of said agreement," without averring performance by such third person, such averment was held insufficient.<sup>3</sup> Only issuable facts should be alleged, and it is held in an action of conversion that an averment of the value of the property is not issuable, and a failure to deny such an allegation is not an admission of its truth, and does not prevent the introduction of evidence of the real value.<sup>4</sup>

§ 3463. **Use of the Common Counts in Assumpsit Retained.**—In code pleading, facts which constitute a single cause of action cannot be subdivided into two or more counts.<sup>5</sup> As there can be but one substantially true statement of a single cause of action, the practice of setting it forth in different counts is abolished.<sup>6</sup> It is, however,

tion in the manner of pleading in that country, the system under those acts being a somewhat close adaptation of the American code system.

<sup>1</sup> *Groves v. Tallman*, 8 Nev. 178. See also *Evans v. Job*, 8 Nev. 322.

<sup>2</sup> *Quinney v. Stockbridge*, 33 Wis. 505.

<sup>3</sup> *Wilson v. Clarke*, 20 Minn. 367; *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264.

<sup>4</sup> *Chicago etc. R. R. Co. v. R. R. Co.*, 38 Iowa, 382.

<sup>5</sup> *Birdseye v. Smith*, 32 Barb. 221; *Ford v. Mattice*, 14 How. Pr. 91; *Ferguson v. Gilbert*, 16 Ohio St. 88.

<sup>6</sup> *Sturges v. Burton*, 8 Ohio St. 218; 72 Am. Dec. 582; *Fern v. Vanderbilt*, 13 Abb. Pr. 72; *Nash v. McCauley*, 9 Abb. Pr. 159.

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generally held that these counts may now be pleaded if they would have been sufficient under the old practice in *assumpsit*; and that it is unnecessary to allege, in terms, the promise to pay, but it is sufficient to state facts showing the duty from which the law will imply the promise.<sup>1</sup> Where there really exist two separate and distinct grounds for claiming the same relief, and the plaintiff states each one separately, or where he is uncertain as to the exact ground of recovery the proof may afford, he may set up several distinct counts for the recovery of but one claim, and he will not be put to his election as to which he will proceed on.<sup>2</sup> As, for instance, when he is uncertain whether the evidence will support an allegation of an express contract, he may allege such a contract as he expects to prove, and add a count on the *quantum meruit*.<sup>3</sup> But, generally speaking, if one cause of action is set forth in several counts, the plaintiff may, on motion, be compelled to elect on which he will rely.<sup>4</sup>

§ 3464. **Where Complaint Defective in Form.**—Where the complaint sufficiently alleges material facts, or where such facts can be reasonably inferred from the allegations, the complaint is not bad on demurrer; but if the allegations are defective or incomplete in manner or form, the remedy is by motion before trial or subsequent pleading,

<sup>1</sup> *De la Guerra v. Newhall*, 55 Cal. 21; *Merritt v. Glidden*, 39 Cal. 559; *Wilkins v. Stidger*, 22 Cal. 231; 83 Am. Dec. 64; *Hosley v. Black*, 28 N. Y. 438; *Farron v. Sherwood*, 17 N. Y. 227; *Allen v. Patterson*, 7 N. Y. 476; 57 Am. Dec. 542; *Comin's v. Verbang*, 63 Ind. 107; *Curran v. Curran*, 40 Ind. 473; *Brown v. Perry*, 14 Ind. 32; *Emslie v. Leavenworth*, 20 Kan. 562; *Clark v. Trusky*, 3 Kan. 389; *Jones v. Mial*, 79 N. C. 164; *Grannis v. Hooker*, 29 Wis. 69; *Green v. Gilbert*, 21 Wis. 395; *Stout v. St. Louis etc. Co.*, 52 Mo. 342; *Carroll v. Paul's Executors*, 16 Mo. 262. Exceptions to this rule are to be found in *Moore v. Hobbs*, 79 N. C. 535;

*Foerster v. Kirkpatrick*, 2 Minn. 210; *Bowen v. Emerson*, 3 Or. 452, where complaints so framed were held demurrable.

<sup>2</sup> *Wilson v. Jerritt*, 61 Cal. 209; *Velie v. Newark City Ins. Co.*, 65 How. Pr. 1; *Songprey v. Yates*, 31 Hun, 432; *Talcott v. Van Vechten*, 25 Hun, 565.

<sup>3</sup> *Cox v. McLaughlin*, 76 Cal. 60. And see *Lancaster v. Conn. Mut. Life Ins. Co.*, 92 Mo. 460; 1 Am. St. R. p. 739.

<sup>4</sup> *Hillman v. Hillman*, 14 How. Pr. 456; *Young v. Edwards*, 11 How. Pr. 201; *Hentig v. Kansas Loan and Trust Co.*, 28 Kan. 617, 620; *Curtis v. Buckley*, 14 Kan. 449; *Sturges v. Burton*, 8 Ohio St. 218; 72 Am. Dec. 582.

to make them more definite and certain by amendment.<sup>1</sup> Advantage of these defects cannot now be taken after verdict in arrest of judgment.<sup>2</sup> Where a complaint set out a copy of a written contract to pay, to the effect that "for value received" the defendant "promised to pay," etc., but did not allege a consideration in any other way, and a demurrer was interposed on the ground of want of facts sufficient, it was held that a copy of the contract was a sufficient allegation of consideration, and that the objection should have been taken by motion to make more definite and certain.<sup>3</sup> In general, if the allegations of a pleading are so indefinite that the nature of what is intended is not apparent, a motion to make more definite and certain will be sustained.<sup>4</sup>

§ 3465. **Variance between Allegata and Probata.**—The rule at common law was, that the proofs adduced at the trial must sustain and correspond with the allegations in the pleadings, and a material variance was fatal to the action. The code provisions on this subject are to the effect that no variance shall be deemed material unless the opposite party has been actually misled to his prejudice thereby; and on it so appearing, the court has power to

<sup>1</sup> *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Prindle v. Carruthers*, 15 N. Y. 425; *Corpenny v. Sedalia*, 57 Mo. 88; *Saulsbury v. Alexander*, 50 Mo. 142; *Blaisdell v. Williams*, 9 Nev. 161; *Winter v. Winter*, 8 Nev. 129; *Johnson v. Robinson*, 20 Minn. 189; *Smith v. Dennett*, 15 Minn. 81; *Barthol v. Blakin*, 34 Iowa, 452; *Mills v. Rice*, 3 Neb. 76. In California and Colorado, an objection of this kind is made by demurrer under the statutory ground of ambiguity, uncertainty, etc.: See *Jameson v. King*, 50 Cal. 132; *Drais v. Hogan*, 50 Cal. 152; *Slatterly v. Hale*, 43 Cal. 191; *Manning v. Haas*, 5 Col. 37. And the ambiguity, etc., must be specified: *Lorenzana v. Camarilla*, 45 Cal. 125.

<sup>2</sup> *Saulsbury v. Alexander*, 50 Mo. 142; *Pomeroy v. Benton*, 57 Mo. 531;

*Russell v. State Ins. Co.*, 55 Mo. 585; *Graham v. Camman*, 5 Duer, 697; *Morris v. Gillman*, 16 Wis. 504.

<sup>3</sup> *Prindle v. Carruthers*, 15 N. Y. 425. See also *Walter v. Fowler*, 85 N. Y. 621; *District Township v. Board of Directors*, 52 Iowa, 287; *McCormic v. Basal*, 46 Iowa, 235; *U. S. Express Co. v. Keefer*, 59 Ind. 263; *Kaster v. Kaster*, 52 Ind. 531; *Hall v. Jones*, 5 Neb. 50; *Ball v. Fulton*, 31 Ark. 379; *State v. North Bull. Min. Co.*, 15 Nev. 385.

<sup>4</sup> *Tilton v. Beecher*, 59 N. Y. 176; 17 Am. Rep. 337; *Olcott v. Carroll*, 39 N. Y. 436; *Spies v. Roberts*, 18 Jones & S. 301; *Faulks v. Camp*, 8 Jones & S. 70; *Bass v. Comstock*, 36 How. Pr. 382; *Louisville etc. R. R. Co. v. Shanklin*, 94 Ind. 297; *Madden v. R. R. Co.*, 30 Minn. 453.

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order the pleading to be amended on such terms as may be just.<sup>1</sup> It is not, however, necessary that the plaintiff should prove his cause of action literally; it is sufficient if he do so substantially;<sup>2</sup> and if the proof shows a cause of action which can be found in the complaint, it is enough.<sup>3</sup> Questions of variance are, in general, to be determined by proof *aliunde* as to whether the party was actually misled to his prejudice.<sup>4</sup> But in some cases, the materiality of the variance may be apparent upon the face of the pleadings themselves.<sup>5</sup> An objection on the ground of variance must be taken on the trial, and it is too late to raise it for the first time in the appellate court.<sup>6</sup> A variance is not material, unless it has misled the adverse party to his prejudice.<sup>7</sup> And an immaterial variance must be disregarded, and the pleadings may be amended to conform to the proofs.<sup>8</sup> The usual code provision on the subject is, that in case of an immaterial variance, the court may direct the fact to be found in accordance with the proof, or may order an immediate amendment without costs.<sup>9</sup>

§ 3466. **Fatal Variance, or Want of Proof.**—Where the allegations of the complaint show a cause of action founded in tort, and the evidence adduced establishes a claim founded in contract, a fatal variance arises, and

<sup>1</sup> Western Union Tel. Co. v. Reed, 96 Ind. 195; Hays v. Carr, 83 Ind. 275; Neidefer v. Chastain, 71 Ind. 363; 36 Am. Rep. 198; Tomlinson v. Monroe, 41 Cal. 94; Rowan v. Bowles, 21 Ill. 17; Knapp v. Roche, 5 Jones & S. 395, 402; Neudecker v. Kohlberg, 81 N. Y. 296; Tooker v. Arnoux, 75 N. Y. 397; N. Y. Amend. Code Civ. Proc., sec. 539; Cal. Code Civ. Proc., sec. 469; N. C. Code Civ. Proc., sec. 128; Dak. Code Civ. Proc., sec. 138.

<sup>2</sup> Moore v. Lake Company, 58 N. H. 254.

<sup>3</sup> Knapp v. Roche, 5 Jones & S. 403; Phoenix Mut. Life Ins. Co. v. Hinesley, 75 Ind. 1; Owen v. Phillips, 73 Ind. 284.

<sup>4</sup> Sharp v. Mayor etc., 40 Barb. 270;

Catlin v. Gunter, 11 N. Y. 368; 62 Am. Dec. 113; Hanck v. Craighead, 4 Hun, 561.

<sup>5</sup> Lyon v. Blossom, 4 Duer, 318, 329; Place v. Minster, 65 N. Y. 89, 104.

<sup>6</sup> Bell v. Knowles, 45 Cal. 193; Tyng v. Commercial Warehouse Co., 58 N. Y. 308.

<sup>7</sup> Johnston Harvester Co. v. Clark, 30 Minn. 308; Kopplekorn v. Huffman, 12 Neb. 99; Dunn v. Durant, 9 Daly, 391.

<sup>8</sup> Began v. O'Reilly, 32 Cal. 11; Plate v. Vega, 31 Cal. 383; Hedrick v. Osborne, 99 Ind. 143.

<sup>9</sup> Cal. Code Civ. Proc., sec. 470; N. Y. Code Civ. Proc., sec. 540; Wis. Rev. Stats., sec. 2670; 2 Ohio Rev. Stats., sec. 5295.



there is a failure of proof under the statutes referred to.<sup>1</sup> And in such a case the pleading cannot be amended, as the statutes do not permit of amendments which change the entire scope and character of the action.<sup>2</sup> A similar rule applies where the cause of action alleged is on one contract, and the proof establishes a claim upon another contract or in tort. These grounds of action being substantially different, a fatal variance arises.<sup>3</sup> Other cases, also, may occur where a fatal variance arises; as, for instance, in an action against an indorser, where it is alleged that a demand was made at maturity, and notice given, but the proofs offered were that demand was excused.<sup>4</sup> Also, where the action was for possession of real property, and the plaintiff averred that the defendant was holding over after expiration of a lease, and offered to prove that he obtained possession by fraud.<sup>5</sup> Where the complaint shows the action to be *ex delicto*, and the proof tends to establish a right of action *ex contractu*, the variance is fatal, even though by regarding the tort as surplusage there would be enough averments remaining to support a liability in contract, or *vice versa*.<sup>6</sup>

<sup>1</sup> *Faulkner v. Faulkner*, 73 Mo. 327; *Waldhier v. R. R. Co.*, 71 Mo. 514; *De Graw v. Elmore*, 50 N. Y. 1; *Hauck v. Craighead*, 4 Hun, 562; *Gossom v. Baigett*, 6 Bush, 97; 99 Am. Dec. 658.

<sup>2</sup> *Knapp v. Simon*, 96 N. Y. 284; *Southwick v. First Nat. Bank*, 84 N. Y. 420; *Egert v. Wicker*, 10 How. Pr. 193; *Grant v. Burgwyn*, 88 N. C. 95.

<sup>3</sup> *Dunn v. Durant*, 9 Daly, 391; *Bolen v. San Geronimo Co.*, 55 Cal. 164; *Hinkle v. R. R. Co.*, 55 Cal. 627; *Hopkins v. Orcutt*, 51 Cal. 537; *Harris v. Kasson*, 79 N. Y. 381; *Arnold v. Angell*, 62 N. Y. 508; *Streeter v. R. R. Co.*, 45 Wis. 383; *Gaston v. Owen*, 43 Wis. 103; *Stowell v. Eldred*, 39 Wis. 614; *Boardman v. Griffin*, 52 Ind. 101; *Long v. Doxey*, 50 Ind. 385; *Jeffersonville etc. R. R. Co. v. Worland*, 50 Ind. 339; *Proctor v. Rief*, 52 Iowa, 592;

*York v. Wallace*, 48 Iowa, 305; *Cummings v. Long*, 25 Minn. 337; *Cowles v. Warner*, 22 Minn. 449.

<sup>4</sup> *Woolsey v. Williams*, 34 Iowa, 413; *Lumbart v. Palmer*, 29 Iowa, 104; *Hudson v. McCartney*, 33 Wis. 331; *Pier v. Heinrichhoffen*, 52 Mo. 333; *Cole v. Wintercost*, 12 Tex. 118. But see *Harrison v. Bailey*, 99 Mass. 620; 97 Am. Dec. 63.

<sup>5</sup> *Johnson v. Moss*, 45 Cal. 575; *Packard v. Snell*, 35 Iowa, 80; *Goldsmith v. Boersch*, 28 Iowa, 351; *Thatcher v. Heisey*, 21 Ohio St. 668; *O'Brien v. St. Paul*, 18 Minn. 176.

<sup>6</sup> *Hatchett v. Bank of Cal.*, 57 Cal. 335; *People v. Dennison*, 84 N. Y. 272; *Matthews v. Cady*, 61 N. Y. 651; *Walter v. Bennett*, 16 N. Y. 250; *Front v. Hardin*, 56 Ind. 165; *Watts v. McAllister*, 33 Ind. 264; *Johannesson v. Borschenius*, 35 Wis. 131; *Rothe v. Rothe*, 31 Wis. 570.

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§ 3467. **Choice of Remedies Preserved.**—The right to select between two or more remedies which the law gave to a plaintiff under the former practice has not been taken away by the code provisions. So that where either trover for the conversion of chattels, or trespass for the wrongful injury to or taking of them, or *assumpsit* for the amount received by the wrong-doer on a sale of them, might have been maintained formerly, the plaintiff can now elect which of those remedies he will sue for.<sup>1</sup> This doctrine has been rather extended than narrowed, so that the owner of property wrongfully taken or converted has now a right of action on an implied contract to pay its value, although it had not been converted into money, and although the plaintiff had his election to sue in trespass or conversion.<sup>2</sup> And also, if one willfully turn his cattle upon the land of another to graze, the latter may sue in tort for the damages, or upon an implied contract for the value of the pasturage.<sup>3</sup> So where goods are injured or lost by the negligence of a common carrier, the owner may waive the tort and sue in contract.<sup>4</sup> And where, on the sale of goods, the purchaser procures credit by false and fraudulent representation, the vendor may bring an action to recover the goods, or sue for their value, even before the expiration of the time for which the credit was given.<sup>5</sup>

<sup>1</sup> *Happendrig v. Shoemaker*, 37 Barb. 270; *Gordon v. Bruner*, 49 Mo. 570; *Berly v. Taylor*, 5 Hill, 577; *Putnam v. Wise*, 1 Hill, 234; 37 Am. Dec. 309; *McKnight v. Dunlop*, 4 Barb. 36; *Roberts v. Evans*, 43 Cal. 380; *Willett v. Willett*, 3 Watts, 277; *Leach v. Leach*, 2 Thomp. & C. 657; *Jones v. Hoar*, 5 Pick. 285; *Morrison v. Rogers*, 2 Ill. 317.

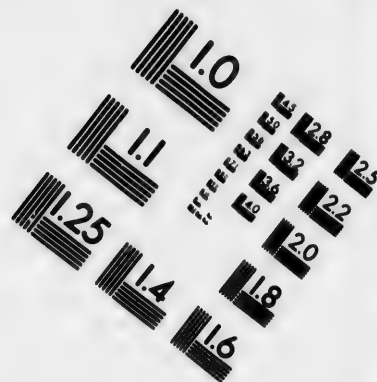
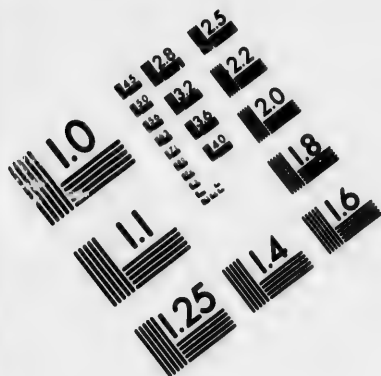
<sup>2</sup> *Freer v. Denton*, 61 N. Y. 492; *Fields v. Bland*, 81 N. Y. 239; *Hill v. Davis*, 3 N. H. 384; *Small v. Robinson*, 9 Hun, 418; *Johnson v. Stader*, 3 Mo. 359; *Kalekhoff v. Zochrlant*, 40 Wis. 427; *Logan v. Wallace*, 76 N. C. 410; *Brady v. Brennan*, 25 Minn. 210;

*Chamballe v. McKenzie*, 31 Ark. 155; *Stockett v. Watkins*, 2 Gill & J. 326; 20 Am. Dec. 438.

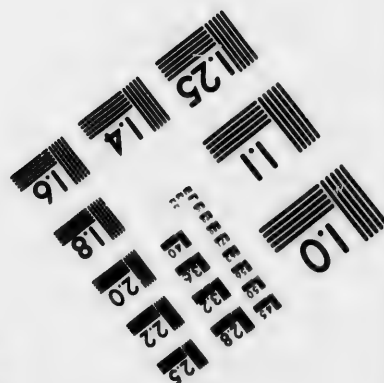
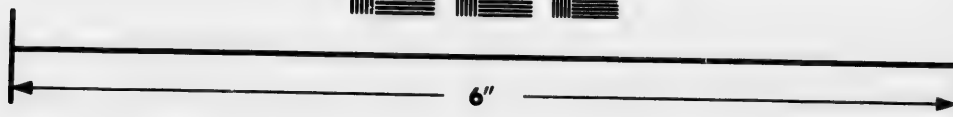
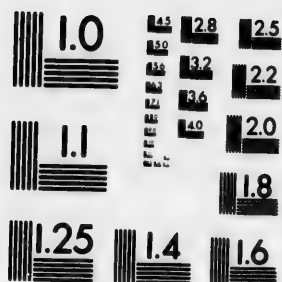
<sup>3</sup> *Norden v. Jones*, 33 Wis. 600; 14 Am. Rep. 782.

<sup>4</sup> *Campbell v. Perkins*, 8 N. Y. 130; *People v. Kendall*, 25 Wend. 399; 37 Am. Dec. 240; *Brown v. Treat*, 1 Hill, 225; *Campbell v. Stakes*, 2 Wend. 137; 19 Am. Dec. 561.

<sup>5</sup> *Kayser v. Siehel*, 34 Barb. 84; *Roth v. Palmer*, 27 Barb. 652; *Union Bank v. Mott*, 27 N. Y. 633; *Byxhie v. Wood*, 24 N. Y. 607; *National Trust Co. v. Gleason*, 77 N. Y. 400; 33 Am. Rep. 632.



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## CHAPTER CLXXI.

## JOINDER OF CAUSES OF ACTION.

§ 3468. Under the statutes.

§ 3469. Demurrer for misjoinder.

§ 3470. Joinder of legal and equitable causes.

§ 3471. Causes of action arising out of same transaction.

§ 3468. **Under the Statutes.**—Under the code system of pleading, the general principle is, that where different causes of action are of the same character, and between the same parties, and the joinder thereof is convenient to them, an objection to such joinder will be overruled.<sup>1</sup> The code provisions in this respect are substantially as follows: The plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, when they arise out of—1. The same transaction, or transactions connected with the same subject of action; 2. Contract, express or implied; 3. Injuries, with or without force, to person or property; 4. Injuries to character; 5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; 6. Claims to recover personal property, with or without damages for the withholding thereof; or 7. Claims against a trustee by virtue of a contract or by operation of law. But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.<sup>2</sup> Under these provisions, causes of action arising out of contract, express or im-

<sup>1</sup> King v. Farmer, 88 N. C. 22; Iowa Code Civ. Proc., sec. 2630; Cal. Young v. Young, 81 N. C. 91. Code Civ. Proc., sec. 427; and the

<sup>2</sup> N. Y. Code Civ. Proc., sec. 484; codes of other states.

plied, and affecting all the parties, may clearly be joined,<sup>1</sup> but subject to the qualification that only those causes of action can be joined which are consistent with each other.<sup>2</sup> Those arising on contract, but inconsistent with each other, cannot be joined.<sup>3</sup> And causes of action generally, which do not affect the same parties, cannot be joined. But it is not necessary that all the parties should be equally affected.<sup>4</sup>

§ 3469. **Demurrer for Misjoinder.**—Where different causes of action are improperly united, exception thereto is taken by demurrer, motion to strike out, or to compel an election; and if not so taken, is deemed to be waived.<sup>5</sup> It is also usually provided by the codes that the different causes of action must be separately stated, and if not so stated, the defect may be reached by motion to make more definite and certain, though generally not by demurrer.<sup>6</sup>

§ 3470. **Joinder of Legal and Equitable Causes.**—The provisions of the codes of most of the states permit of the plaintiff uniting in the same complaint or petition two or more causes of action, whether they are such as formerly came within the category of legal or equitable actions, or both, and they may be enforced in the same action, if otherwise in conformity with the rules relating

<sup>1</sup> *Vogler v. World Mut. L. Ins. Co.*, 51 How. Pr. 301; *Bank of British America v. Suydam*, 6 How. Pr. 379; *Gridley v. Gridley*, 24 N. Y. 130; *Stewart v. Balderston*, 10 Kan. 131.

<sup>2</sup> *Brown v. Ashbough*, 40 How. Pr. 226; *Smith v. Hallock*, 8 How. Pr. 73.

<sup>3</sup> *Nichols v. Drew*, 94 N. Y. 22, 26.

<sup>4</sup> *Earle v. Scott*, 50 How. Pr. 506; *Pulen v. Reynolds*, 22 How. Pr. 353; *Vermeule v. Beck*, 15 How. Pr. 333; *Enos v. Thomas*, 4 How. Pr. 48; *St. Joseph's Orphan Asylum v. Wolpert*, 80 Ky. 86; *North Carolina Land Co. v. Beatty*, 69 N. C. 329; *Turner v. Duchman*, 23 Wis. 500; *Johnson v. Kirby*, 65 Cal. 482; *Howse v. Moody*, 14 Fla. 59.

<sup>5</sup> Ind. Code, sec. 50; Iowa Code, sec. 2633; Ky. Code, secs. 113, 114; Cal. Code Civ. Proc., sec. 430; *Crawfordsville v. Bond*, 96 Ind. 236; *Rankin v. Collins*, 50 Ind. 158; *Keller v. Boatman*, 49 Ind. 104; *Grant v. McCarty*, 38 Iowa, 468; *Dean v. English*, 18 B. Mon. 132; *Mead v. Brown*, 65 Mo. 552; *Haverstick v. Truedel*, 51 Cal. 431; *Finlay v. Hayes*, 81 N. C. 368. But in Minnesota it seems that the objection may be taken by answer: *James v. Wilder*, 25 Minn. 305.

<sup>6</sup> *Bass v. Comstock*, 36 How. Pr. 382; *Freer v. Denton*, 61 N. Y. 492; *Mulholland v. Rapp*, 50 Mo. 42; *Hendry v. Hendry*, 32 Ind. 349; *Wabash etc. R. R. Co. v. Rooker*, 90 Ind. 581.

to the joinder of causes of action.' But the facts and grounds of each cause of action must be separately stated, and they may be divided for the purposes of the trial; though in such cases it is generally required that the several causes of action joined must be in favor of all the plaintiffs, and against all the defendants.<sup>2</sup> A claim for a statutory penalty incurred by reason of failure to enter satisfaction of an extinguished encumbrance, and a claim for damages sustained by reason of such failure, are separate causes of action, and must be separately stated, but they may be joined in the same complaint or petition.<sup>3</sup> Where, however, both legal and equitable relief are claimed in the same action, the two kinds of relief must be consistent with each other, and a claim to recover a statutory penalty for the violation of a city ordinance, and to enjoin a continuance of the violation, are held to be inconsistent.<sup>4</sup>

§ 3471. **Causes of Action Arising out of Same Transaction.**—The code provisions permitting the uniting in one action of all causes of action arising out of the same transaction, or transactions connected with the same subject of action, include causes of action *ex contractu* and *ex delicto*;<sup>5</sup> but if the causes of action do not arise from the same transaction, or transactions connected with the same subject of action, then causes of action *ex delicto* cannot be united with causes of action *ex contractu*.<sup>6</sup> The following are instances of different causes of action arising out of

<sup>1</sup> Gray v. Dougherty, 15 Cal. 266; Beck v. Allison, 56 N. Y. 366; 15 Am. Rep. 430; Lattin v. McCarty, 41 N. Y. 107; Gridley v. Gridley, 24 N. Y. 130; Welch v. Platt, 32 Hun, 194; Montgomery v. McEwen, 7 Minn. 351; N. Y. Code Civ. Proc., sec. 484.

<sup>2</sup> Brady v. Weeks, 3 Barb. 157; Vermeule v. Buck, 15 How. Pr. 333.

<sup>3</sup> Scott v. Robards, 67 Mo. 289.

<sup>4</sup> Lamport v. Abbott, 12 How. Pr. 340; Linden v. Hepburn, 5 How. Pr. 188.

<sup>5</sup> Henderson v. Jackson, 40 How. Pr. 168; Barr v. Shaw, 10 Hun, 580; Anderson v. Hill, 53 Barb. 238; Sturges v. Burton, 8 Ohio St. 218; 72 Am. Dec. 582; Jones v. Steamer Cortez, 17 Cal. 487; 79 Am. Dec. 142; Harris v. Avery, 5 Kan. 146.

<sup>6</sup> Henshaw v. Noble, 7 Ohio St. 226; Jones v. Johnson, 10 Bush, 649; Berry v. Carter, 19 Kan. 135; Minn. Harvester Works v. Smith, 30 Minn. 599; Turner v. First Nat. Bank, 26 Iowa, 562.

the same transaction, or transactions connected with the same subject of action. A claim for damages for an injury to the person and a claim for damages for injury to property of the plaintiff while he was a passenger, committed by the wrongful acts and frauds of the employees of a steamboat company on the same voyage;<sup>1</sup> a claim for damages for failure to furnish paper and to print a book on a stereotype plate of the owner, according to a contract, and also for injuries done to the plates themselves while in the possession of the defendant;<sup>2</sup> a claim to recover the possession of land, and also for the value of the occupancy of it;<sup>3</sup> a claim to recover the price agreed upon in a contract to build a house, and damages caused by a delay of the defendant in having the premises ready for the commencement of the work as stipulated, and for extra work and materials, and also to set aside, on the ground of fraud, an award made in reference to certain matters in dispute in the action;<sup>4</sup> a cause of action for false imprisonment, and one for malicious prosecution, when both arise out of the same transaction;<sup>5</sup> a cause of action for assault and battery, and one for false imprisonment.<sup>6</sup> Causes of action for slander, libel, and malicious prosecution may be joined;<sup>7</sup> a claim for injury to a horse by excessive driving, with one for conversion of the horse;<sup>8</sup> several causes of action arising out of claims to recover real property, with or without damages for the withholding thereof.<sup>9</sup>

<sup>1</sup> Jones v. Steamboat Cortez, 17 Cal. 487; 79 Am. Dec. 142.

<sup>2</sup> Badger v. Benedict, 4 Abb. Pr. 176.

<sup>3</sup> Armstrong v. Hinds, 8 Minn. 254.

And see Larned v. Hudson, 57 N. Y. 151.

<sup>4</sup> Lee v. Partridge, 2 Duer, 463. See also Sinar v. Canaday, 53 N. Y. 298; Phillips v. Gorham, 17 N. Y. 270; Young v. Young, 81 N. C. 91; Blake v. Van Tilborg, 21 Wis. 672; Fish v. Berkeley, 10 Minn. 199; Montgomery v. McEwen, 7 Minn. 351.

<sup>5</sup> King v. Ward, 77 Ill. 603.

<sup>6</sup> Cahill v. Terrio, 55 N. H. 571; Wiley v. Keokuk, 6 Kan. 94.

<sup>7</sup> Brown v. Rice, 51 Cal. 489; Hull v. Vreeland, 42 Barb. 543; Shore v. Smith, 15 Ohio St. 173.

<sup>8</sup> Summerville v. Metcalf, 15 N. Y. Week. Dig. 154.

<sup>9</sup> Van Alstine v. McCarty, 51 Barb. 326; Steinberger v. McGovern, 56 N. Y. 12; Vandevort v. Gould, 56 N. Y. 639; Perry v. Richardson, 27 Ohio St. 110.



## CHAPTER CLXXII.

## DEFENSES.

- § 3472. Statutory provisions.
- § 3473. The answer and reply.
- § 3474. Defects in form of answer.
- § 3475. Defects of substance of answer.
- § 3476. Denials generally
- § 3477. Admission of material averments.
- § 3478. Negative pregnant.
- § 3479. Argumentative denial.
- § 3480. General denial of allegations not otherwise pleaded to.
- § 3481. Confession and avoidance.
- § 3482. Pleading several defenses.
- § 3483. Joinder of defenses in abatement and in bar.
- § 3484. Inconsistent defenses.

§ 3472. **Statutory Provisions.**—The codes of most of the states, following the provisions of the New York code, provide substantially that the answer of the defendant must contain,—1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; 2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.<sup>1</sup> It is also usually provided that the defendant may set forth, by answer, as many defenses and counterclaims as he may have, whether they be such as were formerly denominated legal or equitable, or both; but each must be separately stated, must be complete in itself, and must refer to the cause or causes of action which it is intended to answer in such a manner as to be intelligibly distinguished; and if not thus complete and sufficient, it is demurrable.<sup>2</sup>

<sup>1</sup> N. Y. Code Civ. Proc., sec. 500; Cal. Code Civ. Proc., sec. 437; N. C. Code Civ. Proc., sec. 100; Dak. Code Civ. Proc., sec. 118; Minn. Stats. 1878, p. 720, sec. 96; 2 Iowa Rev. Code 1880, sec. 2655; 2 Ohio Rev. Stats., 5050; *Burley v. German Am. Bank*, 5 Cin. Rep. 172.

<sup>2</sup> *State v. Roche*, 94 Ind. 372, 376; *Lynn v. Crim*, 96 Ind. 89; *Entsminger v. Jackson*, 73 Ind. 144; *Lash v. Rendell*, 72 Ind. 475; *Frazee v. Frazee*, 70

The terms "counterclaim" and "set-off" are defined by the statutes permitting them to be pleaded by way of defense, and it is also provided how and in what cases they may be interposed.<sup>1</sup> In some of the states a cross-complaint or petition is expressly provided for, and the cases where it may be used indicated.<sup>2</sup> But in others the rules of practice in courts of chancery relative to the cross-bill, as modified by the spirit of the code, are still in use.<sup>3</sup>

§ 3473. **The Answer and Reply.**—The only pleading on the part of the defendant under the code system is either an answer or a demurrer, or both;<sup>4</sup> and where any of the matters which, if they appeared on the face of the complaint, would constitute a ground of demurrer do not so appear, they must be set up by way of answer.<sup>5</sup> The general rule is, that the purpose of an answer is to raise an issue of fact only, but it is sometimes used in a wider signification so as to include a pleading which raises an issue of law on the part of the defendant, and in this sense a demurrer is an answer.<sup>6</sup> The provisions of the codes, however, draw a well-defined line of distinction between

Ind. 411; *Smith v. Little*, 67 Ind. 549; *Reid v. Huston*, 55 Ind. 173; *Siter v. Jewett*, 33 Cal. 92; *Baldwin v. U. S. Tel. Co.*, 54 Barb. 517; *Ayrault v. Chamberlain*, 33 Barb. 229; *Norman v. Rogers*, 59 Barb. 275; *Spencer v. Babcock*, 22 Barb. 326; *Swift v. Kingsley*, 24 Barb. 541; *Hammond v. Earle*, 58 How. Pr. 426; *Benedict v. Seymour*, 6 How. Pr. 298; *Kneidler v. Steinbergh*, 10 How. Pr. 67; *Everett v. Waymire*, 30 Ohio St. 308; *Catlin v. Pedrick*, 17 Wis. 88; *Nat. Bank v. Green*, 33 Iowa, 140.

<sup>1</sup> Cal. Code Civ. Proc., sec. 437, subd. 2; N. Y. Code Civ. Proc., sec. 500, subd. 2; *Town v. Bringolf*, 47 Iowa, 133; *Silliman v. Eddy*, 8 How. Pr. 122; *Roscoe v. Maison*, 7 How. Pr. 121; *Great West. Ins. Co. v. Pierce*, 1 Wyo. 45, 49; *Conner v. Winton*, 8 Ind. 315.

<sup>2</sup> Cal. Code Civ. Proc., sec. 442; Ohio Rev. Stats., sec. 5059; Ky. Code, sec. 96; Iowa Code, sec. 2663; Kan. Code, sec. 99; Ind. Code, sec. 58.

<sup>3</sup> *Fletcher v. Holmes*, 25 Ind. 465; *Tucker v. St. Louis Life Ins. Co.*, 63 Mo. 588.

<sup>4</sup> N. Y. Code Civ. Proc., sec. 487; Cal. Code Civ. Proc., sec. 422; *Wines v. Stevens*, 1 Utah, 305, 308; *People v. McClellan*, 31 Cal. 101.

<sup>5</sup> N. Y. Code Civ. Proc., sec. 493; *Zabriskie v. Smith*, 13 N. Y. 322; 64 Am. Dec. 551; *Webb v. Vanderlilt*, 7 Jones & S. 4. Counterclaim is included in answer, and the cross-complaint is in the nature of an original action by the defendant.

<sup>6</sup> *Howell v. Howell*, 15 Wis. 55; *Brodhead v. Brodhead*, 4 How. Pr. 308.

the two, and a demurrer can never be held to be included in the term "answer," unless it manifestly appears on the face of the pleading that such was the intention.<sup>1</sup> An answer is understood to mean an entire answer to the whole of the complaint, and not one or more of several defenses pleaded to one or more causes of action contained in the complaint.<sup>2</sup> The defendant is permitted in some of the states to demur and answer at the same time to the entire complaint and to each cause of action; but the general rule is not to allow such a mode of defense.<sup>3</sup> The test of whether the pleading is a demurrer or an answer is, Does it raise any issue of fact, or require the proof of any fact by the defendant? if it does, it is an answer.<sup>4</sup> The reply is the last pleading of fact permitted by most of the codes, though in Kentucky pleadings in the nature of the common-law rejoinder, surrejoinder, and so on, are still allowed;<sup>5</sup> but on the other hand, in California, Nevada, and Idaho not even a reply is now permitted, all new matter set up in the answer being deemed to be denied.<sup>6</sup> In some of the states no reply to new matter is necessary unless such new matter constitutes a set-off or counterclaim, except that, in some of these, the court may, on defendant's application, order the plaintiff to file a reply.<sup>7</sup> Again, in other states, all new matter must be replied to, or its truth will be taken to be admitted.<sup>8</sup> A reply is not

<sup>1</sup> Kelly v. Downing, 42 N. Y. 71, 77; Brennan v. Ford, 46 Cal. 7.

<sup>2</sup> Strong v. Sproul, 53 N. Y. 497.

<sup>3</sup> People v. McClellan, 31 Cal. 101; Wines v. Stevens, 1 Utah, 305, 308.

<sup>4</sup> Struver v. Ocean Ins. Co., 16 How. Pr. 422; Brennan v. Ford, 46 Cal. 7; Dillaye v. Wilson, 43 Barb. 261.

<sup>5</sup> Ky. Code, secs. 98-100; Nutter v. Johnson, 80 Ky. 426.

<sup>6</sup> Cal. Code Civ. Proc., secs. 422, 462; Herold v. Smith, 34 Cal. 122; Bryan v. Maume, 28 Cal. 238; Colton Co. v. Raynor, 57 Cal. 588; Doyle v. Franklin, 40 Cal. 106; Nev. Comp. Laws, secs. 1101, 1128; Idaho Code, sec. 228.

<sup>7</sup> N. C. Code Civ. Proc., sec. 105;

N. Y. Code Civ. Proc., secs. 514, 516; S. C. Code Proc., sec. 176; Col. Code Civ. Proc., sec. 122; Ariz. Code Civ. Proc., 61; Wis. Rev. Stats. 1878, sec. 2661; Minn. Code Proc., sec. 83; Ark. Dig. 1874, sec. 4579; Metrop. Life Ins. Co. v. Meeker, 85 N. Y. 614; Vassear v. Livingston, 13 N. Y. 248; Devlin v. Bemis, 22 How. Pr. 290; Cannon v. Davies, 33 Ark. 56; Stowell v. Eldred, 39 Wis. 614; Dillon v. R. R. Co., 14 Jones & S. 21; Continental Ins. Co. v. Pearce, 39 Kan. 396; 7 Am. St. Rep. 557.

<sup>8</sup> Kan. Code Civ. Proc., sec. 102; Neb. Code Civ. Proc., sec. 109; Or. Code Civ. Proc., sec. 75; Ind. Code

allowed in Iowa, except to a counterclaim, or to plead matter in avoidance of the defense.<sup>1</sup>

§ 3474. **Defects in Form of Answer.**—At common law, there were two species of demurrer to pleadings, special and general. Objections to matters of form were taken by the former, and to matters of substance by the latter. By the code pleading the special demurrer is abolished, and there is substituted for it the motion to make more definite and certain; and if this motion is not made, the plaintiff cannot, at the trial, exclude evidence of the defense or counterclaim on the ground that it is not pleaded in proper form.<sup>2</sup> In California an answer is held to be insufficient under the code of that state, where, in stating a defense otherwise valid, it violates the primary and essential rules of pleading; so that if inconsistent defenses be set up, the defect may be reached by demurrer.<sup>3</sup>

§ 3475. **Defects in Substance of Answer.**—Where the new matter alleged in an answer is considered insufficient to constitute a defense, the objection is properly taken by demurrer. If the new matter thus pleaded, admitting it to be true, would constitute a bar to the plaintiff's recov-

Civ. Proc., sec. 67; Ohio Code Civ. Proc., sec. 101; Wagner's Mo. Stats., p. 1017, sec. 15; Board of Education v. Shaw, 15 Kan. 33; Seofield v. State Nat. Bank, 9 Neb. 316; Kimberling v. Hall, 10 Ind. 407; Creighton v. Kellerman, 1 Disn. 548.

<sup>1</sup> Iowa Code, sec. 2665; Meadows v. Hawkeye Ins. Co., 62 Iowa, 387; Zwick v. Phoenix Ins. Co., 60 Iowa, 266.

<sup>2</sup> Greenbaum v. Turrill, 57 Cal. 285; Hemme v. Hays, 55 Cal. 337; Fay v. Cobb, 51 Cal. 313; Hutchings v. Castle, 48 Cal. 152. Though in this state one of the grounds of demurrer is that the answer is ambiguous, unintelligible, or uncertain: Cal. Code Civ. Proc., sec. 444, subd. 3; West Union Tel. Co. v. Fenton, 52 Ind. 1; Indianapolis etc. R. R. Co. v. Risly, 50 Ind. 60; Fultz v. Wycoff, 25 Ind. 321;

Sargent v. R. R. Co., 32 Ohio St. 449; Larimore v. Wells, 29 Ohio St. 13; Munger v. Shannon, 61 N. Y. 251; Becker v. Boon, 61 N. Y. 317; Leiter v. Field, 52 N. Y. 621; Manning v. Tyler, 21 N. Y. 567; White v. Spencer, 14 N. Y. 247; Bushby v. Reynolds, 31 Ark. 657; Lerdall v. Charter Oak Ins. Co., 51 Wis. 426; Elmore v. Hill, 46 Wis. 618; Ready v. Somer, 37 Wis. 265; Flanders v. McVickar, 7 Wis. 327; Jackson Sharp Co. v. Holland, 14 Fla. 384; Dail v. Harper, 83 N. C. 4; Brogden v. Henry, 83 N. C. 274; Simpson v. Bryan, 50 Iowa, 293; Phoenix v. Lamb, 29 Iowa, 352.

<sup>3</sup> Uridias v. Morrell, 25 Cal. 31; Klink v. Cohen, 13 Cal. 623. In Idaho the contrary is held: Caldwell v. Ruddy, 1 West Coast Rep. 295 (Idaho).

ery, it is sufficient, even though in the mode of statement there may be the defects of surplusage, vagueness, or want of due particularity; the sufficiency alone being the only point which can be considered on demurrer.<sup>1</sup> A joint answer is demurrable, unless good as to each and all of the defendants. If bad as to one, it is bad as to all; but the filing of separate answers overcomes this difficulty.<sup>2</sup> A demurrer to an entire answer setting up several separate defenses will be overruled if the answer contains one good defense.<sup>3</sup> As a general rule, a defense to a part of the complaint should be so pleaded; as if such a one is set up to the entire action, it is demurrable, though if properly stated, it would be good as a partial defense.<sup>4</sup> In this respect the common-law rule that a plea to the entire declaration, but which went only to a portion of it, was bad on demurrer, has remained unaltered.<sup>5</sup> So in an action upon two promissory notes, an answer purporting to bar the action, which at most only alleges matter in defense of one of the notes, is insufficient on demurrer.<sup>6</sup>

§ 3476. **Denials Generally.**—The denial under the new practice is equivalent to the plea in bar under the old, which was a denial of all or some essential part of the averments in the declaration.<sup>7</sup> The provision of the codes is, that the answer may contain a general or specific denial of each material allegation of the complaint con-

<sup>1</sup> *Gihon v. Levy*, 2 Duer, 327; *Everett v. Waymire*, 30 Ohio St. 308; *Stoutenberg v. Lybrand*, 13 Ohio St. 228; *Finch v. Finch*, 10 Ohio St. 501; *Otero v. Bullard*, 3 Cal. 188; *Taylor v. Richards*, 9 Bosw. 679; *McGregor v. McGregor*, 21 Iowa, 441.

<sup>2</sup> *McDonigal v. Cotter*, 32 Wis. 614; *Webster v. Tibbits*, 19 Wis. 438; *Morton v. Morton*, 10 Iowa, 58.

<sup>3</sup> *Bruce v. Benedict*, 31 Ark. 391; *Roberts v. Johannes*, 41 Wis. 616; *Nichol v. McAlister*, 52 Ind. 586; *Modlin v. Northwest Trust Co.*, 48 Ind. 492; *Davidson v. King*, 47 Ind. 372; *Jeffersonville etc. R. R. Co. v. Vincent*, 40 Ind. 233.

<sup>4</sup> *Peck v. Parchen*, 52 Iowa, 46; *McMahan v. Spinning*, 51 Ind. 187; *Traster v. Grielson's Administrator*, 29 Ind. 96; *Peet v. O'Brien*, 5 Neb. 360.

<sup>5</sup> *Allen v. Randolph*, 48 Ind. 496; *Adkins v. Adkins*, 48 Ind. 12; *Gulick v. Connely*, 42 Ind. 134; *Curran v. Curran*, 40 Ind. 473; *Fitzsimmons v. City Fire Ins. Co.*, 18 Wis. 234; 86 Am. Dec. 761.

<sup>6</sup> *Downey v. Lee*, 86 Ind. 260; and see *Richardson v. Hickman*, 22 Ind. 244; *Foster v. Hazen*, 12 Barb. 547.

<sup>7</sup> *Stephen's Pleading*, 51; 1 *Chitty's Pleading*, 469.

troverted by the defendant.<sup>1</sup> It is sufficient under this provision to deny generally each and every allegation of the complaint, thereby putting in issue every material allegation; but such a general denial does not give the same latitude to the defendant which existed under the "general issue" at common law.<sup>2</sup> By a general denial, every material fact in the complaint is put in issue, including any implied averments; as where, in an action of conversion, a general denial is pleaded, not only the conversion, but the plaintiff's title to the property, is put in issue, and the defendant may adduce evidence controverting the title.<sup>3</sup> A specific denial is a denial applicable only to the particular allegation controverted.<sup>4</sup> A general and specific denial is not permitted to the same allegation.<sup>5</sup> But one or more special allegations may be admitted, and the remainder denied by a general denial, when the allegations are so specified that there can be no mistake as to what is put in issue.<sup>6</sup> Under a general denial in an action upon a *quantum meruit* for work and labor done, the defendant may dispute the value, and even show that the demand was assigned before action brought;<sup>7</sup> or that, through want of skill, the value of plaintiff's services was reduced or rendered nugatory.<sup>8</sup> And to a complaint for

<sup>1</sup> Cal. Code Civ. Proc., sec. 437; Dak. Code Civ. Proc., sec. 118; 2 Iowa Rev. Code 1880, sec. 2655; N. C. Code Civ. Proc., sec. 100; N. Y. Code Civ. Proc., sec. 500; 2 Ohio Rev. Stats., sec. 5070.

<sup>2</sup> Houghton v. Townsend, 8 How. Pr. 441; Livingston v. Finkle, 8 How. Pr. 486; Stoddard v. Onondaga Conf., 12 Barb. 576; Fay v. Grimsteel, 10 Barb. 321; Catlin v. Gunter, 1 Duer, 253; 62 Am. Dec. 113; Benedict v. Seymour, 6 How. Pr. 298.

<sup>3</sup> Bellinger v. Craigue, 31 Barb. 534; Corwin v. Corwin, 9 Barb. 219; Heine v. Anderson, 2 Duer, 318; Prindle v. Carruthers, 15 N. Y. 429; Thompson v. R. R. Co., 45 N. Y. 468; Wand v. Packard, 18 Cal. 391; Johnson v. Oswald, 38 Minn. 550; 8 Am. St. Rep. 698.

<sup>4</sup> Allis v. Leonard, 46 N. Y. 688; Racouillat v. Reno, 32 Cal. 450; San Francisco Gas Co. v. San Francisco, 9 Cal. 453. Under the Colorado code, a specific denial is compulsory: Alden v. Carpenter, 4 Col. L. Rep. 430.

<sup>5</sup> Blake v. Eldred, 18 How. Pr. 240; Fogerty v. Jordan, 2 Rob. (N. Y.) 319, 322.

<sup>6</sup> Haines v. Herrick, 9 Abb. N. C. 379; Long v. Long, 70 Mo. 644; McGuinness v. Mayor, 13 N. Y. Week. Dig. 522; Smith v. Wells, 20 How. Pr. 158. But see McEnroe v. Decker, 58 How. Pr. 250; Thierry v. Crawford, 33 Hun, 366; Luce v. Alexander, 17 Jones & S. 202.

<sup>7</sup> Wetmore v. San Francisco, 44 Cal. 294.

<sup>8</sup> Schermerhorn v. Van Allen, 18 Barb. 29; Bridges v. Paige, 13 Cal. 640.

goods sold and delivered, a general denial admits of proof that the person who actually made the sale was the owner of the goods, and not the plaintiff.<sup>1</sup> Also, in an action upon a written instrument, the defendant, under a general denial, may show an assignment and transfer of the instrument to a third person.<sup>2</sup> So in an action for damages to person or property from defendant's negligence, he may, under a general denial, show that the negligence was that of third persons, for whom he is not responsible, or that the injury was caused by the negligence of the plaintiff.<sup>3</sup> So under a general denial in an action of conversion, evidence may be given in reduction of damages, as that the maker of a converted note was insolvent.<sup>4</sup> In an action to recover possession of land, the defendant, under a general denial, may prove anything tending to defeat the title set up by the plaintiff.<sup>5</sup> In Nebraska and Indiana it is even provided by statute that every defense, legal or equitable, may be proved under a general denial.<sup>6</sup> In actions for malicious prosecution, the allegations of malice and want of probable cause are put in issue by a general denial.<sup>7</sup> Where it is provided by statute that the answer to a verified complaint should contain a specific denial of each allegation controverted, no issue is raised by a conjunctive denial of conjunctive allegations.<sup>8</sup> In

<sup>1</sup> *Merritt v. Briggs*, 57 N. Y. 651; *Hier v. Grant*, 47 N. Y. 278; *Hawkins v. Bencland*, 14 Cal. 413; *Ferguson v. Ramsey*, 41 Ind. 511; *Day v. Wamsley*, 33 Ind. 145.

<sup>2</sup> *Wetmore v. San Francisco*, 44 Cal. 294; *Andrews v. Bond*, 16 Barb. 633. But see *Brett v. First Univ. Soc.*, 63 Barb. 610.

<sup>3</sup> *Hathaway v. R. R. Co.*, 46 Ind. 25; *Indianapolis etc. R. R. Co. v. Rutherford*, 29 Ind. 82; 92 Am. Dec. 336; *Schaus v. Manhattan Gas Co.*, 14 Abb. Pr., N. S., 371; *Schular v. R. R. Co.*, 38 Barb. 653.

<sup>4</sup> *Booth v. Powers*, 56 N. Y. 22; *Quin v. Lloyd*, 41 N. Y. 349. But in Iowa it is held that the defense of title in a

third person must be set up in the answer; *Patterson v. Clark*, 20 Iowa, 429; *Dyson v. Ream*, 9 Iowa, 51.

<sup>5</sup> *Buck v. Tucker*, 42 Cal. 346; *Marshall v. Shafter*, 32 Cal. 176; *Mather v. Hutchinson*, 25 Wis. 27; *Lain v. Shepardson*, 23 Wis. 224.

<sup>6</sup> *Franklin v. Kelly*, 2 Neb. 79; *Vanduyne v. Hepner*, 45 Ind. 589.

<sup>7</sup> *Logden v. Deckard*, 45 Ind. 572; *Ammernan v. Crosby*, 26 Ind. 451; *Levy v. Brannan*, 39 Cal. 486; *Simpson v. McArthur*, 16 Abb. Pr. 302; *Rost v. Harris*, 12 Abb. Pr. 446; *Radde v. Ruckgaber*, 3 Duer, 684.

<sup>8</sup> *Feely v. Sheriby*, 43 Cal. 369; *Landers v. Bolton*, 26 Cal. 393; *Woodworth v. Knowlton*, 22 Cal. 164;

such a case, each allegation controverted should be specifically denied.<sup>1</sup> The statutes of limitation are, as a general rule, required to be expressly pleaded by the codes of the various states.<sup>2</sup> In an action to recover the possession of real property, the defense of adverse possession cannot be shown under a general denial, but must be specially pleaded;<sup>3</sup> and evidence tending to show a defense founded on new matter cannot be introduced under an answer by way of general denial.<sup>4</sup>

§ 3477. **Admission of Material Averments.**—For the purposes of the action, material allegations not denied are to be considered as true and admitted.<sup>5</sup> "Material allegation" means an allegation which it is essential for the plaintiff to prove in order to succeed in his action.<sup>6</sup> The failure to deny a material allegation is an admission of it, and the admission is conclusive evidence of the facts contained in the allegation.<sup>7</sup> Only issuable and material facts are admitted by a failure to deny them. Matters of evidence or of law or redundant facts need not be denied, and it is not generally necessary, though frequently advisable, to deny allegation of time, place, value, or amount

*Kuhland v. Sedgwick*, 17 Cal. 123; *Blankman v. Vallejo*, 15 Cal. 638; *Toombs v. Hornbuckle*, 1 Mont. 286; *Harris v. Shontz*, 1 Mont. 212; *Kay v. Whittaker*, 44 N. Y. 565.

<sup>1</sup> *Fish v. Reddington*, 31 Cal. 185.

<sup>2</sup> *McLane v. Bovee*, 35 Wis. 27; *Orton v. Noonan*, 25 Wis. 672; *Walker v. Flint*, 3 McCrary, 507; *Towsley v. Moore*, 30 Ohio St. 184; *Vose v. Woodford*, 29 Ohio St. 245; *Budd v. Walker*, 29 Hun, 344; *Smith v. Richmond*, 19 Cal. 476; *Steuner Senorita v. Simonds*, 1 Or. 274; *Parker v. Irwin*, 47 Ga. 405; *Kahnweiler v. Anderson*, 78 N. C. 133.

<sup>3</sup> *McManus v. O'Sullivan*, 48 Cal. 15; *Ford v. Sampson*, 30 Barb. 183; *Winslow v. Winslow*, 52 Ind. 8.

<sup>4</sup> *Terry v. Sickles*, 13 Cal. 430; *Glover v. Cliff*, 10 Cal. 303; *Weaver v.*

*Barden*, 49 N. Y. 286; *School Dist. v. Shoemaker*, 5 Neb. 36.

<sup>5</sup> N. Y. Code Civ. Proc., sec. 522; N. C. Code Civ. Proc., sec. 127; Cal. Code Civ. Proc., sec. 462; *Sands v. St. John*, 23 How. Pr. 140; *Jenkins v. Ore Dressing Company*, 65 N. C. 563; *Patterson v. Ely*, 19 Cal. 28; *Reed v. Arnold*, 10 Kan. 111; *Snell v. Crowe*, 3 Utah, 26; *Surget v. Byers*, *Hemp*, 715; *Dole v. Burleigh*, 1 Dak. 227; *Sparrow v. R. R. Co.*, 7 Ind. 369.

<sup>6</sup> *Newman v. Otto*, 4 Sand. 668; *Mayor v. Cunliff*, 2 N. Y. 165; *Col. Code*, sec. 76; *Tucker v. Parks*, 4 Col. L. Rep. 306.

<sup>7</sup> *Wright v. Butler*, 64 Mo. 165; *Lillienthal v. Anderson*, 1 Idaho, 673; *Mulford v. Estudillo*, 32 Cal. 131; *Burke v. Water Company*, 12 Cal. 407.



of damages.<sup>1</sup> As a general rule, nothing which is not well pleaded is admitted by a failure to answer it.<sup>2</sup>

§ 3478. **Negative Pregnant.** — The codes have not changed the principles of common-law pleading relative to the vice of pleading negatives pregnant. A negative pregnant occurs when the denial is pleaded in the precise language of the allegation, as such a denial is held to be pregnant with the admission that the matters denied may have taken place on some other occasion or under different circumstances.<sup>3</sup> Instances of this occur where an act is alleged as having been done "wrongfully and unlawfully," and the denial is that it was so done. There the doing of the act is admitted, and it is only its wrongful or unlawful character which is denied.<sup>4</sup> So a denial of an exact value alleged is an admission of any less value.<sup>5</sup> So where, in an action of unlawful detainer, it is alleged that the defendant unlawfully entered upon the premises, and the answer denies that he entered "unlawfully," the fact of the entry is admitted, and the issue is as to its unlawfulness only.<sup>6</sup> A conjunctive denial, which is a form of negative pregnant, is also bad pleading, and virtually admits the truth of the matter alleged.<sup>7</sup> So that allegations stated conjunctively must be denied disjunctively, if it is desired to raise an issue on them.<sup>8</sup>

<sup>1</sup> *Thompson v. Thompson*, 52 Cal. 154; *Gilbert v. Rounds*, 14 How. Pr. 46; *Flammer v. Kline*, 9 How. Pr. 216; *Bonnell v. Jacobs*, 36 Wis. 59; *Adams Express Co. v. Darnell*, 31 Ind. 20; 99 Am. Dec. 582.

<sup>2</sup> *Harlow v. Hamilton*, 6 How. Pr. 475; *Hicks v. Murray*, 43 Cal. 522.

<sup>3</sup> *Bradley v. Cronise*, 46 Cal. 287; *Feely v. Shirley*, 43 Cal. 369; *Fish v. Redington*, 31 Cal. 185; *Woodworth v. Knowlton*, 22 Cal. 164; *Caulfield v. Saunders*, 17 Cal. 569; *McMurphy v. Walker*, 20 Minn. 382; *Pattgieser v. Dorn*, 16 Minn. 204; *Crane v. Morse*, 49 Wis. 368; *Kay v. Whittaker*, 44

N. Y. 565; *Morgan v. Booth*, 13 Bush, 480; *Hardin v. R. R. Co.*, 4 Neb. 321.

<sup>4</sup> *Larney v. Mooney*, 50 Cal. 610; *Wood v. Richardson*, 35 Cal. 149.

<sup>5</sup> *Huston v. R. R. Co.*, 45 Cal. 550; *Leffingwell v. Griffen*, 31 Cal. 232; *Scovill v. Barney*, 4 Or. 238; *Hecklin v. Ess*, 16 Minn. 51.

<sup>6</sup> *Leroux v. Murdock*, 51 Cal. 541.

<sup>7</sup> *Fitch v. Bunch*, 30 Cal. 211; *Moser v. Jenkins*, 5 Or. 447.

<sup>8</sup> *Shearman v. N. Y. Cent. Mills*, 1 Abb. Pr. 187; *Young v. Catlett*, 6 Duer, 437; *Reed v. Calderwood*, 32 Cal. 109; *Thompson v. R. R. Co.*, 45 N. Y. 468.

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§ 3479. **Argumentative Denial.**—This arises when the affirmative allegations of a reply do not allege new matter, but merely probative facts, in support of the answer, and this form of pleading, if not held bad on demurrer, is obnoxious to a motion to strike out.<sup>1</sup> Where an argumentative denial contained facts constituting a defense to the action, and which might have been given in evidence under the general denial, which was pleaded, it was held that the defendant had a right to plead the facts specially, and a demurrer to the pleading was properly overruled.<sup>2</sup>

§ 3480. **General Denial of Allegations not Otherwise Pleaded to.**—There is a common practice of inserting in an answer, after denying some allegations, and admitting, explaining, or avoiding others, a sweeping clause, substantially to the effect that as to each and every other allegation in the complaint not expressly admitted, denied, or mentioned in the answer, the defendant denies the same. While there is no express authority in the statutes permitting this mode of pleading, it has been held to raise an issue, and the only way to reach the defect appears to be by motion to make the answer more definite and certain.<sup>3</sup>

§ 3481. **Confession and Avoidance.**—Under the code practice the setting up of new matter in the answer is equivalent to the common-law plea of confession and avoidance.<sup>4</sup> New matter must be pleaded as though it

13 Bush,  
Neb. 321.  
Cal. 610;  
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Cal. 550;  
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<sup>1</sup> Clink v. Thurston, 47 Cal. 21; Bruck v. Tucker, 42 Cal. 346; Radde v. Ruckgaber, 3 Duer, 684; Wright v. Schmidt, 47 Iowa, 233; Lowry v. McGee, 52 Ind. 107; Smith v. Denman, 48 Ind. 65; Wagoner v. Liston, 37 Ind. 357; Supply Ditch Co. v. Elliott, 10 Col. 327; 2 Am. St. Rep. 586.

<sup>2</sup> Loeb v. Weis, 64 Ind. 285.

<sup>3</sup> Pennsylvania Coal Co. v. Blake, 85 N. Y. 226; Allis v. Leonard, 46 N. Y. 688; Youngs v. Kent, 46 N. Y.

672; Greenfield v. Massachusetts Life Ins. Co., 47 N. Y. 430; Ingle v. Jones, 43 Iowa, 286; St. Anthony Falls Bridge Co. v. King Bridge Co., 23 Minn. 186.

<sup>4</sup> Bellinger v. Craigie, 31 Barb. 534; Gilbert v. Cram, 12 How. Pr. 455; Carter v. Koezley, 9 Bosw. 583; Goddard v. Fulton, 21 Cal. 430; Anson v. Dwight, 18 Iowa, 241; State v. Williams, 48 Mo. 210; Northrup v. Ins. Co., 47 Mo. 435; 4 Am. Rep. 337.

were being alleged in a complaint; the material facts must be properly averred, and not the evidence of them.<sup>1</sup> Whenever it is admitted that a cause of action once existed, but at the same time the effect of such admission is sought to be avoided by showing that such cause of action has ceased to exist, there is an allegation of new matter.<sup>2</sup> Instances of this occur when the defense set up is that of payment,<sup>3</sup> accord and satisfaction,<sup>4</sup> leave and license,<sup>5</sup> release,<sup>6</sup> act of God,<sup>7</sup> discharge in bankruptcy,<sup>8</sup> and all defenses invalidating the contract sued on, such as usury, fraud, duress, incapacity to contract, and the like.<sup>9</sup>

**§ 3482. Pleading Several Defenses.**—The practice under the provisions of the codes permits of the defendant joining in his answer as many defenses as he may have, whether of a legal or equitable nature, or both,<sup>10</sup> and whether inconsistent with each other or not;<sup>11</sup> but a sworn answer must not deny in one paragraph what it admits in another;<sup>12</sup> and the inconsistency must arise rather by implication of law, being in the nature of a plea in confession and avoidance, as distinguished from a denial, where a fact is hypothetically admitted for the purpose of the defense, but which is nevertheless denied to exist in truth.<sup>13</sup>

<sup>1</sup> *Lefler v. Field*, 52 N. Y. 621; *Richardson v. Hittle*, 31 Ind. 119; *Jenkins v. Long*, 19 Ind. 28; 81 Am. Dec. 374; *Leighton v. Grant*, 20 Minn. 345; *Caprero v. Builders' Ins. Co.*, 39 Cal. 123; *Oroville etc. R. R. Co. v. Supervisors*, 37 Cal. 354.

<sup>2</sup> *Coles v. Soulsby*, 21 Cal. 47.

<sup>3</sup> *Seward v. Torrence*, 3 Hun, 220; *Green v. Palmer*, 15 Cal. 417; 76 Am. Dec. 492.

<sup>4</sup> *Sweet v. Burdett*, 40 Cal. 97; *Piercy v. Sabin*, 10 Cal. 30.

<sup>5</sup> *Clifford v. Dam*, 81 N. Y. 52; *Beatty v. Swarthout*, 32 Barb. 293.

<sup>6</sup> *McKyring v. Bull*, 16 N. Y. 297; 69 Am. Dec. 696; *Turner v. Caruthers*, 17 Cal. 431.

<sup>7</sup> *New Haven etc. Co. v. Quintard*, 37 How. Pr. 29.

<sup>8</sup> *Cornell v. Dakin*, 38 N. Y. 253; *Cromwell v. Burr*, 59 How. Pr. 93.

<sup>9</sup> *Smith v. Dunning*, 61 N. Y. 249; *Wright v. Wright*, 54 N. Y. 437; *Whitman v. Lake*, 32 Wis. 189; *People v. San Francisco*, 27 Cal. 656; *Dillaye v. Parks*, 31 Barb. 132; *Baker v. Bailey*, 16 Barb. 54.

<sup>10</sup> Cal. Code Civ. Proc., sec. 441; N. Y. Code Civ. Proc., sec. 507; 2 Ohio Rev. Stats., sec. 5071; *Royce v. Brown*, 3 How. Pr. 391.

<sup>11</sup> *Bruce v. Burr*, 67 N. Y. 237; *Stiles v. Comstock*, 9 How. Pr. 48; *Billings v. Drew*, 52 Cal. 565; *Bell v. Brown*, 22 Cal. 671.

<sup>12</sup> *Citizens' Bank v. Closson*, 29 Ohio St. 78; *Kuhland v. Sedgwick*, 17 Cal. 123; *Burnham v. Call*, 2 Utah, 433.

<sup>13</sup> *Howard v. Throckmorton*, 48 Cal. 482; *Bell v. Brown*, 22 Cal. 671; *Nelson v. Brodhack*, 44 Mo. 596; 100 Am. Dec. 328; *Pavey v. Pavey*, 30 Ohio St. 600; *Bruce v. Burr*, 67 N. Y. 237;

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For instance, denial and justification may be pleaded together,<sup>1</sup> and a defense on the merits and another suit pending,<sup>2</sup> and a denial and the statute of limitations.<sup>3</sup> Each defense, however, must be separate and complete in itself, and cannot be aided by the allegations of another defense in the same answer, unless it, in terms, adopts or refers to the matters contained in such other defense.<sup>4</sup>

### § 3483. Joinder of Defenses in Abatement and in Bar.

—The distinction between pleas in abatement and in bar having been abolished by the codes, defenses of both of those characters may now be set up in the same answer,<sup>5</sup> and be tried and decided at the same time; but separate issues should be submitted to the jury, and a separate verdict rendered upon each issue, as in case of a general verdict and judgment against the plaintiff it would be impossible to determine whether another action could be brought, as in case of abatement, or not.<sup>6</sup>

§ 3484. Inconsistent Defenses. — Even though the defenses sought to be joined in the same action are inconsistent with each other, they may, under the code provisions, be nevertheless pleaded together; it being required only that each defense should be consistent with itself, and the same rule obtains whether the answer is

Y. 249;  
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Y. 237;

Willard v. Giles, 24 Wis. 319; Booth v. Sherwood, 12 Minn. 426; Shed v. Augustine, 14 Kan. 282; Billings v. Drew, 52 Cal. 565; Kellogg v. Baker, 15 Abb. Pr. 286.

<sup>1</sup> Hollenbeck v. Clow, 9 How. Pr. 289; Derby v. Gallup, 5 Minn. 119; Hackley v. Ogunn, 10 How. Pr. 44; Murphy v. Carter, 1 Utah, 17.

<sup>2</sup> Gardner v. Clark, 21 N. Y. 399.

<sup>3</sup> May v. Burk, 80 Mo. 675; Nelson v. Brodhack, 44 Mo. 596; 100 Am. Dec. 328; Willson v. Cleaveland, 30 Cal. 192.

<sup>4</sup> Baldwin v. United States Tel. Co., 54 Barb. 505; Nat. Bank v. Green, 33

Iowa, 140; Potter v. Weston, 29 Ind. 371; Truitt v. Baird, 12 Kan. 420.

<sup>5</sup> Gardner v. Clark, 21 N. Y. 399; Board of Supervisors v. Van Stralen, 45 Wis. 675; Erb v. Perkins, 32 Ark. 428; Dawley v. Brown, 9 Hun, 461.

<sup>6</sup> Sweet v. Tuttle, 14 N. Y. 465; Hooker v. Green, 50 Wis. 271; Bond v. Wagner, 28 Ind. 462. In Missouri and Oregon it is held that a plea in bar waives one in abatement: Fordgee v. Hathorn, 57 Mo. 120; Rippstein v. St. Louis etc. Ins. Co., 57 Mo. 86; Hopwood v. Patterson, 2 Or. 49; Thompson v. Greenwood, 28 Ind. 327.

verified or unverified.<sup>1</sup> In Missouri and Minnesota inconsistent defenses are not permitted,<sup>2</sup> though in the former state it is held that a general denial and confession and avoidance are not necessarily inconsistent,<sup>3</sup> and in some states the defendant is compelled to elect on which defense he will proceed.<sup>4</sup> A denial of the execution of an instrument, and that it was executed under duress, are held to be inconsistent and insufficient.<sup>5</sup> So, also, of a denial of a contract and an allegation of non-performance by the adverse party.<sup>6</sup> And a denial and tender are defenses of such an inconsistency as cannot be pleaded to the same cause of action.<sup>7</sup> So the defendant, a carrier by water, was not allowed to plead that he was not the owner of the vessel, and also that the goods shipped had been delivered to plaintiff.<sup>8</sup>

<sup>1</sup> *Billings v. Drew*, 52 Cal. 565; *Buhne v. Corbett*, 43 Cal. 264; *Willson v. Cleaveland*, 30 Cal. 192; *Springer v. Dwyer*, 50 N. Y. 19; *Mott v. Bennett*, 2 E. D. Smith, 50; *Barr v. Hack*, 46 Iowa, 308; *Vail v. Jones*, 31 Ind. 467; *Moore v. Willamette Co.*, 7 Or. 355.  
<sup>7</sup> *Fugate v. Pierce*, 49 Mo. 141; *Adams v. Trigg*, 37 Mo. 141; *Atteberry v. Powell*, 29 Mo. 429; 77 Am. Dec.

579; *Cook v. French*, 19 Minn. 407; *Derby v. Gallup*, 5 Minn. 119.

<sup>3</sup> *Nelson v. Brodhack*, 44 Mo. 596; 100 Am. Dec. 328.

<sup>4</sup> *Pavey v. Pavey*, 30 Ohio St. 600.

<sup>5</sup> *Wright v. Bacheller*, 16 Kan. 259.

<sup>6</sup> *Lewis v. Acker*, 11 How. Pr. 163.

<sup>7</sup> *Livingston v. Harrison*, 2 E. D. Smith, 197.

<sup>8</sup> *Arnold v. Dimon*, 4 Sand. 680.

## CHAPTER CLXXIII.

## SET-OFF, COUNTERCLAIM, AND CROSS-COMPLAINT.

- § 3485. Set-off.  
 § 3486. Counterclaim.  
 § 3487. May include equitable relief.  
 § 3488. Must be designated as such.  
 § 3489. Must be in favor of defendant pleading it.  
 § 3490. Demand must be against plaintiff.  
 § 3491. Joint and several liabilities.  
 § 3492. What not valid.  
 § 3493. Must arise out of the contract, or be connected with the subject of the action.  
 § 3494. In action of tort.  
 § 3495. Cross-complaint.  
 § 3496. Difference between cross-complaint and counterclaim.  
 § 3497. When to be pleaded.

§ 3485. **Set-off.** — The common-law defense of set-off is now, in most of the states, under the code practice, included and merged in the counterclaim.<sup>1</sup> In some of the states the statutory provisions relating to set-off are separate and distinct from those relating to counterclaim;<sup>2</sup> and in those states it is held, as was the rule at common law, that unliquidated demands cannot be made the subject of set-off.<sup>3</sup>

§ 3486. **Counterclaim.** — This is an innovation of the codes, and is much broader in its signification than the set-off at common law, which it has largely superseded. Under the codes of most of the states it embraces any

<sup>1</sup> *Humphrey v. Merritt*, 51 Ind. 197; *Wilson v. Runkel*, 38 Wis. 526; *Chapman v. Plummer*, 36 Wis. 262; *Town v. Bringolf*, 47 Iowa, 133; *Quinn v. Smith*, 49 Cal. 163; *Greer v. Greer*, 24 Kan. 102; *Faulks v. Rhodes*, 12 Nev. 225; *Van Brunt v. Day*, 81 N. Y. 251; *Westervelt v. Ackley*, 62 N. Y. 505; *Bathgate v. Haskin*, 59 N. Y. 533.

<sup>2</sup> Kan. Code Civ. Proc., sec. 98; Ky. Code, sec. 125; Neb. Code Civ. Proc., sec. 104; 2 Ohio Rev. Stats.,

sec. 5075; *Carver v. Shelley*, 17 Kan. 472, 475; *Wagner v. Stocking*, 22 Ohio St. 297; *Stanley v. Mut. Life Ins. Co.*, 95 Ind. 262.

<sup>3</sup> *Boyer v. Clark*, 3 Neb. 161; *Shropshire v. Conrad*, 2 Met. (Ky.) 143; *Evens v. Hall*, 1 Handy, 434. In Kansas the rule is otherwise: *Read v. Jeffries*, 16 Kan. 534. And in Indiana there is a statutory provision to the same effect: Code Civ. Proc., sec. 57; Rev. Stats. 1881, sec. 348.

claim, or demand of any right, or of any amount due, or claimed to be due, in opposition to the claim or demand of the plaintiff.<sup>1</sup> The provision for a counterclaim, in most of the states, is substantially as follows: The counterclaim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint, or connected with the subject of the action; 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.<sup>2</sup> In Iowa and Indiana the counterclaim is even more comprehensive; and in Iowa, especially, its scope is enlarged with respect to parties.<sup>3</sup> Formerly, under the old doctrines of recoupment and set-off, the defendant was allowed only to reduce or defeat the plaintiff's claim, and could obtain no judgment for affirmative relief, but was compelled to bring a separate action for the excess of any claim above that of the plaintiff against him.<sup>4</sup> Both of these defenses were formerly confined to actions on contract, and set-off could be only for a liquidated debt arising upon some other contract than the one sued upon, while recoupment was for unliquidated damages arising out of the breach of the same contract. Under former statutory regulations, the defendant might sometimes recover a balance due him, after crediting the plaintiff with the amount of his claim; but this was not allowed in cases of recoupment.<sup>5</sup> Under the code practice, the defense of counterclaim is substituted for these, and the defendant is entitled to an affirmative

<sup>1</sup> *Chamboret v. Cagney*, 41 How. Pr. 125; *Gage v. Angell*, 8 How. Pr. 335.

<sup>2</sup> N. Y. Code Civ. Proc., sec. 501; N. C. Code Civ. Proc., sec. 101; S. C. Code Civ. Proc., sec. 173; Cal. Code Civ. Proc., sec. 438; 1 Mo. Rev. Stats., sec. 3522; Wis. Rev. Stats., sec. 2656; Minn. Stats. 1878, p. 721, sec. 97.

<sup>3</sup> Iowa Code, sec. 2659; Ind. Code, sec. 59.

<sup>4</sup> *Still v. Hall*, 20 Wend. 51; *Ives v. Van Epps*, 22 Wend. 155; *Blanchard v. Ely*, 21 Wend. 343; *Mayer v. Mabie*, 13 N. Y. 15.

<sup>5</sup> *Seymour v. Davis*, 2 Sandf. 239.

judgment for any balance found due him.<sup>1</sup> Counterclaim, in effect, enables a defendant to obtain all the relief which under the former practice he would have been entitled to in a separate action, or a bill in equity, or a cross-bill, on the same facts.<sup>2</sup> In the codes of some of the states, however, the term is less comprehensive, being confined to claims which might formerly have been set up by way of recoupment.<sup>3</sup> In those states a counterclaim resembles recoupment at common law, and must be a cause of action in favor of the defendant, against the plaintiff, arising out of the contract or transaction sued on, or connected with the subject of the action.<sup>4</sup> But where the counterclaim is used in its fullest extent, the defendant is allowed to plead any other cause of action arising also on contract, express or implied, and existing at the commencement of the action, and such counterclaim may be either for liquidated or unliquidated damages.<sup>5</sup> In order that a counterclaim may be pleaded, it is not necessary that the plaintiff's claim should be a valid one, and the defendant may deny such claim, and in the same answer set up a counterclaim based upon the same instrument. The counterclaim must be sufficient to constitute a separate cause of action against the plaintiff, and it must be pleaded as though it were a complaint in an independent action.<sup>6</sup> In most of the states the defendant is not bound to set up

<sup>1</sup> *Terrell v. Walker*, 66 N. C. 244; *Hay v. Short*, 49 Mo. 139; *Batterman v. Pierce*, 3 Hill, 171; *Morrison v. Lovejoy*, 6 Minn. 319; *Butler v. Titus*, 13 Wis. 429.

<sup>2</sup> *Leavenworth v. Packer*, 52 Barb. 137; *Boston Mills v. Eull*, 37 How. Pr. 299.

<sup>3</sup> *Hudson v. Snipes*, 40 Ark. 75; *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477; *Bloom v. Lehman*, 27 Ark. 490; *Standley v. Mutual Life Ins. Co.*, 95 Ind. 254.

<sup>4</sup> *Williams v. Boyd*, 75 Ind. 286; *Hinkle v. Margerum*, 50 Ind. 240; *Hudson v. Snipes*, 40 Ark. 75.

<sup>5</sup> *Parsons v. Sutton*, 66 N. Y. 92; *Wheelock v. Pacific etc. Co.*, 51 Cal.

223, 226; *Schubart v. Harteau*, 34 Barb. 447; *Barnes v. McMullin*, 78 Mo. 260; *Empire Transp. Co. v. Boggianno*, 52 Mo. 294; *Morrison v. Lovejoy*, 6 Minn. 319; *Lignot v. Redding*, 4 E. D. Smith, 285.

<sup>6</sup> *Davis v. Toulmin*, 77 N. Y. 280; *Quebec Bank v. Weyand*, 30 Ohio St. 126; *Town v. Bringolf*, 47 Iowa, 133; *Exlive v. Lawry*, 46 Iowa, 546; *Francis v. Edwards*, 77 N. C. 271; *Bellinger v. Craigie*, 31 Barb. 534; *Rucker v. Stillman*, 73 Ind. 396; *Bleaksley v. Boruff*, 71 Ind. 93; *Shee v. McQuilken*, 59 Ind. 269; *Leavenworth v. Packer*, 52 Barb. 132; *Cavalli v. Allen*, 57 N. Y. 508; *Waddell v. Darling*, 51 N. Y. 327; *Deitrich v. Roch*, 35 Wis. 618.



his counterclaim, but may bring a separate action for its recovery;<sup>1</sup> but in California it must be so set up, or is deemed to be waived, and cannot be subsequently sued on;<sup>2</sup> and in a few of the states the omission entails upon the defendant the loss of costs in a separate action.<sup>3</sup>

**§ 3487. May Include Equitable Relief.**—A counterclaim may be either of an equitable or legal character; and even where the claim sued on is of a strictly common-law nature, a counterclaim of a purely equitable character may be set up.<sup>4</sup> So where, in a suit to annul a conveyance of land on the ground of fraud, the defendant denied the fraud, and counterclaimed for damages occasioned by the plaintiff's wrongful possession and acts of waste, and demanded judgment for possession, damages for the waste, and for rents and profits, it was held to be a good counterclaim, under the Indiana code, except for the waste.<sup>5</sup> And in an action to quiet title to land, where the plaintiff alleged possession under a certain tax sale and deed, and defendant counterclaimed that he had possession under another tax deed, and prayed for judgment accordingly, it was held to be a good counterclaim.<sup>6</sup>

**§ 3488. Must be Designated as Such.**—A counterclaim must be pleaded as such, and must be so designated in the answer, and should also contain a prayer for the relief sought for, in the same manner as is required in a complaint or petition.<sup>7</sup> And if the counterclaim is so

<sup>1</sup> *Morgan v. Powers*, 66 Barb. 35; *Stoddard v. Treadwell*, 26 Cal. 308; *Halsey v. Carter*, 1 Duer, 667; *Woody v. Jordan*, 69 N. C. 189.

<sup>2</sup> Cal. Code Civ. Proc., sec. 439.

<sup>3</sup> Kan. Code Civ. Proc., sec. 96; Neb. Code Civ. Proc., sec. 102; Ohio Code Civ. Proc., sec. 95; *Terry v. Shiveley*, 93 Ind. 413.

<sup>4</sup> *Hicksville etc. R. R. Co. v. R. R. Co.*, 48 Barb. 355; *Wemple v. Stewart*, 22 Barb. 154; *Morgan v. Spangler*, 20 Ohio St. 38; *Currie v. Cowles*, 6 Bosw. 453; *Macauley v. Fulton*, 44 Cal. 362;

*Binck v. Tucker*, 42 Cal. 346; *Wright v. Salisbury*, 46 Mo. 26; *Canal Co. v. Hewitt*, 62 Wis. 316.

<sup>5</sup> *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477.

<sup>6</sup> *Jarvis v. Peck*, 19 Wis. 74; *Hay v. Short*, 49 Mo. 139; *Holzbaumer v. Heine*, 37 Mo. 443.

<sup>7</sup> *Equitable Life Ass'n v. Cuyler*, 75 N. Y. 514; *Bates v. Rosekrans*, 37 N. Y. 409; *Wilde v. Boynton*, 63 Barb. 547; *Selleck v. Griswold*, 49 Wis. 39; *Stowell v. Eldred*, 39 Wis. 614; *Sullivan v. Byrne*, 10 S. C. 122.

designated in the answer, the defendant will not be permitted to treat it as a cross-complaint.<sup>1</sup>

**§ 3489. Must be in Favor of Defendant Pleading It.—**

A counterclaim, except where the contrary is provided by statutory provision, must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.<sup>2</sup> In New York, where the plaintiff sues in a representative capacity, the counterclaim may be against the person he represents.<sup>3</sup> But where goods are purchased from one doing business in his own name, but in fact with a special partner, of which the purchaser is ignorant, such purchaser cannot, when sued by both partners for the price, set up by way of counterclaim an indebtedness of the ostensible partner incurred prior to the purchase.<sup>4</sup> In an action by an undisclosed principal for the price of goods sold for him by his agent, the purchaser may counterclaim a debt due him by the agent.<sup>5</sup> Though in an action by a firm a counterclaim against one partner cannot be set up against the firm;<sup>6</sup> and in an action against partners a claim in favor of one of them cannot be set up as a counterclaim.<sup>7</sup> So where a member of a firm sues for a demand due him individually, a claim against the firm cannot be counterclaimed;<sup>8</sup> nor, in an action by a corporation, can a claim against all the persons who compose it be set up by way of counterclaim.<sup>9</sup> Where a state is plaintiff, an affirma-

<sup>1</sup> *McAber v. Randall*, 41 Cal. 136.

<sup>2</sup> N. C. Code Civ. Proc., sec. 101; Cal. Code Civ. Proc., sec. 428; *Scott v. Timberlake*, 83 N. C. 382; *Dolph v. Rice*, 21 Wis. 590; *McConihe v. Hollister*, 19 Wis. 269; *Briggs v. Seymour*, 17 Wis. 255; *King v. Wise*, 43 Cal. 628; *Babbett v. Young*, 51 Barb. 466; *Thompson v. Sickles*, 46 Barb. 49; *Merrick v. Gordon*, 20 N. Y. 93; *Barnes v. McMullins*, 78 Mo. 260, 269; *Grier v. Hinman*, 9 Mo. App. 213; *Linn v. Rugg*, 19 Minn. 181; *Ernst v. Kunkle*, 5 Ohio St. 520.

<sup>3</sup> N. Y. Code Civ. Proc., sec. 501.

<sup>4</sup> *Rosenberg v. Block*, 18 Jones & S. 357.

<sup>5</sup> *Pratt v. Collins*, 20 Hun, 126; *Judson v. Stilwell*, 26 How. Pr. 513.

<sup>6</sup> *Lamb v. Brolaski*, 38 Mo. 51; *Weil v. Jones*, 70 Mo. 560; *Sloan v. McDowell*, 71 N. C. 356.

<sup>7</sup> *Peabody v. Bloomer*, 5 Duer, 678; *Harris v. Rivers*, 53 Ind. 216; *Weil v. Jones*, 70 Mo. 560.

<sup>8</sup> *Ives v. Miller*, 19 Barb. 196; *Myn-derse v. Snook*, 1 Lans. 488.

<sup>9</sup> *N. Y. Ice Co. v. Parker*, 21 How. Pr. 302.

tive judgment cannot be obtained against it on a counterclaim or set-off.<sup>1</sup> If, however, principal and surety are sued together, a counterclaim successfully interposed by the principal in his own favor inures to the benefit of the surety.<sup>2</sup>

§ 3490. **Demand must be against Plaintiff.**—In order to constitute a counterclaim, the demand must be one existing against the plaintiff or plaintiffs. So that in an action on an assigned claim a demand against the assignor cannot be pleaded by way of counterclaim so as to enable the defendant to obtain an affirmative judgment against the assignee plaintiff, though in such a case the counterclaim would be a bar to the plaintiff's recovery in the action.<sup>3</sup> And in an action against the guarantor of bonds, where the principal is not joined as defendant, a claim against the principal only cannot be set up as a counterclaim.<sup>4</sup> Where a surety is sued as such, he cannot plead by way of counterclaim a demand in favor of his principal against the plaintiff.<sup>5</sup> In an action for the price of work, labor, and materials, where the defendant pleaded payments made by him in excess of the plaintiff's demand, but did not ask for judgment for the excess, it was held that the answer amounted to a plea of payment only, and there was no right to recover the excess.<sup>6</sup> And a debt due the defendant by the plaintiff's husband cannot be counterclaimed in an action by the wife to recover a claim as her separate estate.<sup>7</sup>

<sup>1</sup> *Commonwealth v. R. R. Co.*, 81 Ky. 572; *People v. Denison*, 59 How. Pr. 157; *United States v. Eckford*, 6 Wall. 484; *Treasurer v. Thompson*, 65 N. C. 406.

<sup>2</sup> *Springer v. Dwyer*, 50 N. Y. 19; *O'Brien v. Karing*, 57 N. Y. 649.

<sup>3</sup> *Holliday v. McMillan*, 83 N. C. 270; *Mauney v. Ingram*, 78 N. C. 96; *Freeman v. Lorillard*, 61 N. Y. 612; *Vassear v. Livingston*, 13 N. Y. 248; *Boyd v. Foot*, 5 Bosw. 110; *McConihe v. Hollister*, 19 Wis. 269; *Linn v. Rugg*, 19 Minn. 181.

<sup>4</sup> *Burroughs v. Garrison*, 15 Abb. Pr., N. S., 144.

<sup>5</sup> *Lasher v. Williamson*, 55 N. Y. 619; *La Farge v. Halsey*, 1 Bosw. 171; *Emery v. Baltz*, 22 Hun. 434; *Hendry v. Daley*, 17 Hun. 210; *People v. Brandreth*, 3 Abb. Pr., N. S., 224.

<sup>6</sup> *Holzbauer v. Heine*, 37 Mo. 443; *Kent v. Cantrell*, 44 Ind. 452; *McCrary v. Daning*, 38 Iowa, 527; *Lash v. McCormick*, 17 Minn. 403.

<sup>7</sup> *Paine v. Hunt*, 40 Barb. 75; *Carpenier v. Leonard*, 5 Minn. 155.

§ 3491. **Joint and Several Liabilities.**—The counterclaim, as defined in the codes, must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action. Consequently a debt due from one of several plaintiffs to the defendants, in an action upon a contract strictly joint, cannot be counterclaimed so as to reduce a joint recovery.<sup>1</sup> Where there are several plaintiffs, and the cause of action is joint, a several judgment cannot be rendered, and a counterclaim or set off belonging to one of the defendants could not be properly pleaded.<sup>2</sup> But if the defendants are severally, or jointly and severally, liable, a separate recovery may be had, and a counterclaim in favor of one of the defendants is well pleaded.<sup>3</sup>

§ 3492. **What not Valid.**—In Missouri, the counterclaim must be a legal cause of action; a demand for equitable relief cannot be set up by way of counterclaim.<sup>4</sup> And in Wisconsin it is held that no legal counterclaim can be pleaded as a defense in an action of ejectment.<sup>5</sup> Where the plaintiff sues to recover specific personal property, the defendant cannot counterclaim to recover distinct and separate chattels.<sup>6</sup> A claim against which the statute of limitations has run cannot be pleaded as a counterclaim.<sup>7</sup> As it is barred by the statute at the commencement of the action, it does not constitute a cause of

<sup>1</sup> Field v. Hahn, 65 Mo. 417; Freeman v. Lorillard, 61 N. Y. 612.

<sup>2</sup> Utley v. Foy, 70 N. C. 303; Gordon v. Swift, 46 Ind. 208; Blankenship v. Rogers, 10 Ind. 333; Stayback v. Jones, 9 Ind. 470; Newell v. Salmons, 22 Barb. 647; Briggs v. Briggs, 20 Barb. 477; Perry v. Chester, 12 Abb. Pr., N. S., 131; People v. Cram, 8 How. Pr. 151; Pinckney v. Keyler, 4 E. D. Smith, 469.

<sup>3</sup> Bathgate v. Haskin, 59 N. Y. 533; Well v. Jones, 70 Mo. 560; Tinsley v. Tinsley, 15 B. Mon. 454; Parsons v. Nash, 8 How. Pr. 454; Gt.

West. Ins. Co. v. Pierce, 1 Wyo. 45; Plyer v. Parker, 10 S. C. 464; Davis v. Notware, 13 Nev. 421; Bird v. McCoy, 22 Iowa, 549.

<sup>4</sup> Jones v. Moore, 42 Mo. 413.

<sup>5</sup> Lawe v. Hyde, 39 Wis. 345.

<sup>6</sup> Lovensohn v. Ward, 45 Cal. 8. And *quære* whether any counterclaim could be set up in such a case: De Leyer v. Michaels, 5 Abb. Pr. 203; Moffatt v. Van Doren, 4 Bosw. 609.

<sup>7</sup> De Lavallette v. Wendt, 75 N. Y. 579; Taylor v. Mayor, 82 N. Y. 10; Van Alen v. Schermerhorn, 14 How. Pr. 287.

action then existing.<sup>1</sup> But if not then barred, it does not become so during the pendency of that action.<sup>2</sup> In Iowa a counterclaim may be pleaded, even though barred by the statute, if it belonged to the defendant pleading it when it became barred, and was not barred when the cause of action sued on originated.<sup>3</sup> But items of a counterclaim accruing after the commencement of the action cannot be given in evidence.<sup>4</sup> The sufficiency of a counterclaim on contract may be tested by ascertaining whether the facts constituting it would support a separate and independent action in contract at the instance of the defendant, in the court where the suit is pending.<sup>5</sup> A cause of action founded purely in tort, and not arising out of the transaction mentioned in the complaint, cannot be pleaded as a counterclaim in an action on contract.<sup>6</sup> But where the defendant is at liberty to waive the tort, and sue as on an implied contract, he may plead such damages by way of counterclaim to an action on contract.<sup>7</sup> For instance, in an action on a contract, brought by one who had converted property of the defendant, the latter may exercise his right of waiving the tort and counterclaim on the implied contract.<sup>8</sup> But where plaintiff sued on a promissory note, damages for fraud and deceit arising out of a contract of sale cannot be set up as a counterclaim, the promissory note having no connection with the contract of sale.<sup>9</sup> The rule, tersely stated, is, that where the plaintiff sues in contract, the defendant may counterclaim on any contract between them, or on any claim arising out of the trans-

<sup>1</sup> *Lyon v. Petty*, 65 Cal. 322.

<sup>2</sup> *Eve v. Louis*, 91 Ind. 457; *Stilwell v. Bertrand*, 22 Ark. 375; *Bramble v. Brown*, 71 N. C. 513.

<sup>3</sup> *Folsom v. Welch*, 63 Iowa, 477.

<sup>4</sup> *Paige v. Carter*, 64 Cal. 489.

<sup>5</sup> *Cragin v. Lovell*, 88 N. Y. 258; *Vashear v. Livingston*, 13 N. Y. 248.

<sup>6</sup> *Devries v. Warren*, 82 N. C. 356; *Trotter v. Comm'rs*, 90 N. C. 455; *Chambers v. Lewis*, 2 Hilt. 591; *Bell*

*v. Lesbini*, 66 How. Pr. 385; *Berry v. Carter*, 19 Kan. 140; *Shelly v. Vanarsdall*, 23 Ind. 543; *Clapp v. Wright*, 21 Hun, 240.

<sup>7</sup> *Barnes v. McMullins*, 87 Mo. 260; *Wood v. Mayor*, 73 N. Y. 556; *City Nat. Bank v. Nat. Park Bank*, 32 Hun, 105; *Brown v. Tuttle*, 66 Barb. 169; *Brady v. Brannan*, 25 Minn. 210.

<sup>8</sup> *Coit v. Stewart*, 50 N. Y. 17.

<sup>9</sup> *Barnes v. McMullins*, 87 Mo. 260.

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action sued on, in his favor, and against the plaintiff, whether such claim sounds in tort or in contract.<sup>1</sup>

§ 3493. **Must Arise out of the Contract, or be Connected with the Subject of the Action.**—The counterclaim in all the states (except Iowa and Indiana) which have adopted the code practice must arise out of contract or be connected with the subject of the action. But it need not arise out of the same contract as that upon which the action is brought; it is sufficient if it be connected with the subject of the action. The phrase "subject of the action" is held to mean the facts constituting the plaintiff's cause of action, or the subject-matter in dispute.<sup>2</sup>

§ 3494. **In Actions of Tort.**—To render a counterclaim available in an action of tort, it must arise out of the same transaction or be connected with the subject of the action.<sup>3</sup> In an action for damages for a conversion, the defendant may counterclaim damages growing out of the contract or transaction sued upon;<sup>4</sup> but as a general rule a counterclaim cannot, in an action of tort, consist of damages arising from the breach of a contract not connected with the subject of the action;<sup>5</sup> and generally, a counterclaim founded on contract cannot be pleaded in an action in

<sup>1</sup> *Parsons v. Sutton*, 66 N. Y. 92; *Lasher v. Williamson*, 55 N. Y. 619; *Denniston v. Trimmer*, 27 Hun, 393; *Stoddard v. Treadwell*, 26 Cal. 294; *Spencer v. Babcock*, 22 Barb. 326; *Bitting v. Thaxton*, 72 N. C. 541; *Walsh v. Hall*, 66 N. C. 233; *Hoffa v. Hoffman*, 33 Ind. 172; *Sprout v. Crowley*, 30 Wis. 187; *Martin v. Pugh*, 23 Wis. 184; *Tinsley v. Tinsley*, 15 B. Mon. 459; *Ritchie v. Hayward*, 71 Mo. 560; *Chambers v. Frazier*, 29 Ohio St. 362.

<sup>2</sup> *More v. Rand*, 60 N. Y. 208; *Boreel v. Lawton*, 90 N. Y. 293, 297; *Dudley v. Scranton*, 57 N. Y. 424; *Dounce v. Dow*, 57 N. Y. 16; *Edgerton v. Page*, 20 N. Y. 281; *Cook v. Soule*, 56 N. Y. 420; *Myers v. Burns*, 35 N. Y. 269; *Levy v. Loeb*, 85 N. Y. 365; *Howard*

*v. Johnston*, 82 N. Y. 271; *Standley v. Mut. Life Ins. Co.*, 95 Ind. 254, 263; *Washburn v. Roberts*, 72 Ind. 213; *Griffin v. Moore*, 52 Ind. 295; *Hoffa v. Hoffman*, 33 Ind. 172; *Cobb v. Morgan*, 83 N. C. 211; *Craig v. Heis*, 30 Ohio St. 550; *James v. Center*, 53 Cal. 31; *Dennis v. Belt*, 30 Cal. 247; *Tinsley v. Tinsley*, 15 B. Mon. 454.

<sup>3</sup> *Whedbee v. Reddick*, 79 N. C. 521; *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun, 49; *Chamboret v. Cagney*, 41 How. Pr. 125; *Henry v. Henry*, 27 How. Pr. 5; *Griffin v. Moore*, 52 Ind. 295; *Gilpin v. Wilson*, 53 Ind. 443.

<sup>4</sup> *Bitme v. Thaxton*, 12 N. C. 541; *Judah v. Trustees*, 16 Ind. 56.

<sup>5</sup> *Allen v. Randolph*, 48 Ind. 496; *Chambers v. Lewis*, 28 N. Y. 454.

tort.<sup>1</sup> Except in Iowa and a few other states, where the action is in tort, and the counterclaim is wholly unconnected with the tort sued on, it is not well pleaded.<sup>2</sup> Where the plaintiff has the option to sue in tort or on contract, he cannot, by adopting the former, prevent the defendant from setting up a counterclaim which would have been well pleaded if the action had been in contract.<sup>3</sup>

§ 3495. **Cross-complaint.** — Under the provisions of the codes of most of the states, the defendant is permitted to file a cross-complaint, which is practically a substitute for the cross-bill, in equity, with the modifications necessary for an adherence to the principles of code practice.<sup>4</sup> It is generally provided that the allegations of the cross-complaint must grow out of or relate to or be dependent upon the contract or transaction sued upon, or affect the property to which the action relates, or be connected with the subject-matter of the original complaint.<sup>5</sup> The cross-complaint, like an original complaint, must state all the facts requisite to constitute a cause of action in favor of the defendant pleading it, and against the plaintiff or some other defendant, and the averments in another pleading cannot be used in aid of it unless by express reference and embodiment.<sup>6</sup> But it is not neces-

<sup>1</sup> *Holliday v. McMillan*, 83 N. C. 270; *People v. Dennison*, 84 N. Y. 272; *Smith v. Hall*, 67 N. Y. 48; *Humphrey v. Merritt*, 51 Ind. 197; *Schenbert v. Kachler*, 23 Wis. 523.

<sup>2</sup> *Macdougall v. Maguire*, 35 Cal. 274; *Fishkill Sav. Ins. Co. v. Nat. Bank*, 80 N. Y. 162; *Barbyte v. Hughes*, 33 Barb. 320; *Shelly v. Vandersdell*, 23 Ind. 543; *Heury v. Henry*, 17 Abb. Pr. 41.

<sup>3</sup> *Thompson v. Kessel*, 30 N. Y. 383; *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 389; *Gordon v. Bruner*, 49 Mo. 570; *Norden v. Jones*, 33 Wis. 600; 14 Am. Rep. 782; *Brady v. Brennan*, 25 Minn. 210.

<sup>4</sup> Ky. Code, sec. 96; Iowa Code, sec. 2663; Cal. Code Civ. Proc., sec. 442; Ohio Rev. Stats., sec. 5059; *Fletcher v. Holmes*, 25 Ind. 465; *Tucker v. St.*

*Louis Life Ins. Co.*, 63 Mo. 588; *Crabtree v. Banks*, 1 Met. (Ky.) 484; *Royse v. Reynolds*, 10 Bush, 286.

<sup>5</sup> *Taylor v. McLain*, 64 Cal. 513; *Cotton L. & W. Co. v. Raynor*, 57 Cal. 588; *Hills v. Sherwood*, 48 Cal. 386; *Cross v. Del Valle*, 1 Wall. 5; *Heard v. Case*, 32 Ill. 45; *Daniel v. Morrison*, 6 Dana, 186; *Crisman v. Heiderer*, 5 Col. 589; *May v. Armstrong*, 3 J. J. Marsh. 262; 22 Am. Dec. 137; *Griffin v. Fries*, 23 Fla. 173; 11 Am. St. Rep. 351.

<sup>6</sup> *Cockerly v. Duncan*, 87 Ind. 332; *Masters v. Beckett*, 83 Ind. 595; *James v. Center*, 53 Cal. 31; *O'Connor v. Frasher*, 53 Cal. 435; *Thompson v. Thompson*, 52 Cal. 154; *Lynch v. Brigham*, 51 Cal. 491; *Kreichbaum v. Melton*, 49 Cal. 55.

sary that the defendant should deny the allegations of the complaint or set up new matter, in order to entitle him to relief by way of cross-complaint.<sup>1</sup> And where, in an action for the recovery of real estate, the defendant filed a cross-complaint, alleging his ownership of the property claimed by plaintiff, and want of title in the plaintiff, it was held to be well pleaded.<sup>2</sup> Where written instruments are filed with the complaint, and are common to both pleadings, it is not necessary that the cross-complaint should reallege them.<sup>3</sup> And where real estate is described in a cross-complaint, in an action to quiet title, as "the real estate in the complaint mentioned," it is sufficient.<sup>4</sup> In Ohio it is not necessary to designate the cross-complaint by any formal description in the answer;<sup>5</sup> but in California, where the defendant styled his answer a counterclaim, he was not permitted afterwards to assert that it was a cross-complaint, and that, as its allegations were not denied by answer, they must be taken to be admitted and be entitled to judgment,<sup>6</sup> though the mere entitling the pleading a cross-complaint will not make it such, and necessitate a reply on the part of the plaintiff. The real nature of the pleading will be looked into.<sup>7</sup> In New York the code does not provide for the filing of a cross-complaint, all the relief to which the defendant would be entitled thereunder being obtainable by way of counterclaim.<sup>8</sup>

§ 3496. **Difference between Cross-complaint and Counterclaim.**—This is not very clearly defined by the statutes or decisions. In California, the counterclaim must be a cause of action arising out of the transaction set forth in

<sup>1</sup> *Bradford v. Andrews*, 20 Ohio St. 208; *Fithian v. Corwin*, 17 Ohio St. 118.

<sup>2</sup> *Collins v. McDuffie*, 89 Ind. 562; *Gossard v. Woods*, 98 Ind. 195.

<sup>3</sup> *Crowder v. Reed*, 80 Ind. 1; *Sidener v. Davis*, 69 Ind. 336; *Branham v. Johnson*, 62 Ind. 259; *Pattison v. Vaughan*, 40 Ind. 253.

<sup>4</sup> *Cookerly v. Duncan*, 87 Ind. 332.

<sup>5</sup> *Klonne v. Bradstreet*, 7 Ohio St. 322.

<sup>6</sup> *McAbee v. Randall*, 41 Cal. 137.

<sup>7</sup> *Thompson v. Thompson*, 52 Cal. 154.

<sup>8</sup> *Leavenworth v. Packer*, 52 Barb. 132; *Boston etc. Mills v. Eull*, 37 How. Pr. 299.



the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; or in an action on contract, it may be any other cause of action also arising on contract, and existing at the commencement of the action,<sup>1</sup> while a cross-complaint may be pleaded whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought or affecting the property to which it relates.<sup>2</sup> The principal practical distinctions seem to be, that the cross-complaint requires an answer, while the counterclaim does not; that the former may be pleaded against a co-defendant, but not the latter; that the cross-complaint is essentially a demand for affirmative relief in excess and independent of the demands of the plaintiff, and is in no sense the subject of set-off. It is usually employed where relief of an equitable nature is asked for, and would not lie for a mere money demand exceeding the plaintiff's claim.<sup>3</sup> The Iowa code provides for a cross-demand being made by the defendant. This is more comprehensive than either set-off or counterclaim. It arises upon any independent cause of action, whether in contract or tort. But it must exist in favor of all the plaintiffs, and against all the defendants; and a cross-demand cannot be pleaded in favor of one, where there are several defendants.<sup>4</sup>

§ 3497. **When to be Pled.** — Where one defendant seeks relief against a co-defendant, or against the plaintiff and a co-defendant, he may do so by cross-complaint,

<sup>1</sup> Cal. Code Civ. Proc., sec. 438.

<sup>2</sup> Cal. Code Civ. Proc., sec. 442.

<sup>3</sup> *Hopkins v. Gilman*, 47 Wis. 581; *Wilson v. Madison*, 55 Cal. 5; *O'Connor v. Frasher*, 53 Cal. 445; *Kreichbaum v. Melton*, 49 Cal. 50; *Williams v. Boyd*, 75 Ind. 286; *Shoemaker v. Smith*, 74 Ind. 71; *Joyce v. Whitney*, 57 Ind. 550; *Daly v. Nat. Life Ins. Co.*, 64 Ind. 1; *Winslow v. Winslow*, 52 Ind. 8; *Board of Comm'rs v. R. R. Co.*, 50

Ind. 85, 116; *Dice v. Morris*, 32 Ind. 283; *Marr v. Lewis*, 31 Ark. 203; *Trapnall v. Hill*, 31 Ark. 346; *Earle v. Hale*, 31 Ark. 473; *Sheland v. Erpelding*, 6 Or. 258; *Pond v. Waterloo Agrl. Works*, 50 Iowa, 593; *Hervey v. Savery*, 48 Iowa, 313; *Wright v. Bacheller*, 16 Kan. 259.

<sup>4</sup> *Musselman v. Gallagher*, 32 Iowa, 383.

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but not by counterclaim, under the express provisions of the codes of some of the states.<sup>1</sup> In other states a cross-complaint has not been specifically provided for, and the relief is obtained under the counterclaim, or the former equity practice, with necessary adaptations, is permitted by cross-bill.<sup>2</sup> Thus in California it is held that, in an action to have a deed absolute in form declared a mortgage, and for redemption, the defendant may, by cross-complaint, assert that the deed is in fact absolute, and ask for possession, and if successful, possession may be decreed accordingly.<sup>3</sup> And in a foreclosure suit a defendant encumbrancer whose mortgage covers other property may, by cross-complaint, ask for a sale of all the property included in his mortgage.<sup>4</sup> Also, where the plaintiff has unjustifiably and illegally sued out a writ of attachment in the case, and thereby inflicted a great injury on the defendant, the damages arising therefrom furnish the ground for a cross-complaint in the action.<sup>5</sup>

<sup>1</sup> Ky. Code, sec. 96; Ohio Code Civ. Proc., sec. 84; Iowa Code, sec. 2663; Cal. Code Civ. Proc., sec. 442. Sweeny, 359; Leavenworth v. Packer, 52 Barb. 132.

<sup>2</sup> Fletcher v. Holmes, 25 Ind. 465; Tucker v. St. Louis Life Ins. Co., 63 Mo. 588; Burton etc. Mills v. Eull, 1

<sup>3</sup> Taylor v. McLain, 64 Cal. 513.

<sup>4</sup> Switz v. Black, 45 Iowa, 597; Kimball v. Connor, 3 Kan. 414.

<sup>5</sup> Wangenheim v. Graham, 39 Cal. 169.

## PART III.—ATTACHMENT.

## CHAPTER CLXXIV.

## NATURE OF THE ACTION.

- § 3498. Attachment defined.
- § 3499. Attachment a remedy at law — Equity has no jurisdiction.
- § 3500. Suit is personal in form, but includes proceeding in rem.
- § 3501. Property attached, and defendant personally served.
- § 3502. Property not attached, but defendant personally served.
- § 3503. Property attached, but no personal service — Publication.
- § 3504. No property found, and no personal service.

§ 3498. **Attachment Defined.** — Attachment is a proceeding to create and enforce a lien. It is a remedy for the collection of an ordinary debt by a preliminary levy upon property of the debtor, to preserve it to the creditor until his lien shall have been perfected by judgment. It is a remedy entirely statutory,<sup>1</sup> and as each state has its own statute, the decisions of the courts, cited hereafter, will not always be found to be harmonious; but if it be borne in mind that the words of the particular statute may be different in each case, these differences will be understood. In the general principles of the law of attachment the statutes of the different states are nearly uniform. As attachment is a harsh remedy, it will not be extended by implication; the statutes are strictly construed, and the writ will be issued only in those cases in which it is explicitly allowed by statute.<sup>2</sup> Domestic attachment is a proceeding against the property or credits of a resident debtor.<sup>3</sup> Foreign attachment is a proceed-

<sup>1</sup> Waples on Attachment, 24; Drake 37 Pa. St. 566; Wooster v. McGee, 1 on Attachment, sec. 83. Tex. 17; Caldwell v. Haley, 3 Tex.

<sup>2</sup> Denegre v. Milne, 10 La. Ann. 324; 317. May v. Baker, 15 Ill. 89; Pool v. Webster, 3 Met. 278; Humphrey v. Wood,

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ing against the property or credits of a non-resident debtor.

§ 3499. **Attachment a Remedy at Law—Equity has No Jurisdiction.**—The remedy by attachment is a remedy at law, and cannot be aided or corrected by a court of equity.<sup>1</sup> An equitable attachment is not known to the common law.<sup>2</sup>

§ 3500. **Suit is Personal in Form, but Includes Proceeding in Rem.**—An attachment suit, though always personal in form, includes, also, a suit *in rem*.<sup>3</sup> The writ of attachment is always preceded or accompanied by a summons, which is either served on the defendant personally or by publication.<sup>4</sup> The judgment in an attachment suit binds only the property attached, although the judgment may, in form, be *in personam*.<sup>5</sup> A plaintiff who fails to sustain the ground of his attachment cannot succeed in his action against the defendant personally.<sup>6</sup>

§ 3501. **Property Attached, and Defendant Personally Served.**—If property be attached, and the summons be served on the defendant, the property is held for such judgment as the plaintiff may recover, and the judgment is against the defendant *in personam*, and authorizes an execution against any property of his, whether attached

the legal custody of the officer making the same, by virtue of and in pursuance of the directions contained in a writ of attachment": Lowry v. Cady, 4 Vt. 504; 24 Am. Dec. 628.

<sup>1</sup> McPherson v. Snowden, 19 Md. 197; Gooding v. Pierce, 13 R. I. 532; Lackland v. Garsche, 56 Mo. 267. A proceeding called attachment in chancery prevails in Virginia: Moore v. Holt, 10 Gratt. 284. And Mississippi: Comstock v. Rayford, 1 Smedes & M. 423; 40 Am. Dec. 102; Freeman v. Malcolm, 11 Smedes & M. 53; Trotter v. White, 10 Smedes & M. 611. And Tennessee: Isaacks v. Edwards, 7

Humph. 465; 46 Am. Dec. 86. And by statute, in Arkansas, proceedings may be had by attachment in equity suits: American Land Co. v. Grady, 33 Ark. 550. And in Iowa: Crouch v. Crouch, 9 Iowa, 269.

<sup>2</sup> Biglow v. Address, 31 Ill. 322; Van Volkenberg v. Bates, 14 Abb. Pr., N. S., 314, note.

<sup>3</sup> Waples on Attachment, 19; Erwin v. Heath, 50 Miss. 795.

<sup>4</sup> Drake on Attachment, sec. 5.

<sup>5</sup> Parsons v. Paine, 25 Ark. 124.

<sup>6</sup> Lewenthall v. Miss. Mills, 55 Miss. 101.

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or not.<sup>1</sup> The personal suit may be prosecuted to judgment, and the attachment suit dismissed.<sup>2</sup>

§ 3502. **Property not Attached, but Defendant Personally Served.**—If the summons be served on the defendant, but no property is found to attach, then the suit proceeds as any other personal suit against the defendant.<sup>3</sup>

§ 3503. **Property Attached, but No Personal Service — Publication.**—If property be attached, but no personal service of the summons is obtained on the defendant, or he does not appear, then he is notified by publication. This brings him before the court only for the purpose of dealing with the property attached.<sup>4</sup> The procedure in

<sup>1</sup> Drake on Attachment, sec. 5.

<sup>2</sup> Miller v. Ewing, 8 Smedes & M. 421; Harris v. Gwin, 10 Smedes & M. 563; Jones v. Hunter, 4 How. (Miss.) 342; Henderson v. Hamer, 5 How. (Miss.) 525; Holman v. Fisher, 49 Miss. 472; Erwin v. Heath, 50 Miss. 795; Hendrix v. Cawthorn, 71 Ga. 742.

<sup>3</sup> Drake on Attachment, sec. 5.

<sup>4</sup> Drake on Attachment, sec. 5; Phelps v. Holker, 1 Dall. 261; Lincoln v. Tower, 2 McLean, 473; Westervelt v. Lewis, 2 McLean, 511; Kilburn v. Woodworth, 5 Johns. 37; 4 Am. Dec. 321; Chamberlin v. Faris, 1 Mo. 517; 14 Am. Dec. 304; Fitzsimmons v. Marks, 66 Barb. 333; Clymore v. Williams, 77 Ill. 618; Force v. Gower, 23 How. Pr. 294; Maxwell v. Stewart, 22 Wall. 77; Miller v. Dungan, 36 N. J. L. 21; Coleman's Appeal, 75 Pa. St. 441; Clark v. Holliday, 9 Mo. 711; Phelps v. Baker, 60 Barb. 107; White v. Floyd, Speers Eq. 351; Manchester v. McKee, 9 Ill. 511; Boswell v. Otis, 9 How. 336; Webster v. Reed, 11 How. 437; Erwin v. Heath, 50 Miss. 795; Bliss v. Heasty, 61 Ill. 338; Wilson v. Spring, 38 Ark. 181; Moore v. Gennett, 2 Tenn. Ch. 375; Earthman v. Jones, 2 Yerg. 484; Steel v. Smith, 7 Watts & S. 447; Pawling v. Willson, 13 Johns. 192; Robinson v. Ward, 8 Johns. 86; 5 Am. Dec. 327;

Oakley v. Aspinwall, 4 N. Y. 514; Williams v. Preston, 3 J. J. Marsh. 600; 20 Am. Dec. 179; Gilman v. Thompson, 11 Vt. 643; 34 Am. Dec. 714; Sutherland v. De Leon, 1 Tex. 250; 46 Am. Dec. 100; Cooper v. Reynolds, 10 Wall. 308; Mr. Justice Miller, saying: "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: 1. The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any

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obtaining jurisdiction over absent defendants is governed by the statutes of the different states.<sup>1</sup> The publication is generally intended as a substitute for personal service; and after proof of publication is made, both parties, so far as relates to the question of appearance and pleading, stand in the same position as they would have occupied on the return of summons personally served.<sup>2</sup>

Where an attachment defendant is a non-resident, and is notified only by publication, he is before the court for all purposes except the rendition of a personal judgment.<sup>3</sup> A personal judgment cannot be rendered against him.<sup>4</sup> The judgment binds only the property attached, and cannot be enforced *in personam*.<sup>5</sup> If the plaintiff recovers judgment against the defendant without his appearance, such judgment will have no effect in another state as a personal judgment against the debtor. But if the defendant appears and defends himself in person or by attorney,

other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendants out of any other property than that attached in the suit. 2. The court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

<sup>1</sup> It must be proved before judgment is rendered that the defendant had notice by advertisement; and the record must state that such evidence was given, or must itself contain the evidence: *Foyles v. Kelso*, 1 Blackf. 215. It is not necessary in the notice to state what counties the writs were issued to, or to give a description of the property attached: *Morris v. Trustees of Schools*, 15 Ill. 266; *Rose v. Maloney*, 21 Kan. 31; *Beckwith v. Douglas*, 25 Kan. 229. Or to show that the proceedings are in attachment: *Drouillard v. Whistler*, 29 Ind. 552.

A substantial compliance with the statute is sufficient: *Bretney v. Jones*, 1 G. Greene, 366. If the court acquired jurisdiction by attaching the property of the defendant, and renders judgment without giving notice by publication, the judgment is merely irregular, and cannot be collaterally attacked: *Paine v. Mooreland*, 15 Ohio, 435; 45 Am. Dec. 585. But unless the publication ordered is duly made, the attachment becomes void: *Cummings v. Tabor*, 61 Wis. 185.

<sup>2</sup> *Thompson v. Thomas*, 11 Mich. 274.

<sup>3</sup> *King v. Vance*, 46 Ind. 246. By a valid attachment of property within its jurisdiction, a state court acquires jurisdiction to give judgment that an absent defendant, not otherwise served with process in the proceeding, is indebted to the plaintiff therein, and to enforce the payment of the same by the sale of such property: *Mickey v. Stratton*, 5 Saw. 475.

<sup>4</sup> *King v. Vance*, 46 Ind. 246; *Eastman v. Wadleigh*, 65 Me. 251; 20 Am. Rep. 695. See *Massey v. Scott*, 49 Mo. 278.

<sup>5</sup> *Banta v. Wood*, 32 Iowa, 469.

then the judgment will have the same force and effect everywhere as a judgment recovered in an ordinary suit.<sup>1</sup> The plaintiff cannot take judgment for a greater amount than that for which the attachment issued,<sup>2</sup> nor for any other cause of action than that stated in the attachment or publication.<sup>3</sup>

**§ 3504. No Property Found, and No Personal Service.—**

If no property is found to attach, and there is no service on the defendant, or appearance by him in the state,<sup>4</sup> then there is nothing to give the court jurisdiction, and a judgment against the defendant would be void.<sup>5</sup>

<sup>1</sup> Fisher v. March, 26 Gratt. 765.

<sup>2</sup> Henrie v. Sweasey, 5 Blackf. 273; Rowley v. Berrian, 12 Ill. 198; Hobson v. Emporium Co., 42 Ill. 306; Forsyth v. Warren, 62 Ill. 68; Skinner v. Moore, 2 Dev. & B. 138; 30 Am. Dec. 155.

<sup>3</sup> Janney v. Spedden, 38 Mo. 395.

<sup>4</sup> Whitney v. Lehmer, 26 Ind. 503.

<sup>5</sup> Bruce v. Cloutman, 45 N. H. 37; Eaton v. Badger, 33 N. H. 228; Carleton v. Washington Ins. Co., 35 N. H. 162; Smith v. McCutcheon, 38 Mo. 415; Abbott v. Sheppard, 44 Mo. 273; Reppine v. McPherson, 2 Kan. 340; Cooper v. Smith, 25 Iowa, 269; Hopkirk v. Bridges, 4 Hen. & M. 413; Miller v. Sharp, 3 Rand. 41; Austin v. Bodley, 4 T. B. Mon. 434; Maude v. Rodes, 4 Dana, 144; Johnson v. Johnson, 26 Ind. 441; Ward v. McKenzie, 33 Tex. 297; 7 Am. Rep. 261; Judah v. Stephenson, 10 Iowa, 493; Morris v. R. R. Co., 56 Iowa, 135; Phelps v. Baker, 60 Barb. 107; Cochran v. Fitch, 1 Sand. Ch. 142; Clymore v. Williams, 77 Ill. 618; Borders v. Murphy, 78 Ill. 81; Skinner v. Moore, 2 Dev. & B. 138; 30 Am. Dec. 155; Ewer v. Coffin, 1 Cush. 23; 48 Am. Dec. 587. In Pennoyer v. Neff, 95 U. S. 714, the court say: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its own-

er, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability. The want of authority of the tribunals of a state to adjudicate

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upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment, or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against the owner, or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subse-

quent discovery of property of the defendant, or by his subsequent acquisition to it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If, before the levy, the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."



# CHAPTER CLXXV.

## IN WHAT ACTIONS AND FOR WHAT CAUSES ATTACHMENT WILL LIE.

- § 3505. Causes of action on which attachment may issue.
- § 3506. Causes of action on which attachment will not lie.
- § 3507. Construction of terms used to describe the demands for which attachment will lie under the different statutes.
- § 3508. Debts not due.
- § 3509. Suit by one partner against another.
- § 3510. Creditors holding collateral security.
- § 3511. Who may bring attachment.
- § 3512. Liability of persons in representative capacities — Corporations — Other persons.
- § 3513. The grounds for attachment.
- § 3514. Absent debtors.
- § 3515. Absconding debtors.
- § 3516. Debtors concealing or secreting themselves.
- § 3517. Non-resident debtors.
- § 3518. Removing property from state.
- § 3519. Concealing or disposing of property.
- § 3520. Debt fraudulently contracted.
- § 3521. Anomalous grounds in certain states.

§ 3505. **Causes of Action on Which Attachment may Issue.** — The causes of action for which an attachment may issue are different in different states; the statutes of some states restricting it to actions of debt, others extending it to include all demands both in contract and in tort.<sup>1</sup> Unless expressly authorized, however, it can be resorted to only in legal, not in equitable, actions.<sup>2</sup>

§ 3506. **On Which Attachment will not Lie.** — In the absence of a statute expressly permitting an attachment to issue in actions founded on tort,<sup>3</sup> it is generally held that in such actions the writ will not lie.<sup>4</sup> Thus it has

<sup>1</sup> Drake on Attachment, secs. 9 et seq.

<sup>2</sup> Ebner v. Bradford, 3 Abb. Pr., N. S., 248.

<sup>3</sup> As in some states: See Tahoe v. Mining Co., 14 Fed. Rep. 636.

<sup>4</sup> Greinar v. Prendergast, 3 La. Ann. 376; Swagar v. Pierce, 3 La. Ann. 435; Griswold v. Sharpe, 2 Cal. 17; Holmes v. Barclay, 4 La. Ann. 63; McDonald v. Forsyth, 13 Mo. 549; Porter v. Hildebrand, 14 Pa. St. 129; Fellows v.

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been held that the writ will not issue in an action of assault and battery,<sup>1</sup> malicious prosecution,<sup>2</sup> slander,<sup>3</sup> trespass,<sup>4</sup> trover;<sup>5</sup> nor to recover from the defendants money which the plaintiffs intrusted to their clerk, and which the defendants won from him in gambling;<sup>6</sup> nor in an action founded on false and fraudulent representations as to the value of land conveyed by defendant to plaintiff<sup>7</sup> So it has been held not to lie for a penalty intended to secure unliquidated damages;<sup>8</sup> nor for the recovery of unliquidated damages consequent upon the breach of a contract;<sup>9</sup> nor for a violation of the United States bankrupt law by a debtor in making a sale of his property;<sup>10</sup> nor in an action for equitable relief, as an action seeking to have a deed canceled, an accounting, an injunction, and the appointment of a receiver.<sup>11</sup>

§ 3507. **Construction of Terms Used to Describe the Demands for Which Attachment will Lie under the Different Statutes.**—The language of the different statutes setting out the demands for which the claimant may have a writ of attachment is, as has been said, not uniform; sometimes one word or phrase is used, sometimes another. These several terms, and the construction given to them by the courts, are as follows: An action for the recovery of damages for the loss, by negligence of a common carrier, of goods intrusted to him for transportation is not “an

Brown, 38 Miss. 541; *Handy v. Brong*, 4 Neb. 60; *Elliot v. Jackson*, 3 Wis. 649; *Saddlesvene v. Arnes*, 32 How. Pr. 280; *Minga v. Zollicoffer*, 1 Ired. 278; *Fisher v. Consequa*, 2 Wash. C. C. 382; *Jacoby v. Gogell*, 5 Serg. & R. 450; *Sheffer v. Nelson*, 18 Abb. Pr. 455.

<sup>1</sup> *Thompson v. Carper*, 11 Humph. 542; *Minga v. Zollicoffer*, 1 Ired. 278; *Prewitt v. Carmichael*, 2 La. Ann. 943.

<sup>2</sup> *Stanly v. Ogden*, 2 Root, 259; *Tarbell v. Bradley*, 27 Vt. 535; *Hynson v. Taylor*, 3 Ark. 552.

<sup>3</sup> *Sargeant v. Helmbold*, Harp. 219; *Baune v. Thomassin*, 6 Martin, N. S., 563.

<sup>4</sup> *Ferris v. Ferris*, 25 Vt. 100; *Tabor v. Company*, 14 Fed. Rep. 636; *Piscataqua Bank v. Turnley*, 1 Miles, 312; *Rover v. Webster*, 3 Iowa, 502.

<sup>5</sup> *Marshall v. White*, 8 Port. 551; *Hynson v. Taylor*, 3 Ark. 552.

<sup>6</sup> *Babeock v. Briggs*, 52 Cal. 502.

<sup>7</sup> *Crossman v. Lindsley*, 42 How. Pr. 107.

<sup>8</sup> *Cheddick v. Marsh*, 21 N. J. L. 463.

<sup>9</sup> *Zerya v. McDonald*, 1 Woods, 496.

<sup>10</sup> *Stanley v. Sutherland*, 54 Ind. 339.

<sup>11</sup> *Ebner v. Bradford*, 3 Abb. Pr., N. S., 248.

action arising on contract";<sup>1</sup> "contract for the direct payment of money" is a phrase used in some statutes, and includes the official bond of a county officer,<sup>2</sup> an undertaking by an appellant to pay a judgment appealed from, with costs if affirmed,<sup>3</sup> and money paid on a consideration which had failed;<sup>4</sup> "contract for the recovery of money only" includes a claim for damages upon a breach of contract by the defendant to purchase sound corn for the plaintiff,<sup>5</sup> but not a foreclosure of a mortgage,<sup>6</sup> nor an action for breach of promise of marriage,<sup>7</sup> nor an action against a carrier for damages caused by his negligence to goods in his charge;<sup>8</sup> an action to enforce a liability conferred by statute is not an action on a "contract, express or implied,"<sup>9</sup> nor is a suit based solely on a breach of duty, without an averment in the affidavit that the duty arose by contract.<sup>10</sup> The term "debt" is used in several states. Technically, this word means the owing of a sum of money by express agreement, but in the attachment laws it is generally construed in the sense of the owing of a sum, whether the obligation arose upon express agreement or not.<sup>11</sup> Some courts, however, hold to the stricter construction;<sup>12</sup> but the debt must be an actual one, and not

<sup>1</sup> *Atlantic etc. Ins. Co. v. McLoon*, 48 Barb. 27.

<sup>2</sup> *Monterey County v. McKee*, 51 Cal. 255.

<sup>3</sup> *Hathaway v. Davis*, 33 Cal. 161.

<sup>4</sup> *Peat Fuel Co. v. Tuck*, 53 Cal. 304.

<sup>5</sup> *Lawton v. Kiel*, 51 Barb. 30; 34 How. Pr. 465.

<sup>6</sup> *Van Wyck v. Bauer*, 9 Abb. Pr., N. S., 142.

<sup>7</sup> *Barns v. Buck*, 1 Lans. 268; *Price v. Cox*, 83 N. C. 261.

<sup>8</sup> *Atlantic Mut. Ins. Co. v. McLoon*, 48 Barb. 27.

<sup>9</sup> *Remington Paper Co. v. O'Dougherty*, 32 Hun, 255.

<sup>10</sup> *Pope v. Ins. Co.*, 24 Ohio St. 481.

<sup>11</sup> *Waples on Attachment*, 64; *Peter v. Butler*, 1 Leigh, 285; *Hunt v.*

*Norris*, 4 Mart. (La.) 517. As a claim for general average: *Morris v. Turner*, 3 Pa. L. J. 423. The claim of the holder against the indorser of a promissory note is a "debt"; *Smead v. Christfield*, 1 Handy, 442.

<sup>12</sup> *Fisher v. Consequa*, 2 Wash. C. C. 382; *Jacoby v. Gogell*, 5 Serg. & R. 450; *Rouss v. Wright*, 14 Neb. 457. The "debts" which can be reached by this process are only legal debts; causes of action upon which the defendant in the attachment, under the common-law practice, could maintain an action of debt or *indebitatus assumpsit*. Merely equitable claims are not included: *Hassie v. God etc. Cong.*, 35 Cal. 378. Nor a claim arising out of the official neglect of a public officer: *Dunlop v. Keith*, 1 Leigh, 430; 19 Am. Dec. 755.

only merely possible.<sup>1</sup> The phrase "debt or demand" has been held to include an action for a breach of warranty;<sup>2</sup> and a claim for damages for injury to goods while in possession of the defendant as a common carrier.<sup>3</sup> In some statutes it is required that the defendant should be "indebted" to the plaintiff, to authorize the writ. It has been held that this term is to be construed liberally, and that where the contract sued on furnishes a standard by which the amount due can be easily ascertained, an attachment will lie.<sup>4</sup> Being indebted is synonymous with "owing,"<sup>5</sup> and includes, in Arkansas, an unliquidated as well as a liquidated demand arising out of contract.<sup>6</sup> In Alabama the indebtedness must be on a cause of action for which debt or *indebitatus assumpsit* would lie.<sup>7</sup> A false warranty or a deceit in the sale of personal property is not "an injury to the property of another."<sup>8</sup> Medical attendance is "necessaries," under a statute which authorizes an attachment, in a suit for necessaries.<sup>9</sup> "Money demands, whether arising *ex contractu* or *ex delicto*," include an action for breach of promise of marriage,<sup>10</sup> or for seduction.<sup>11</sup>

<sup>1</sup> *Benson v. Campbell*, 6 Port. 455; *Harrod v. Burgess*, 5 Rob. (La.) 449; *Taylor v. Drane*, 13 La. 62.

<sup>2</sup> *Weaver v. Puryear*, 11 Ala. 941.

<sup>3</sup> *Bausman v. Smith*, 2 Ind. 374.

<sup>4</sup> *Wilson v. Wilson*, 8 Gill, 192; 50 Am. Dec. 685; *Warwick v. Chase*, 23 Md. 154; *Carland v. Cunningham*, 37 Pa. St. 228.

<sup>5</sup> *Lenox v. Howland*, 3 Caines, 323; *In re Marty*, 3 Barb. 229. In *Roelofson v. Hatch*, 3 Mich. 277, it is said: "What is an indebtedness? It is the owing of a sum of money upon contract or agreement; and in the common understanding of mankind, it is not less an indebtedness that such sum is uncertain. The result of a contrary doctrine would be to hold any liability which could only be the subject of a general *indebitatus assumpsit*, *quantum meruit*, or *quantum valebant* count in a declaration such an indebtedness as could not be the subject of this remedy by attachment. Without fully deciding this point, which is not necessarily raised in this case, we see no reason

why a demand arising *ex contractu*, the amount of which is susceptible of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the plaintiff, by affidavit, to aver it as near as may be, or a jury to find it, may not be a foundation of a proceeding by attachment. . . . In the present case the contract furnishes such standard equally as does any contract for goods sold, or work or labor done, without express agreement as to price or compensation."

<sup>6</sup> *Jones v. Buzzard*, 2 Ark. 415. *Contra*, *Jeffery v. Wooley*, 10 N. J. L. 123; *Barber v. Robeson*, 15 N. J. L. 17; *Hoy v. Brown*, 16 N. J. L. 157; *Cheddick v. Marsh*, 21 N. J. L. 463; *Dickerson v. Simms*, 1 N. J. L. 199; *Mills v. Findlay*, 14 Ga. 230; *Hazard v. Jordan*, 12 Ala. 180.

<sup>7</sup> *Hazard v. Jordan*, 12 Ala. 180.

<sup>8</sup> *Webb v. Bowler*, 5 Jones, 362.

<sup>9</sup> *Alexander v. Lydick*, 80 Mo. 341.

<sup>10</sup> *Morton v. Pearman*, 28 Ga. 323.

<sup>11</sup> *Graves v. Strozier*, 37 Ga. 32.

The official bond of a county treasurer is an "obligation for the direct payment of money."<sup>1</sup> So is a bail bond in a criminal case.<sup>2</sup> "Recovery of money" covers an action either *ex contractu* or *ex delicto*,<sup>3</sup> or a mechanic's lien;<sup>4</sup> but not an action to charge the separate estate of a married woman with the payment of notes made by her;<sup>5</sup> nor an action for an injunction against the infringement of a trade-mark, and for damages.<sup>6</sup> A suit on an administrator's bond is not a suit on a "written instrument for the direct payment of money."<sup>7</sup>

§ 3508. **Debts not Due.**—In the absence of statutory authority, the debt must be due, or the attachment cannot be sustained.<sup>8</sup> An attachment issued on the 9th of November against one who had agreed to deliver cotton that fall is void, the obligor not being in fault until the expiration of the fall.<sup>9</sup> An accommodation acceptor of a bill of exchange is not entitled to an attachment against the drawer until after payment of the bill by him.<sup>10</sup> If a vendor who contracts to deliver goods at a future day certain receives payment of the price, and before the day appointed disables himself from complying with his contract, the purchaser may treat the contract as rescinded, and sue presently for the money paid out; and an attachment on such a debt would not be premature, though commenced before the time fixed for the delivery of the cotton.<sup>11</sup> And when the debt was fraudulently contracted, it becomes due immediately.<sup>12</sup> In some states an attachment is allowed on a debt not yet due.<sup>13</sup> Under such a statute the holder may proceed in this way against the

<sup>1</sup> *Monterey County v. McKee*, 51 Cal. 255.

<sup>2</sup> *San Francisco v. Brader*, 50 Cal. 506.

<sup>3</sup> *Davidson v. Owens*, 5 Minn. 69; *Morrison v. Lovejoy*, 6 Minn. 183.

<sup>4</sup> *Gillespie v. Lovell*, 7 Kan. 419.

<sup>5</sup> *Hoover v. Gibson*, 24 Ohio St. 389.

<sup>6</sup> *Guilhon v. Lindo*, 9 Bosw. 601.

<sup>7</sup> *People v. Boylan*, 25 Fed. Rep. 594.

<sup>8</sup> *Tignor v. Bradley*, 32 Ark. 781.

<sup>9</sup> *Moore v. Dickerson*, 44 Ala. 485.

<sup>10</sup> *Henderson v. Thornton*, 37 Miss. 448; 75 Am. Dec. 70.

<sup>11</sup> *Russell v. Gregory*, 62 Ala. 454.

<sup>12</sup> *Muser v. Lisser*, 67 How. Pr. 509.

<sup>13</sup> *Drake on Attachment*, secs. 31 et seq.

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indorser of a negotiable note,<sup>1</sup> or upon a note on the day it is payable.<sup>2</sup> But where by statute an attachment is permitted on a debt not due, such debt must nevertheless be an actual subsisting debt, which in time will become due.<sup>3</sup> "The statute does not apply to debts resting in mere contingency, whether they will ever become due to the attaching creditor or not."<sup>4</sup> If the proceeding is under a statute allowing attachments for debts not due, debts due cannot be recovered in this way, nor can a debt due be combined with a claim not due.<sup>5</sup> Judgment cannot be entered until the demand matures.<sup>6</sup>

§ 3509. **Suits by One Partner against Another.**— Under the statutes giving attachment to "creditors," it seems that in Illinois a partner may have an attachment on an action of account instituted by him against his copartner.<sup>7</sup> But in other states an action by attachment by one partner against another for an amount alleged to be due him from the partnership cannot be maintained,<sup>8</sup> or at least until there has been an accounting and an ascertainment of the balance due.<sup>9</sup>

<sup>1</sup> Smead v. Chrisfield, 1 Handy, 442.

<sup>2</sup> Cox v. Reinhardt, 41 Tex. 591. See Whitwell v. Brigham, 19 Pick. 117.

<sup>3</sup> Blanchard v. Grousset, 1 La. Ann. 96; Read v. Ware, 2 La. Ann. 498; Moore v. Dickerson, 44 Ala. 485. An attachment will lie on an unmatured debt when nothing but time is wanting to fix an absolute indebtedness: Bacon v. Marshall, 37 Iowa, 581; Brace v. Greeley, 36 Iowa, 352. See Dwinel v. Stone, 30 Me. 384.

<sup>4</sup> Black v. Zacharie, 3 How. 483.

<sup>5</sup> Levy v. Millman, 7 Ga. 167; Danforth v. Carter, 1 Iowa, 546. *Contra*, Kahn v. Kahn, 44 Ark. 404.

<sup>6</sup> Ware v. Todd, 1 Ala. 199; Jones v. Holland, 47 Ala. 732; Rice v. Jerenson, 54 Wis. 248.

<sup>7</sup> Humphreys v. Matthews, 11 Ill. 471; the court saying: "The claim of a joint tenant, tenant in common, or

coparcener is just as sacred as that of any other creditor; and because he cannot resort to the more usual common-law actions to enforce his rights affords no reason why he should be deprived of the benefit of the attachment act, when he presents a case that would authorize an attachment were he permitted to sue in debt or *assumpsit*." And see Halloway v. Brinkley, 42 Ga. 266.

<sup>8</sup> Rice v. Beers, 1 Rice Dig. 75; Levy v. Levy, 11 La. 581; Brinegar v. Grifftin, 2 La. Ann. 154; Johnson v. Short, 2 La. Ann. 277; Wheeler v. Farmer, 38 Cal. 203. An action between partners for an accounting is not an action upon a "demand arising upon contract": Treadway v. Ryan, 3 Kan. 437.

<sup>9</sup> Treadway v. Ryan, 3 Kan. 437; Guilhon v. Lindo, 9 Bosw. 601; Ackroyd v. Ackroyd, 11 Abb. Pr. 345; 20 How. Pr. 93; Ketchum v. Ketchum, 1 Abb. Pr., N. S., 167.

§ 3510. **Creditor Holding Collateral Security.**—A creditor may attach though he holds property of the debtor as collateral security for the debt.<sup>1</sup> A mortgagee of personal property whose debt is payable may waive his claim under the mortgage and attach the property to secure the debt.<sup>2</sup> Both separate and joint creditors may attach either separate or joint property, and sell it upon execution in satisfaction of their judgments, without regard to the equities of the debtors.<sup>3</sup>

§ 3511. **Who may Bring Attachment.**—In general, any creditor is authorized to sue out an attachment; and the statute is silent as to the matter or form of the action in which the writ may issue. It is applicable to actions of account, and the claim of a joint tenant, tenant in common, or coparcener may be enforced under it.<sup>4</sup> Where the remedy is given to a "creditor," a creditor is one who has a right to require of another the fulfillment of a contract or obligation.<sup>5</sup> It has been held to include a claimant of unliquidated damages for negligence in performing a contract,<sup>6</sup> and of damages for breach of a covenant.<sup>7</sup> Non-residents as well as residents may avail themselves of the writ of attachment;<sup>8</sup> and so where both parties are non-residents.<sup>9</sup> A corporation, either foreign or domestic, as well as a natural person, may sue by attachment.<sup>10</sup> The state has the same right as any other

<sup>1</sup> *Whitwell v. Brigham*, 19 Pick. 117; *Taylor v. Cheever*, 6 Gray, 146; overruling *Cleverly v. Brackett*, 8 Mass. 150. But see *Porter v. Brooks*, 35 Cal. 199; *Beaudry v. Vache*, 45 Cal. 3.

<sup>2</sup> *Beck v. Ingersoll*, 11 Met. 226; *Whitney v. Farrar*, 51 Me. 418; *Libby v. Cushman*, 29 Me. 429.

<sup>3</sup> *Bardwell v. Perry*, 19 Vt. 292; 47 Am. Dec. 687.

<sup>4</sup> *Humphreys v. Matthews*, 11 Ill. 471.

<sup>5</sup> *Drake on Attachment*, sec. 12; citing 1 *Bouvier's Law Dict.* 383.

<sup>6</sup> *New Haven Saw Mill Co. v. Fowler*, 28 Conn. 103.

<sup>7</sup> *Woolfolk v. Cage*, Walk. Ch. 300.

<sup>8</sup> *Ward v. McKenzie*, 33 Tex. 297; 7 Am. Rep. 261; *Mitchell v. Shook*, 72 Ill. 492; *Givens v. Merchants' Bank*, 85 Ill. 442; *Woodley v. Shirley*, Minor, 24; *Posey v. Buckner*, 3 Mo. 413; *Graham v. Bradbury*, 7 Mo. 281; *McClerkin v. Sutton*, 29 Ind. 407; *Gray v. Briscoe*, 6 Bush, 687; *Ex parte Caldwell*, 6 Cow. 603; *Robbins v. Cooper*, 6 Johns. Ch. 186.

<sup>9</sup> *Hills v. Lazelle*, 5 Sneed, 363; *Ward v. McKenzie*, 33 Tex. 297; 7 Am. Rep. 261.

<sup>10</sup> *Trenton Banking Co. v. Haverstick*, 11 N. J. L. 171; *Union Bank v. United States Bank*, 4 Humph. 369.

creditor,<sup>1</sup> or a board of supervisors in behalf of the county.<sup>2</sup>

§ 3512. **Liability of Persons in Representative Capacities — Corporations — Other Persons.**—An heir, executor, trustee, or one who claims merely by right of representation cannot be proceeded against as an absent debtor,<sup>3</sup> unless he is sued personally.<sup>4</sup> A corporation, domestic or foreign, is liable to attachment.<sup>5</sup> An infant may be adjudged a trustee for any personal property in his hands belonging to the principal defendant, or for any debt for necessities due to him.<sup>6</sup> An attachment may issue against a female debtor.<sup>7</sup>

§ 3513. **The Grounds for Attachment.**—Ordinarily, the mere inability of a debtor to pay his debts will not justify attaching his property.<sup>8</sup> "Attachment," says Mr. Waples,<sup>9</sup> "is based on the assumed indebtedness of property, and it authorizes procedure against it where the personal debtor cannot be effectively reached by ordinary process." The principal grounds for resort to this extraordinary remedy are the same in all the states, a few exceptional grounds existing in only a few states. These principal grounds are: 1. Where the debtor absents him-

<sup>1</sup> People v. Johnson, 14 Ill. 342.

<sup>2</sup> State v. Fortinberry, 54 Miss. 316.

<sup>3</sup> Haight v. Bergh, 15 N. J. L. 183; Peacock v. Wildes, 8 N. J. L. 179; Taliaferro v. Lane, 23 Ala. 369; Smith v. Riley, 32 Ga. 356; Bryant v. Fussell, 11 R. I. 286; Stanton v. Holmes, 4 Day, 87; Weyman v. Murdock, Harp. 123; In re Hurd, 9 Wend. 465; Jackson v. Walsworth, 1 Johns. Cas. 372; Metcalf v. Clark, 41 Barb. 45. *Contra*, Moores v. White, 3 Gratt. 139; Carlington v. Didier, 8 Gratt. 260.

<sup>4</sup> In re Galloway, 21 Wend. 32; 34 Am. Dec. 209.

<sup>5</sup> St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 421; Mineral Point R. R. Co. v. Keep, 22 Ill. 9; 74 Am. Dec. 123; Libbey v. Hodgden, 9 N. H. 394; Union Bank v. U. S. Bank, 4 Humph. 369; Planters etc. Bank v. Andrews, 8

Port. 404; South Carolina R. R. Co. v. McDonald, 5 Ga. 531; Wilson v. Danforth, 47 Ga. 676; Bushel v. Com. Ins. Co., 15 Serg. & R. 173; U. S. Bank v. Merchants' Bank, 1 Rob. (Va.) 573; Martin v. Branch Bank, 14 La. 415; Hazard v. Agricultural Bank, 11 Rob. (La.) 326; Bowen v. First Nat. Bank, 34 How. Pr. 408; Robinson v. Nat. Bank, 81 N. Y. 385; 37 Am. Rep. 508; Everdell v. R. R. Co., 41 Wis. 395. *Contra*, McQueen v. Middleton Mfg. Co., 16 Johns. 5; Vogle v. New Grenada Canal Co., 1 Houst. 204.

<sup>6</sup> Scofield v. White, 29 Vt. 330.

<sup>7</sup> Davis v. Mahany, 38 N. J. L. 104; *Contra*, Williams v. R. R. Co., 8 Mo. App. 135.

<sup>8</sup> Farmer v. Keith, 16 Neb. 91.

<sup>9</sup> Waples on Attachment, 31.



self or absconds from the state; 2. Where he conceals himself; 3. Where he is a non-resident; 4. Where he is about to remove his property from the state; 5. Where he is fraudulently disposing of his property, or is about to do so;<sup>1</sup> 6. Where the debt has been fraudulently contracted.

§ 3514. **Absent Debtors.**—Absence, in the attachment law, does not mean a mere temporary absence with intention to return.<sup>2</sup> But an absence, even with an intention to return, is sufficient if it was taken to avoid proceedings by the creditor, or naturally has that effect.<sup>3</sup> And one who removes to another state for purposes requiring his remaining there for an indefinite time must be deemed a non-resident of the state he leaves, for the purpose of subjecting his property there to attachment, although he may intend to return in the remote future.<sup>4</sup> If a person voluntarily absent himself from his residence or country with the intention of engaging in hostilities against the latter, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings are conducted.<sup>5</sup>

**ILLUSTRATIONS.**—An attachment was permitted where the debtor "has been absent from the state four months." *Held*, that if he left his home with the intention of going out of the

<sup>1</sup> The fraudulent act of a debtor made the ground of an attachment must have accrued before the time of the making of the affidavit or it must then exist: *Bumberger v. Gerson*, 24 Fed. Rep. 257.

<sup>2</sup> *Mandel v. Peet*, 18 Ark. 236; *Watson v. Pierpont*, 7 Mart. (La.) 413. "It often happens that the ordinary process of the law is delayed by the temporary and innocent absence of resident debtors; but such absence does not subject them to the extraordinary remedy by attachment": *Fuller v. Bryan*, 20 Pa. St. 144; *Kingsland v.*

*Worsham*, 15 Mo. 657; *Ellington v. Moore*, 17 Mo. 424; *Clark v. Arnold*, 9 Dana, 305; *Pitts v. Burroughs*, 6 Ala. 733; *Alston v. Newcomer*, 42 Miss. 186; *Klepper v. Powell*, 6 Heisk. 503; *Egan v. Lumsden*, 2 Disn. 168; *Meek v. Fox*, 42 Miss. 513.

<sup>3</sup> *In re Thompson*, 1 Wend. 43; *Morgan v. Avery*, 7 Barb. 656; *Gibson v. McLaughlan*, 1 Browne (Pa.), 292; *New Orleans Canal Co. v. Comly*, 1 Rob. (La.) 231.

<sup>4</sup> *Wheeler v. Cobb*, 75 N. C. 21; *Leathers v. Cannon*, 27 La. Ann. 522.

<sup>5</sup> *Ludlow v. Ramsey*, 11 Wall. 581.

state, and was absent four months, he was within the statute, though he was detained in another part of the state several days before crossing the line: *Spalding v. Simms*, 4 Met. (Ky.) 285. A, a merchant in New Orleans, in the summer, left his store in charge of an agent, and went to New York on business, declaring his intention of returning in the fall. *Held*, not an absence: *Watson v. Pierpont*, 7 Mart. (La.) 413. An attachment was permitted where the debtor was "without the limits of the state." The debtor, by his conduct and conversation before his disappearance, had given good reason to believe that he was out of the state, nevertheless he was really in concealment in the state. *Held*, that there was no ground for the attachment: *Wheeler v. Degnan*, 2 Nott & McC. 323.

§ 3515. **Absconding Debtors.**—An absconding debtor is one who hides, conceals, or absents himself from his usual place of abode with intent to avoid legal process.<sup>1</sup> He need not go beyond the limits of the state.<sup>2</sup> So a person who shuts himself up from his creditors is an absconding debtor.<sup>3</sup> But one who leaves his abode, without any fraudulent design, and intending to return, is not an absconding debtor.<sup>4</sup> An intention to abscond is not sufficient; there must be an actual absconding, such as prevents service of process on the debtor.<sup>5</sup> One who resides abroad, and comes thence into a particular jurisdiction, and then returns to his domicile, cannot be said, in leaving the place he has visited, to be an absconder.<sup>6</sup> An attachment is wrongfully sued out if the defendant intended to remove or leave the state, but abandoned such intention, and the plaintiff had notice of this abandonment of intention before suing out the attach-

<sup>1</sup> *Bennett v. Avant*, 2 Sneed, 152.

<sup>2</sup> *Field v. Adreon*, 7 M. l. 209; *Stouffer v. Niple*, 40 Md. 477.

<sup>3</sup> *Ives v. Curtis*, 2 Root, 133.

<sup>4</sup> *Boardman v. Bickford*, 2 Aiken, 345; *Fitch v. Waite*, 5 Conn. 117; *Oliver v. Wilson*, 29 Ga. 642; *In re Chipman*, 1 Wend. 66; *In re Warner*, 3 Wend. 424; *Croynne v. Wells*, 2 Ill. App. 574. An affidavit averring that the defendant is in another state, and is about to sell or remove his property, does not sufficiently aver an ab-

sconding: *State v. Morris*, 50 Iowa, 203. See *Lorri v. Higgins*, 2 Chand. 116. It is not enough that, having departed with a lawiul intent, he stays away with intent to defraud: *Hafern v. Davis*, 10 Wis. 501.

<sup>5</sup> *Temple v. Cochran*, 13 Mo. 116; *Kingsland v. Worsham*, 15 Mo. 657.

<sup>6</sup> *In re Fitzgerald*, 2 Caines, 318; *In re Schroeder*, 6 Cow. 603; *Shugart v. Orr*, 5 Yerg. 192; *Clements v. Kerby*, 7 U. C. P. 103.

ment.<sup>1</sup> The declaration of the party, at the time of his departure, or immediately previous thereto, as to his destination and intention to return, are admissible to show his innocent intention;<sup>2</sup> and so are they to show his intention to abscond.<sup>3</sup> Evidence of common reputation in the neighborhood on the subject is inadmissible.<sup>4</sup>

ILLUSTRATIONS. — A debtor went from the town of his usual residence to another town in the state, and there worked openly at his trade as a journeyman, for above three months, without taking any measures to conceal himself. *Held*, not to be an absent or absconding debtor with respect to a creditor in the town which he left, though his friends and neighbors there did not know where he was, and his absence was a subject of conversation among them: *Fitch v. Waite*, 5 Conn. 117. One of two partners was guilty of fraudulent acts, on account of which he absconded. The other party remained in the state, carrying on the business, and had been guilty of no actual misconduct. *Held*, that an attachment could be had only against the property of the absconding partner: *Bogart v. Dart*, 25 Hun, 395.

§ 3516. **Debtors Concealing or Secreting Themselves.** — Some of the statutes use the words "conceal" and "secrete," — "so conceals or secretes himself that process cannot be served on him." These words are synonymous.<sup>5</sup> In an Illinois case the meaning of this phrase is thus stated: It is concealment to avoid service of process, no matter whether for an hour, a day, or a week, whether with a view to defraud creditors, or merely to have time to make a disposition, lawful or otherwise, of his property, before his creditors get at him; it is placing himself designedly so that his creditor cannot reach him with process, which constitutes concealment under the statute.<sup>6</sup> If a person

<sup>1</sup> *Reddy v. Bego*, 33 Miss. 529.

<sup>2</sup> *Oliver v. Wilson*, 29 Ga. 642; *Brady v. Parker*, 67 Ga. 636; *Pitts v. Burroughs*, 6 Ala. 733; *Havis v. Taylor*, 13 Ala. 324; *Burgess v. Clark*, 3 Ind. 250; *Offut v. Edwards*, 9 Rob. (La.) 90; *Wallace v. Lodge*, 5 Ill. App. 507.

<sup>3</sup> *Ross v. Clark*, 32 Mo. 296.

<sup>4</sup> *Pitts v. Burroughs*, 6 Ala. 733; *Havis v. Taylor*, 13 Ala. 324.

<sup>5</sup> *Goss v. Gowing*, 5 Rich. 477; *Conrad v. McGee*, 9 Yerg. 428.

<sup>6</sup> *Young v. Nelson*, 25 Ill. 565; *North v. McDonald*, 1 Biss. 57. An affidavit showing that the person making it had called at the residence of the defendant, and endeavored to secure an interview with him, which was refused, under the asserted authority of the defendant, is not sufficient: *Wal-lach v. Sippilli*, 65 How. Pr. 501.

going away tells his neighbors where he is going, it is not concealment that he does not also inform his creditor.<sup>1</sup> But if, in leaving, he request false information to be given of his movements, this is concealment.<sup>2</sup> The fact that the defendant lives out of the county where he does business does not amount to "concealing" himself within the statute.<sup>3</sup> The concealment, to justify an attachment, must be to avoid or delay claims of creditors. A concealment to avoid a criminal prosecution is not within the law.<sup>4</sup> And the debtor must conceal himself.<sup>5</sup>

§ 3517. **Non-resident Debtors.** — In all the states, that the debtor is a non-resident is a good ground for an attachment against his property.<sup>6</sup> The phraseology is different; some statutes say, "when the defendant is a non-resident"; others, "when the defendant is not an inhabitant"; others, "when the defendant resides out of the state." Yet all these are held to be synonymous in meaning.<sup>7</sup> But residence and domicile are not convertible terms. The debtor may have his domicile in a foreign state, and yet have a residence in the country where the suit is brought.<sup>8</sup> "The debtor may be the subject of a foreign power; he may be a citizen of a state other than that in which the attachment suit is instituted; he may not only be a citizen and a voter there, but his domicile or principal residence may be there; yet if he have a residence also in the place where the suit is brought, at which he may be duly served with ordinary process, his

<sup>1</sup> Walcott v. Hendrick, 6 Tex. 406.

<sup>2</sup> North v. McDonald, 1 Biss. 57.

<sup>3</sup> Boggs v. Bindschoff, 23 Ill. 66.

<sup>4</sup> Evans v. Saul, 8 Martin, N. S., 247.

<sup>5</sup> "To authorize the attachment, it must appear that there was an intent upon the part of the debtor to conceal himself so that process cannot be served upon him. It must be his own misconduct or bad faith, and not the acts or misconduct of any other person, and that fact must positively ap-

pear by averments": Winkler v. Barthel, 6 Ill. App. 111.

<sup>6</sup> Waples on Attachment, 34.

<sup>7</sup> Drake on Attachment, sec. 59; Waples on Attachment, 34, 35. In Maryland it was even held that the word "citizen," in the attachment law of that state, was held to mean the same thing as "inhabitant" and "resident": Field v. Adreon, 7 Md. 209; Risewick v. Davis, 19 Md. 82.

<sup>8</sup> Drake on Attachment, sec. 38.

property ought not to be subjected to attachment."<sup>1</sup> A person once acquiring a residence in a place does not lose it by going out of the state, unless with such removal the intention is also present to make such new place his home, either temporarily or for good.<sup>2</sup> One who has left the state, removed his family, and engaged in permanent business elsewhere, is a non-resident, although he may intend to return at some uncertain time.<sup>3</sup> A change of abode with the intention of not returning (*sine animo revertendi*) makes one immediately a non-resident of the place from which he came.<sup>4</sup> But, having a residence in the state, the fact that he is a new-comer will not justify an attachment,<sup>5</sup> nor the fact that he is only a boarder or lodger; the mode of living is not material.<sup>6</sup> So the debtor may be a citizen of the state in which the suit is brought, and be domiciled there; yet if he be residing at the time out of the state, he is a non-resident, and within the at-

<sup>1</sup> Waples on Attachment, 36; Perrine v. Evans, 35 N. J. L. 221; Stout v. Leonard, 37 N. J. L. 492; In re Thompson, 1 Wend. 45; Haggart v. Morgan, 5 N. Y. 422; 55 Am. Dec. 350; Ellington v. Moore, 17 Mo. 424; Wells v. People, 44 Ill. 40. "A residence or place of abode, in this state, of a temporary or permanent character, at which a summons might lawfully be served, is the condition on which process of attachment cannot be issued. If the debtor has not such a place of abode that a summons could be served at it, he is a non-resident within the meaning of the statute, and may be proceeded against by attachment"; Baldwin v. Flagg, 43 N. J. L. 498.

<sup>2</sup> Lyle v. Foreman, 1 Dall. 480; Bainbridge v. Alderson, 2 Browne (Pa.), 51; Long v. Ryan, 30 Gratt. 718; Shipman v. Woodbury, 2 Miles, 67; Wheeler v. Degnan, 2 Nott & McC. 323; Smith v. Story, 1 Humph. 420; Stratton v. Brigham, 2 Sneed, 420; Reed's Appeal, 71 Pa. St. 378; Tibbits v. Townsend, 15 Abb. Pr. 221; Collins v. Campbell, 9 How. Pr. 521; Wolf v. McGavock, 23 Wis. 516; Weltkany v. Loehr, 53 N. Y. Sup. Ct. 79; Rither v. Ins. Co.,

32 Kan. 504; Loder v. Littlefield, 39 Mich. 512; Bowers v. Ross, 55 Miss. 213. "Residence is made up of fact and intention; that is, of abode with intention of remaining"; Pfoutz v. Comfort, 36 Pa. St. 422.

<sup>3</sup> Morgan v. Nunes, 54 Miss. 308.

<sup>4</sup> Moore v. Holt, 10 Gratt. 284; In re Wrigley, 4 Wend. 602; 8 Wend. 134; Whitley v. Steakly, 3 Baxt. 393; Nailor v. French, 4 Yeates, 241; Taylor v. Knox, 1 Dall. 158; Farrow v. Barker, 3 B. Mon. 217; McCollem v. White, 23 Ind. 43; Reed v. Ketch, 1 Phila. 105.

<sup>5</sup> People v. McClay, 2 Neb. 7; Swaney v. Hutchins, 13 Neb. 266; Heidenback v. Schland, 10 How. Pr. 477; Chesney v. Francisco, 12 Neb. 626; Brown v. Ashbough, 40 How. Pr. 260; Barnet's Case, 1 Dall. 152; Long v. Ryan, 30 Gratt. 718. But a citizen of one state who removes therefrom clandestinely and conceals himself in another to evade process, does not become a resident of the latter state till he has acquired a fixed place of residence; Shugart v. Orr, 5 Yerg. 192.

<sup>6</sup> Drake on Attachment, sec. 62; Kennedy v. Baillie, 3 Yeates, 55.

attachment laws.<sup>1</sup> Or he may have a domicile nowhere, or a residence nowhere; to ground an attachment, the essential is that he be a non-resident of the state where the remedy is sought, not that he must be a resident elsewhere.<sup>2</sup> That a person has a place of business in the state, coming there in business hours, does not make him a resident, if he lives outside the state.<sup>3</sup> If he be a "non-resident," the fact that he is, at the time of the attachment, temporarily in the state does not alter the case,<sup>4</sup> nor the fact that he is in the state looking around and making up his mind whether he will settle here or not.<sup>5</sup> As to at what point of time the person departing from his place of abode becomes a non-resident of the state in which he has resided, it seems that an actual removal out of the state is neces-

<sup>1</sup> *Haggart v. Morgan*, 5 N. Y. 422; 55 Am. Dec. 350; *Frost v. Brisbin*, 19 Wend. 11; 32 Am. Dec. 423; *Risewick v. Davis*, 19 Md. 82; *Dorsey v. Kyle*, 30 Md. 512; 96 Am. Dec. 61; *Alston v. Newcomer*, 42 Miss. 186; *Morgan v. Nunes*, 54 Miss. 308; *Wheeler v. Cobb*, 75 N. C. 21; *Wolf v. McGavock*, 23 Wis. 516; *Mayor v. Genet*, 4 Hun, 487; *Burrill v. Jewett*, 2 Robt. 701. In *Weber v. Weitling*, 18 N. J. Eq. 443, it is said: "A man may not change his domicile, he may do nothing to acquire or establish a new domicile, but may have abandoned his residence. If a resident of the state sells his homestead and goes to Europe with all his family, with the intention of remaining a few months or a few years, and then returning and purchasing a new home somewhere in the state, and residing here, he acquires no new domicile; he is a citizen of New Jersey, but he has no residence here. The test of residence under the attachment act is, whether a person has such residence in the state as that a summons can be served."

<sup>2</sup> "He need not be a foreign resident. He may be a cosmopolitan, having no fixed place of abode. He may be a constant traveler, claiming no home. He may be personally amenable to no particular jurisdiction. The essential charge is that he is not

residing or living in the state": *Waples on Attachment*, 35.

<sup>3</sup> *Barry v. Beckover*, 6 Abb. Pr. 374; *Wallace v. Castle*, 68 N. Y. 370; *Malone v. Lindley*, 1 Phila. 192; *Greene v. Beckwith*, 38 Mo. 384; *Rayne v. Taylor*, 10 La. Ann. 726; *Perrine v. Evans*, 35 N. J. L. 221. Even although he has furnished apartments at his place of business, and habitually lodges and takes his meals there: *Murphy v. Baldwin*, 11 Abb. Pr., N. S., 407; 41 How. Pr. 270. A non-resident of Georgia, who is lessee of a railroad in that state, and liable to be sued as a railroad company, is not, on that account, exempted from proceedings by attachment like other non-residents: *Breed v. Mitchel*, 48 Ga. 533.

<sup>4</sup> *Burcalow v. Trump*, 1 Houst. 363; *Malone v. Lindley*, 1 Phila. 192; *Greene v. Beckwith*, 38 Mo. 384; *Jackson v. Perry*, 13 B. Mon. 231; *Bryan v. Dunseth*, 1 Martin, N. S., 412; *Rayne v. Taylor*, 10 La. Ann. 726; *Murphy v. Baldwin*, 41 How. Pr. 270; In re *Fitzgerald*, 2 Caines, 318; *Barnet's Case*, 1 Dall. 152; *Boardman v. Bickford*, 2 Aiken, 345; *Shugart v. Orr*, 5 Yerg. 192; In re *Wigley*, 8 Wend. 134; 4 Wend. 602; *Perrine v. Evans*, 35 N. J. L. 221; *Frost v. Brisbin*, 19 Wend. 11; 32 Am. Dec. 423.

<sup>5</sup> *Burrows v. Miller*, 4 How. Pr. 349.

sary, and until he has quitted the state he is not a non-resident, notwithstanding his intention to remove.<sup>1</sup> The legal residence of the wife follows that of her husband.<sup>2</sup> An attachment against a non-resident will not be set aside on the ground that the defendant has since become a resident.<sup>3</sup>

ILLUSTRATIONS. — A had a business in New York, where he was engaged eight hours a day. His house was in New Jersey, where he lived with his family, spending there his nights and Sundays. All his property and business capital were in New York. *Held*, that A was a non-resident of New York: *Barry v. Bockover*, 6 Abb. Pr. 374. A had a residence in New York, in which he lived in the winter, and one in New Jersey, where he lived in the summer. *Held*, that A was a non-resident of New Jersey in the winter: *Stout v. Leonard*, 37 N. J. L. 492. In May, 1881, A came from Illinois to Nebraska, with the intention of abandoning his former residence and taking up a new one, leaving his wife in Illinois until October. *Held*, that an attachment made in an action begun against them in January, on the ground that they were non-residents, could not be sustained: *Swaney v. Hutchins*, 13 Neb. 266.

§ 3518. **Removing Property from State.**—Where a statute authorizes attachment "where the defendant is about to remove his property from the state," it must appear that the property is of such a character that its removal out of the state is beyond its ordinary and customary use.<sup>4</sup> Thus to take a steamboat on her regular trip out of the state,<sup>5</sup> or to take logs to their usual place of sale outside the state,<sup>6</sup> is not within the statute; nor is shipping property by a debtor to a creditor in another state in payment of a *bona fide* debt, and without fraudulent intent.<sup>7</sup> So the mere fact that the defendant is removing

<sup>1</sup> *Ballinger v. Lantier*, 15 Kan. 608; *Kugler v. Shreve*, 28 N. J. L. 129; *Knapp v. Gerson*, 25 Fed. Rep. 197. *Contra*, *Clark v. Ward*, 12 Gratt. 440. Intention to remove one's residence within the state does not exempt him from the operation of an attachment law against non-residents. There must also be actual removal: *Adams v. Evans*, 19 Kan. 174.

<sup>2</sup> *Hackettstown Bank v. Mitchell*, 28

N. J. L. 516; *Baldwin v. Flagg*, 43 N. J. L. 495. See *post*, Conflict of Laws.

<sup>3</sup> *Larimer v. Kelly*, 10 Kan. 298.

<sup>4</sup> *Warder v. Thirkeld*, 52 Iowa, 134.

<sup>5</sup> *Russell v. Wilson*, 10 La. 367; *Lyons v. Mason*, 4 Cold. 525; *Montgomery v. Tilly*, 1 B. Mon. 155; *Hogan v. Canes*, 12 La. Ann. 49.

<sup>6</sup> *Hurd v. Jarvis*, 1 Pinn. 475.

<sup>7</sup> *Rice v. Pertuis*, 40 Ark. 157.

part of his property is no ground for attachment if he has left, or intends to leave, sufficient to satisfy the debt.<sup>1</sup> Taking property out of the state for a mere temporary purpose, intending to bring it back, is not a "removal" within the statute.<sup>2</sup> To sustain the issue of the defendant being about to remove his property, it is not necessary to show that he is doing so with fraudulent intent,<sup>3</sup> unless the statute so provides.<sup>4</sup> If the purpose to remove exists, and may be carried out in one, two, three, or several weeks or months, and the object is to evade or delay creditors, the writ may issue. This purpose, like all other motives, may be inferred from the speeches, acts, and conduct of the party, although his movements may not be characterized by "fright," "speed," or "haste."<sup>5</sup>

ILLUSTRATIONS.—A statute authorized an attachment of the goods of a person "removing out of the county." *Held*, that the goods of one not a resident of the state, but who was passing through the same, could be attached: *Johnson v. Lowry*, 47 Ga. 560; 15 Am. Rep. 655.

§ 3519. **Concealing or Disposing of Property.**—In many states an attachment is authorized upon the ground that the defendant has disposed of, or is about to fraudulently dispose of, his property.<sup>6</sup> "His property," in this

<sup>1</sup> *White v. Wilson*, 18 Ill. 21; *Ridgway v. Smith*, 17 Ill. 33; *Harber v. Nassitts*, 12 Fla. 589; *Stewart v. Cole*, 46 Ala. 646; *Montague v. Gaddis*, 37 Miss. 453; *Runyan v. Morgan*, 7 Humph. 210; *Friedlander v. Pollock*, 5 Cold. 490; *Steele v. Dodd*, 14 Neb. 496. But see *Holliday v. Cohen*, 34 Ark. 707; *Mack v. McDaniel*, 2 McCrary, 198. In *Friedlander v. Pollock*, 5 Cold. 490, the court say: "It is not possible to define by precise words the amount of property removed, or about to be removed, which will bring the debtors within the scope of the statute. It need not be all his property, nor will a comparative little suffice. It must be an amount of substantial consequence in reference to the ability of his estate to bear hon-

estly the withdrawal of the amount a way from his liability, in the domestic court, to his creditors."

<sup>2</sup> *Friedlander v. Pollock*, 5 Cold. 490; *Warder v. Thrilkeld*, 52 Iowa, 134.

<sup>3</sup> *Friedlander v. Pollock*, 5 Cold. 490; *Mack v. McDaniel*, 2 McCrary, 198; *Durr v. Hervey*, 44 Ark. 301; 51 Am. Rep. 594.

<sup>4</sup> *Hunter v. Soward*, 15 Neb. 215.

<sup>5</sup> *Myers v. Farrell*, 47 Miss. 281.

<sup>6</sup> *Chouteau v. Sherman*, 11 Mo. 385; *Knapp v. Joy*, 9 Mo. App. 47; *Field v. Livermore*, 17 Mo. 218; *Enders v. Richards*, 33 Mo. 598; *Spencer v. Deagle*, 34 Mo. 455; *Taylor v. Kuhke*, 26 Kan. 132; *Rosenfeld v. Howard*, 15 Barb. 546; *Wilson v. Britton*, 6 Abb. Pr. 97; 6 Abb. Pr. 33; *Dick-*



connection, has been construed to mean any property in his possession to which he claims title, though his title may be imperfect or bad.<sup>1</sup> "Disposing" of the property means any kind of alienation of it, whether by sale, gift, pledge, or other transfer.<sup>2</sup> But a dealer's daily selling of his goods in the regular course of his business is not within the statute;<sup>3</sup> nor selling property for the purpose of obtaining money with which to purchase necessities for his family;<sup>4</sup> nor using small amounts of a firm's assets for individual expenses and obligations;<sup>5</sup> nor a mere threat by a debtor to make a preferential assignment;<sup>6</sup> nor confessions of judgment in favor of *bona fide* creditors, for the purpose of hindering or defrauding other creditors.<sup>7</sup> Some statutes include "concealing" as well as disposing of his property, and such concealing may be by a concealment or misrepresentation of fact as well as of property.<sup>8</sup> It is not necessary to show that the defendant was about to dispose of all his property; the attachment will be sustained if it is shown that he was about to dispose of any part of it.<sup>9</sup> Actual intent to delay, and not a mere refusal to pay debts, is requisite.<sup>10</sup> An intent to defraud his creditors is essential.<sup>11</sup> Where the facts averred in an affidavit are traversed by the defendant's plea, the burden of proof is on the plaintiff to establish facts sufficient to prove fraud, and it is not enough that the de-

inon v. Benham, 10 Abb. Pr. 390; 12 Abb. Pr. 150; Gashier v. Apple, 14 Abb. Pr. 64; Hazlette v. Lake, 1 Deady, 469; Donnell v. Jones, 17 Ala. 689; 52 Am. Dec. 194.

<sup>1</sup> Treadwell v. Lawlor, 15 How. Pr. 8.

<sup>2</sup> Bullexe v. Smith, 73 Mo. 151. But not an alienation in writing; *Id.*

<sup>3</sup> Hershheim v. Levy, 32 La. Ann. 340.

<sup>4</sup> Estes v. Fry, 22 Mo. App. 80.

<sup>5</sup> McKinney v. Rosenband, 23 Fed. Rep. 785.

<sup>6</sup> Evans v. Warner, 21 Hun, 574; Farwell v. Furniss, 67 How. Pr. 188. But see Stevens v. Helpman, 29 La. Ann. 635.

<sup>7</sup> Estes v. Fry, 22 Mo. App. 80.

<sup>8</sup> Powell v. Matthews, 10 Mo. 49. And see Anderson v. O'Reilly, 54 Barb. 620.

<sup>9</sup> Taylor v. Myers, 34 Mo. 81; Johnson v. Laughlin, 7 Kan. 359; Flannagan v. Donaldson, 85 Ind. 517; Weiller v. Schreiber, 63 How. Pr. 491.

<sup>10</sup> Durr v. Jackson, 59 Ala. 203.

<sup>11</sup> Bowen v. Gilkison, 7 Iowa, 503; Pittman v. Searcey, 8 Iowa, 352; Spencer v. Deagle, 34 Mo. 455; Hinds v. Fagebank, 9 Minn. 68. In order to sustain an attachment of real estate on the ground of its fraudulent conveyance, fraud on the part of the purchaser, as well as of the debtor, must be established: Johnston v. Field, 62 Ind. 377.

defendant was trying to dispose of his stock of goods, there being no proof that he had no other property, that he owed other debts, or that he was insolvent.<sup>1</sup> Fraud may be presumed where defendant is about to put his property out of his hands without consideration while in debt.<sup>2</sup> One who, when embarrassed, gives a mortgage without consideration, in order to cover up and conceal his interest in land, and to defraud and hinder his creditors, affords ground sufficient for an attachment by a creditor; and attachment proceedings, once instituted, will not be vacated because the debtor offers the attaching creditor a second mortgage upon the same property.<sup>3</sup> In Illinois and other states the fraud must be intentional; must be a fraud in fact, and not merely a constructive fraud.<sup>4</sup> The fraudulent intent must be in existence before the attachment is sued out.<sup>5</sup>

ILLUSTRATIONS.—A few days before the issuing of the writ, the defendant had made a deed of property to his wife, which was left to be recorded, but was never recorded, and two days before the suit was brought, the deed, by consent of all parties in interest, was withdrawn and destroyed; defendant executed the deed in good faith on information that he had a right to provide for his wife, but on learning that he could not, it was withdrawn and destroyed, so that at the date of the writ there was no deed in existence. *Held*, that the court properly quashed the writ: *McCrosky v. Leach*, 63 Ill. 61. An insolvent debtor made to a creditor an exhibit of liabilities and assets, setting forth cash on hand and book debts, but not the value of stock on hand. The question of the value of such stock was discussed, however, its value being uncertain, and the creditor was able to form an opinion. *Held*, that the debtor was not liable to an attachment for concealing the value of his property: *Kipling v. Corbin*, 66 How. Pr. 12.

§ 3520. **Debt Fraudulently Contracted.**—A ground of attachment in several states is that the debtor fraudu-

<sup>1</sup> Towle v. Lamphere, 8 Ill. App. 399.

<sup>2</sup> Curtis v. Hoadley, 29 Kan. 566.

<sup>3</sup> Taylor v. Kuhuke, 26 Kan. 132.

<sup>4</sup> Shore v. Farwell, 9 Brad. App. 256; Eaton v. Wells, 18 Minn. 410.

<sup>5</sup> Warner v. Everett, 7 B. Mon. 262. It will not do to show such an intent a long time—say ten years—before the attachment: Lewis v. Kennedy, 3 G. Greene, 57.

lently contracted the debt.<sup>1</sup> False representations made by the debtor after the debt was contracted do not make the debt fraudulent.<sup>2</sup> That one has misapplied money which came into his hands rightfully will not authorize an attachment on the ground of fraudulent contraction of a debt.<sup>3</sup> The fraud must be a fair and logical sequence from facts proved, and the sources from which witnesses derive information must be given. It is not enough that the defendant was insolvent when he purchased the goods, that he bought more goods than he needed, and failed to disclose his insolvency,—no false statements having been made,—nor that afterwards he refused to secure the plaintiff, though large discounts were offered.<sup>4</sup> A debtor who, by fraudulently representing himself to be solvent, induces the acceptance of new notes for overdue ones fraudulently incurs an "obligation," within the Wisconsin statute.<sup>5</sup>

ILLUSTRATIONS. — One who was indebted seven thousand dollars made, in order to obtain credit, a financial statement itemizing his indebtedness at only two thousand five hundred dollars, and on the faith thereof obtained the credit. *Held*, a fraud, and ground for an attachment: *Rosenthal v. Wehe*, 58 Wis. 621. A drew upon B for the price of certain hogs, writing, "I have purchased 125 hogs," etc. B paid the draft; but it subsequently appeared that at the time of writing A had not purchased any hogs for B. *Held*, fraud in the contracting of the debt justifying an attachment: *Young v. Cooper*, 12 Neb. 610.

§ 3521. **Anomalous Grounds in Certain States.** — In Arkansas<sup>6</sup> and Kentucky<sup>7</sup> an attachment will lie where

<sup>1</sup> *Marqueze v. Sontheimer*, 59 Miss. 430; *Young v. Cooper*, 12 Neb. 610; *Rosenthal v. Wehe*, 58 Wis. 621. The Ohio statute providing that an attachment may issue "in a civil action for the recovery of money" when the defendant has "fraudulently or criminally contracted the debt or incurred the obligation" sued on, includes a civil action to recover unliquidated damages for assault and battery: *Sturdevant v. Tuttle*, 22 Ohio St. 111.

<sup>2</sup> *Marqueze v. Sontheimer*, 59 Miss. 430.

<sup>3</sup> *Goss v. Boulder County Comm'rs*, 4 Col. 468; *Rohan Brothers Boiler Mfg. Co. v. Latimore*, 18 Mo. App. 16.

<sup>4</sup> *Ellison v. Bernstein*, 60 How. Pr. 145.

<sup>5</sup> *Wachter v. Famachon*, 62 Wis. 117.

<sup>6</sup> Ala. Code 1876.

<sup>7</sup> Bullitt's Ky. Code 1876.

personal property has been ordered to be delivered to the plaintiff, but the defendant has so disposed of it that the sheriff cannot execute the order; and in Kentucky, when the defendant has not property enough in this state to satisfy the plaintiff's demand, and the collection will be endangered;<sup>1</sup> in Georgia,<sup>2</sup> where property is sold and delivered, when the debt becomes due and the property is still in the possession of the purchaser and not paid for;<sup>3</sup> in Kansas,<sup>4</sup> where the debtor has failed to pay the price of an article, payable on delivery,<sup>5</sup> and where the action is for damages resulting from a felony or misdemeanor, or for seduction; in Nevada,<sup>6</sup> where the contract is for the direct payment of money in the state, and is not secured by mortgage, lien, or pledge, or if so secured, the mortgage, etc., has been rendered nugatory by the defendant's act; in Rhode Island,<sup>7</sup> where, since the contracting of the debt, the defendant has owned property or received an income which he has refused or neglected to apply to the debt; in Virginia,<sup>8</sup> where the suit is for specific personal property.

<sup>1</sup> *Burdett v. Phillips*, 78 Ky. 246.

<sup>2</sup> Ga. Code 1882.

<sup>3</sup> See *Camp v. Cahn*, 53 Ga. 558.

<sup>4</sup> *Dassler's Comp. Laws* 1879.

<sup>5</sup> Where the contract to pay upon delivery has been modified by the vendor, or if he has waived the right to

demand payment upon delivery, an attachment under the provision is not authorized: *Young v. Lynch*, 30 Kan. 205.

<sup>6</sup> *Nev. Comp. Laws* 1873.

<sup>7</sup> *R. I. Stats.* 1882.

<sup>8</sup> *Va. Code* 1873.

3. — In  
where

59 Miss.

Comm'rs,  
s Boiler  
Mo. App.

How. Pr.

62 Wis.

## CHAPTER CLXXVI.

## THE AFFIDAVIT.

- § 3522. Affidavit required to give court jurisdiction — Collateral attack of judgment.
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§ 3522. **Affidavit Required to Give Court Jurisdiction — Collateral Attack of Judgment.** — All the statutes require, as a preliminary to the issuance of a writ of attachment, that the plaintiff or creditor make an affidavit that one or more of the statutory grounds for the issue of a writ exist. The jurisdiction of the court depends upon this affidavit, and unless this jurisdiction exists, the writ and all subsequent proceedings founded upon it are void. Therefore, if there be no affidavit, or if the affidavit be so defective as not to be amendable, the whole proceedings are void.<sup>1</sup> But if the affidavit tends to make out a case for the creditor, but is defective in form, the subsequent proceedings cannot be attacked collaterally.<sup>2</sup> If there

<sup>1</sup> *Waples on Attachment*, 77; *Staples v. Fairchild*, 3 N. Y. 41; *Miller v. Brinkerhoff*, 4 Denio, 118; 47 Am. Dec. 242; *Greenway v. Mead*, 26 N. J. L. 303; *Maples v. Tunis*, 11 Humph. 108; 53 Am. Dec. 779; *Matthews v. Densmore*, 43 Mich. 461; *Bray v. McClury*, 55 Mo. 128; *Hargadine v. Van Horn*, 72 Mo. 370.

<sup>2</sup> *Wade on Attachment*, sec. 55; *Webber v. Weitling*, 3 N. J. Eq. 441; *Skinner v. Moore*, 2 Dev. & B. 138; 30

be no affidavit at all, or one with a total absence of the grounds prescribed by law as essential to the issue of the writ, the writ so issued will be without jurisdiction, and all subsequent proceedings will be void.<sup>1</sup> In case of several orders of attachment issued at the same time, or in succession, but one affidavit is necessary.<sup>2</sup> The affidavit may contain the requisites both of a complaint and affidavit, so as to dispense with any separate complaint.<sup>3</sup>

§ 3523. **Who may Make Affidavit.**—The affidavit may be made by the plaintiff, or his agent or attorney.<sup>4</sup> An affidavit in an action by a corporation may be made by its agent.<sup>5</sup> In an affidavit made by an agent or attorney, he must describe himself as such,<sup>6</sup> and having done so, it is not necessary for him to swear that he is the agent or attorney of the plaintiff.<sup>7</sup> He must state that he makes it on behalf of the plaintiff.<sup>8</sup> Where the affidavit by statute is to be made "by the plaintiff, or some person for him," an affidavit made by one not the plaintiff will be held to be made for him.<sup>9</sup> But where it is to be made "by the plaintiff, or some one in his behalf," it must show that the affiant (if not the plaintiff) was his agent or attorney, or made it on his behalf.<sup>10</sup> He need not disclose his means of knowledge.<sup>11</sup> But he must state the grounds

Am. Dec. 155; *Moresi v. Swift*, 15 Nev. 215; *Russell v. Work*, 35 N. J. L. 316; *Crowell v. Johnson*, 2 Neb. 146; *Boothe v. Estes*, 16 Ark. 104; *Hardin v. Lee*, 51 Mo. 241.

<sup>1</sup> *Drake on Attachment*, sec. 89.

<sup>2</sup> *Thompson v. Stetson*, 15 Neb. 112.

<sup>3</sup> *Dunn v. Crocker*, 22 Ind. 324.

<sup>4</sup> *Waples on Attachment*, 81; *Flake v. Day*, 22 Ala. 132; *Murray v. Cone*, 8 Port. 250; *Cribben v. Schillinger*, 30 Hun, 248; *Bates v. Pinstein*, 15 Abb. N. C. 480; *Franklin Sav. Inst. v. Bank*, 1 Met. (Ky.) 156; *Weaver v. Roberts*, 84 N. C. 493; *Beer v. Hooper*, 32 Miss. 246. *Contra*, *Didier v. Kerr*, 12 Gill & J. 499; *Mantz v. Hendley*, 2 Hen. & M. 308. Either the attorney at law or in fact: *Clark v. Morse*, 16 La. 575; *Austin v. Latham*, 19 La. 88. See *Wetmore*

*v. Daffin*, 5 La. Ann. 496; *Rausch v. Moore*, 48 Iowa, 611; 30 Am. Rep. 412.

<sup>5</sup> *Trenton Banking Co. v. Haverstick*, 11 N. J. L. 171.

<sup>6</sup> *Willis v. Lyman*, 22 Tex. 268; *Manley v. Headly*, 10 Kan. 88; *Tessier v. Crowley*, 16 Neb. 369.

<sup>7</sup> *Wetherwax v. Paine*, 2 Mich. 555; *Evans v. Lawson*, 64 Tex. 199.

<sup>8</sup> *Wiley v. Aultman*, 53 Wis. 560;

*Miller v. R. R. Co.*, 58 Wis. 310.

<sup>9</sup> *Mandel v. Peet*, 18 Ark. 236; *Gilkeson v. Knight*, 71 Mo. 403.

<sup>10</sup> *Wiley v. Aultman*, 53 Wis. 560; *Miller v. R. R. Co.*, 58 Wis. 310.

<sup>11</sup> *Gilkeson v. Knight*, 71 Mo. 403; *Rice v. Morner*, 64 Wis. 599; *Anderson v. Wehe*, 58 Wis. 615. *Contra*, *Cribben v. Schillinger*, 30 Hun, 248; *Marine Bank v. Ward*, 35 Hun, 395.

for the attachment positively, though he may state the amount to the best of his belief.<sup>1</sup> Although the statute authorizes the affidavit to be made by an "attorney," one attorney may verify some of the essential facts, and another attorney the others.<sup>2</sup>

§ 3524. **Before Whom Taken.**—The affidavit need not be taken before the officer who issues the writ; any officer authorized to take oaths will do.<sup>3</sup> An officer, as plaintiff, cannot make an affidavit before his own deputy,<sup>4</sup> nor can a party properly take it before his own attorney.<sup>5</sup>

§ 3525. **Form of Affidavit.**—Where the plaintiff files a petition sworn to, this will take the place of an affidavit,<sup>6</sup> provided it contain all the statutory essentials of an affidavit.<sup>7</sup> The affiant should sign the affidavit, but his omission to do so is not fatal if it can be otherwise shown that he made the oath;<sup>8</sup> nor is the signature of the officer to the jurat absolutely necessary, if it can be shown in other ways that the oath was administered.<sup>9</sup> So the omission of the official designation of the officer after his name is not fatal;<sup>10</sup> nor the omission of his seal.<sup>11</sup> The omission of a venue in the affidavit is not fatal.<sup>12</sup> Unless required

<sup>1</sup> *Stowers v. Carter*, 28 Ga. 351.

<sup>2</sup> *Lewis v. Stewart*, 62 Tex. 352.

<sup>3</sup> *Wright v. Smith*, 66 Ala. 545; *Minnece v. Jeter*, 65 Ala. 222; *Dorr v. Clark*, 7 Mich. 310; *Rowley v. Berrian*, 12 Ill. 198. Even the clerk of another county from where the writ is issued: *Wright v. Smith*, 66 Ala. 545; *Wicker v. Schofield*, 39 Ga. 210. Or an authorized officer in another state: *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9; 74 Am. Dec. 124.

<sup>4</sup> *Owens v. Johns*, 59 Mo. 89. A notary public was an employee of a bank, in which a member of a firm desiring an attachment was also an employee and stockholder. Held, not to create such a relation between the two as made it improper for the notary to issue the attachment: *Georgia Ice Co. v. Porter*, 70 Ga. 637.

<sup>5</sup> *Bliss v. Molter*, 58 How. Pr. 112.

<sup>6</sup> *Miller v. Chandler*, 29 La. Ann. 88; *Watts v. Harding*, 5 Tex. 386; *Shaffer v. Sundwall*, 33 Iowa, 579; *Scott v. Doneghy*, 17 B. Mon. 321.

<sup>7</sup> *Endel v. Leibrock*, 33 Ohio St. 254.

<sup>8</sup> *Redus v. Wafford*, 4 Smedes & M. 579; *Hitsman v. Garrard*, 16 N. J. L. 124; *Bates v. Robinson*, 8 Iowa, 310; *Stout v. Folger*, 34 Iowa, 71; *West Tennessee Agricultural etc. Ass'n v. Madison*, 9 Lea, 407. *Contra*, *Cohen v. Manco*, 28 Ga. 27; *Hargadine v. Van Horn*, 72 Mo. 370.

<sup>9</sup> *English v. Wall*, 12 Rob. (La.) 132; *Kruse v. Wilson*, 79 Ill. 233; *Wiley v. Bennett*, 9 Baxt. 581.

<sup>10</sup> *Singleton v. Wofford*, 4 Ill. 576. But see *Birdsong v. McLaren*, 8 Ga. 521.

<sup>11</sup> *Finn v. Rose*, 12 Iowa, 565.

<sup>12</sup> *Struthers v. McDowell*, 5 Neb. 491.

by statute, the affidavit need not show that an action has been commenced or summons issued.<sup>1</sup> But the cause of action must be shown in the affidavit.<sup>2</sup> It need not recite the allegations of the complaint. It is enough if, in general terms describing the demand, it shows it to be that on which suit is brought.<sup>3</sup> And surplusage in an affidavit will not vitiate it.<sup>4</sup>

**§ 3526. Writ Issuing on Affidavit Alone — Officer's Duty only Ministerial.**— Where the affidavit is required only to state the existence of a ground of attachment, and thereupon the writ is to be issued, the officer's duty is merely ministerial; i. e., to see if the affidavit conforms to the statute, and not to inquire into the truth of the allegations it contains.<sup>5</sup>

**§ 3527. Existence of Grounds to be Proved by Party — Officer's Duty Judicial.**— But in other states the existence of the ground of attachment must be proved to the satisfaction of the judge or officer issuing the writ. Here he acts judicially. "In every such case evidence

<sup>1</sup> *Pickhardt v. Antony*, 27 Hun, 269; *Blake v. Sherman*, 12 Minn. 420.

<sup>2</sup> *Pomeroy v. Ricketts*, 27 Hun, 242.

<sup>3</sup> *Bowers v. London Bank*, 3 Utah, 417.

<sup>4</sup> *Spear v. King*, 6 Smedes & M. 276; *Farley v. Farior*, 6 La. Ann. 725. But see *Emmet v. Yeigh*, 12 Ohio St. 335.

<sup>5</sup> *Ferris v. Carlton*, 8 Phila. 549; *Reyburn v. Brackett*, 2 Kan. 227; 83 Am. Dec. 457; *Mayhew v. Dudley*, 1 Pinn. 95; *Harrison v. King*, 9 Ohio St. 388; *Coston v. Page*, 9 Ohio St. 397; *Crawford v. Roberts*, 8 Or. 324; *Ellison v. Tallon*, 2 Neb. 14. In *Wheeler v. Farmer*, 38 Cal. 215, the court said: "The objection that the affidavit does not state the probative facts necessary to establish the ultimate facts required by statute to be shown as the basis of the writ is not well taken. Under our statute, it is the duty of the clerk of the court in which the suit is commenced to issue the writ upon the filing by the plain-

tiff of an affidavit stating the ultimate facts in the language of the statute, together with an undertaking in amount and form as defined by statute. Upon such compliance with the statute, the plaintiff demands, as a right, the issuance of the writ, and in issuing the writ, the clerk has no discretionary power. He but performs a ministerial duty in obedience to a plain statutory mandate. The authorities cited from New York reports to which our attention is called by appellant are all applicable to cases arising under the revised statutes and codes of procedure of that state, each of which, in essential particulars, is different from our statute. There the issuance of the writ, both under the revised statutes and code, is only upon the order of a judicial officer to whom application for the writ is made, who, in a judicial capacity, acts upon the application, and either grants or denies the writ."



must be presented to and acted on by the officer. He cannot act upon his own knowledge or mere belief, however well founded it may be, nor upon report or information. If proof be presented to him, a mere error in judgment as to its legality or sufficiency will impose no liability upon him; but there must be some proof."<sup>1</sup> Thus where an attachment is allowed whenever it shall appear by affidavit that for "good and sufficient reason the plaintiff will be in danger of losing" his debt unless an attachment issue, a statement is required of the facts relied on to show the danger to the creditor of losing such debt; and the competency and sufficiency of these facts for that purpose are referred to the sound discretion of the officer to whom application for the writ is made.<sup>2</sup>

**§ 3528. What Affidavit must Show.**—The two principal averments in the affidavit are: 1. The indebtedness of the defendant; and 2. The grounds for the exercise of the extraordinary remedy to secure it. The first, as in all actions upon contract, is essential to the plaintiff's recovery as a matter of pleading, with this addition, that the certainty of statement required by the statute must be

<sup>1</sup> Drake on Attachment, sec. 99; *Skinnion v. Kelley*, 18 N. Y. 355; *Easton v. Malavasi*, 7 Daly, 147; *Allen v. Myer*, 7 Daly, 229; *Vosburgh v. Welch*, 11 Johns, 175. In *Miller v. Brinkerhoff*, 4 Denio, 118, 47 Am Dec. 242, *Bronson, C. J.*, said: "When certain facts are to be proved to a court of special and limited jurisdiction as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. This is sufficiently established by the cases cited at the bar, as well as by many others to be found in the books. But when the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be

slight and inconclusive, the process will be valid, until it is set aside by a direct proceeding for that purpose. In one case the court acts without authority; in the other, it only errs in judgment upon a question properly before it for adjudication: *Matter of Faulkner*, 4 Hill, 598; *Harman v. Brotherson*, 1 Denio, 537; *Vosburgh v. Welch*, 11 Johns, 175; *Tallman v. Bigelow*, 10 Wend. 420. In one case, there is a defect of jurisdiction; in the other, there is only an error of judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight and importance of evidence only makes the act erroneous, and it will stand good until reversed."

<sup>2</sup> *Keigher v. McCormick*, 11 Minn. 545.

followed.<sup>1</sup> Thus the following statements as to the claim and indebtedness have been held essential to the validity of the affidavit: The amount of the indebtedness;<sup>2</sup> that the claim is just;<sup>3</sup> that no part of the debt is paid;<sup>4</sup> the existence of a cause of action;<sup>5</sup> the grounds of the action;<sup>6</sup> the nature of the indebtedness, i. e., in what manner the

<sup>1</sup> Wade on Attachment, sec. 65; Waples on Attachment, 86; Frisbie v. Williamson, 16 N. J. L. 61; Yarnall v. Haddaway, 4 Harr. (Del.) 437.  
<sup>2</sup> Klenk v. Schwalm, 19 Wis. 111; Flower v. Griffith, 12 La. 345; Morrison v. Ream, 1 Pinn. 244; Espey v. Heidenheimer, 58 Tex. 662; Joiner v. Perkins, 59 Tex. 300; Marshall v. Alley, 25 Tex. 342. "The statute gives no latitude of statement in the affidavit as to the amount due; some fixed and definite sum to which the affiant can positively depose must be named. In estimating the amount so positively stated, the utmost exactness is not required. It may be a little more or a little less than the real amount without vitiating the proceedings, provided that the sum be such that the affiant can conscientiously depose to its correctness. But the amount named must be certain, leaving no room for speculation on the face of the affidavit": Lathrop v. Snyder, 16 W. s. 293. But this need not be sworn to positively; it is sufficient if he swear to the best of his knowledge and belief: Powell v. Hampton, Cam. & N. 86, 299. It need not disclose the evidence, as a bond or note, etc., but only the sum claimed as due: Fleming v. Burge, 6 Ala. 373. In a suit for damages for breach of contract, it must show the specific amount of damages: Golden Gate Concentrator Co. v. Jackson, 13 Abb. N. C. 476. The writ cannot be had where the damages demanded are uncertain in amount: Wilson v. Louis Cook Mfg. Co., 88 N. C. 5. The statement of an amount "as near as this plaintiff is able to determine" is insufficient: Hawes v. Clement, 64 Wis. 152. But where the bill states the amount of the defendant's indebtedness, it is not necessary the affidavit should state it:

Foster v. Hall, 4 Humph. 346; Morgan v. Johnson, 15 Tex. 568; Kennedy v. Morrison, 31 Tex. 207.  
<sup>3</sup> Taylor v. Smith, 17 B. Mon. 536; Worthington v. Cary, 1 Met. (Ky.) 470; Allen v. Brown, 4 Met. (Ky.) 342; Bailey v. Beadles, 7 Bush, 383; Wilkins v. Tourtellott, 28 Kan. 825; Livengood v. Shaw, 10 Mo. 273; Gulman v. Virginia Iron Co., 5 W. Va. 22; Ludlow v. Ramsay, 11 Wall. 581; Evans v. Tucker, 59 Tex. 249. An affidavit that "the plaintiffs are justly entitled to recover" the sum claimed is sufficient: Gutman v. Virginia Iron Co., 5 W. Va. 22. If the affidavit shows that the claim is just, it is sufficient, although no positive statement of the justice of the claim is made: Wilkins v. Tourtellott, 28 Kan. 825.  
<sup>4</sup> Turner v. McDaniel, 1 McCord, 552.  
<sup>5</sup> Manton v. Poole, 67 Barb. 330; Pomeroy v. Ricketts, 27 Hun, 242; Smith v. Davis, 29 Hun, 306; Blakely v. Bird, 12 Iowa, 601. An affidavit which fails to show a breach of the contract set forth is defective: Smadbeck v. Sisson, 66 How. Pr. 220; Reilly v. Sisson, 31 Hun, 572.  
<sup>6</sup> Zerega v. Benoist, 7 Rob. (N. Y.) 199; 33 How. Pr. 129; Richter v. Wise, 6 Thomp. & C. 70. The omission affects the jurisdiction, and cannot be remedied by amendment. The attachment must be set aside: Zerega v. Benoist, 33 How. Pr. 129; 7 Rob. (N. Y.) 199. *Contra*, Day v. Bennett, 18 N. J. L. 287; Irvin v. Howard, 37 Ga. 18; Shaduck v. Marsh, 21 N. J. L. 434. It is sufficient to aver the grounds in the language of the statute, as by alleging that defendant fraudulently contracted the debt, etc., without setting out in detail the circumstances constituting or proving the fraud: Ellison v. Tallon, 2 Neb. 14.

debt accrued;<sup>1</sup> that he is not indebted to the defendant;<sup>2</sup> that the sum demanded is actually due.<sup>3</sup>

**§ 3529. Affidavit must Follow Strictly the Grounds Specified in Statute.** — The affidavit must follow the statute. If the statute specifies several grounds, upon any of which the writ may issue, the affiant must swear to the

<sup>1</sup> In *re Hollingshead*, 6 Wend. 553; *Smith v. Luce*, 14 Wend. 237; *Phelps v. Young*, 1 Ill. 255; *Haywood v. McCrory*, 33 Ill. 459; *Theirman v. Vahle*, 32 Ind. 400; *Ferguson v. Smith*, 10 Kan. 394; *Bartlett v. Ware*, 74 Me. 292; *Richter v. Wise*, 6 Thomp. & C. 70; 3 Hun, 398; *Cox v. Wallis*, 34 Md. 460. An affidavit which does not state the nature of the debt, whether by note, bill, or breach of contract, is defective; and all proceedings under such an affidavit are void: *Sullivan v. Fugate*, 1 Heisk. 20. An affidavit to sue out an attachment for purchase-money must so describe the property for which the debt was created, and in possession of the debtor, as to certify to the officer making the levy what property he is authorized to seize and sell: *Waxelbaum v. Paschal*, 64 Ga. 275. In proceedings to subject by attachment the property of a married woman, the account annexed was simply for "professional service as per agreement, \$200," without further specification. Held, defective: *Hoffman v. Reed*, 57 Md. 370. But it is sufficient to show "the nature of the plaintiff's claim." It is not required to set forth every item of the account: *Theirman v. Vahle*, 32 Ind. 400. In California, the affidavit need not state the facts out of which the indebtedness of the defendant to the plaintiff arose: *Weaver v. Hayward*, 41 Cal. 117. An affidavit that "the claim in this action is for money due on three promissory notes, copies of which are filed with the complaint, executed by defendants to plaintiff," sufficiently describes the nature of the claim: *Fremont Cultivator Co. v. Fulton*, 103 Ind. 393. So an affidavit which states, in the language of the statute, that the indebtedness for which suit is brought is "due upon contract, express or implied," is suffi-

cient, without stating more precisely the nature of such contract: *Klenk v. Schwalm*, 19 Wis. 111.

<sup>2</sup> *Turner v. McDaniel*, 1 McCord, 552; *Morrison v. Ream*, 1 Pinn. 244; *Holston Mfg. Co. v. Lea*, 18 Ga. 647. Some statutes require that the affidavit should state the amount to be over and above all counterclaims, offsets, etc., of the defendant. This must, in such cases, be particularly set out: *Donnell v. Williams*, 21 Hun, 216; *Ruppert v. Haug*, 87 N. Y. 141; *Lampkin v. Douglass*, 10 Abb. N. C. 342; 27 Hun, 517; *Murray v. Hankin*, 30 Hun, 37; *Cribben v. Schilling*, 30 Hun, 248; *Lyon v. Blakesly*, 19 Hun, 297; *Trow's Printing Co. v. Hart*, 60 How. Pr. 190. That "the defendant is indebted to the plaintiff in the sum stated, and that he is justly entitled to recover said sum," is not sufficient: *Ruppert v. Haug*, 87 N. Y. 141; 62 How. Pr. 364.

<sup>3</sup> *Zinn v. Dzialynski*, 13 Fla. 597; *Bowen v. Slocum*, 17 Wis. 181; *Trowbridge v. Sickler*, 42 Wis. 417; *Mathews v. Densmore*, 43 Mich. 461. The writ will not lie for debts not due: *Davis v. Eppinger*, 18 Cal. 378; 79 Am. Dec. 184; *Stacy v. Stichton*, 9 Iowa, 399; *Young v. Broadbent*, 23 Iowa, 539; *Swift v. Crocker*, 21 Pick. 241. A statement that the defendants are indebted to the plaintiffs in a sum named, "over and above all legal set-offs, and that the said indebtedness is for a bill of merchandise purchased by said plaintiffs," shows that the sum named is "due": *Trowbridge v. Sickler*, 42 Wis. 417, reversing *Bowen v. Slocum*, 17 Wis. 181; *Whitney v. Brunette*, 15 Wis. 61. And see *Ruthe v. R. R. Co.*, 37 Wis. 344. If the whole of the claim is not due at the time, the affidavit should state how much is due: *Sydnor v. Totman*, 6 Tex. 189.

existence of one or more of the grounds, in the language and words of the statute, and following the statute form, if any is prescribed.<sup>1</sup> Where a form is prescribed by statute for proceedings in attachment, it should be followed, and an affidavit which follows the statute is sufficient. But where none is specified, there should be a substantial compliance with all the requirements of the law.<sup>2</sup> The grounds may be stated in the affidavit in the language of the statute, without specifying more particularly the facts intended to be alleged.<sup>3</sup> The affidavit is defective if, instead of stating necessary facts, it states merely inferences and conclusions of law.<sup>4</sup> But it has been ruled in some cases that a substantial compliance with the terms of the statute, by the use of language which necessarily implies the case provided for by the law, will satisfy the court.<sup>5</sup>

<sup>1</sup> Lankin v. Douglass, 27 Hun, 517; Emmet v. Yeigh, 12 Ohio St. 335; Shockley v. Bulloch, 18 Ga. 283; Harrill v. Humphries, 26 Ga. 514; Moody v. Levy, 58 Tex. 532; Hilton v. Ross, 9 Neb. 406; Richards v. Donaughey, 13 Phila. 514; McCollem v. White, 23 Ind. 43; Reyburn v. Brackett, 2 Kan. 227; 83 Am. Dec. 457; Matthews v. Dare, 20 Md. 248; Crayne v. Wells, 2 Ill. App. 574; Napper v. Noland, 9 Port. 218; Thompson v. Chambers, 12 Smedes & M. 488; Poage v. Poage, 3 Dana, 579 (but see Miller v. Munson, 34 Wis. 579; 17 Am. Rep. 261); Hopkins v. Suttles, Hardin, 95, note; Davis v. Edwards, Hardin, 342; Bennett v. Avant, 2 Sneed, 152; McCulloch v. Foster, 4 Yerg. 162; Drew v. Dequindre, 2 Doug. 503; McHaney v. Cawthorn, 4 Heisk. 508; Jackson v. Burke, 4 Heisk. 610; Aden v. Fleming, 14 Rich. 196; Powers v. Hurst, 3 Blackf. 229; Lane v. Fellows, 1 Mo. 251; Alexander v. Haden, 2 Mo. 187; Reding v. Ridge, 14 La. Ann. 36; New Orleans v. Garland, 11 La. Ann. 438; Millaudon v. Foucher, 3 La. 582; Mantz v. Hendry, 2 Hen. & M. 398; Levy v. Millman, 7 Ga. 167; Brown v. McCluskey, 26 Ga. 577; Love v. Young, 69 N. C. 65; Croxall v. Hutchings, 12 N. J. L. 84; Miller v. Brinkerhoff, 4 Denio,

118; 47 Am. Dec. 242; Biddle v. Black, 99 Pa. St. 380; Delaplain v. Armstrong, 21 W. Va. 211.

<sup>2</sup> Shockley v. Bulloch, 18 Ga. 283; Harrill v. Humphries, 26 Ga. 514; McCollem v. White, 23 Ind. 43; Reyburn v. Brackett, 2 Kan. 227; 83 Am. Dec. 457; Matthews v. Dare, 20 Md. 248.

<sup>3</sup> Fallon v. Ellison, 3 Neb. 63.

<sup>4</sup> Wilmerding v. Cunningham, 65 How. Pr. 344.

<sup>5</sup> Franklin v. Chaffin, 49 Md. 24; Van Kirk v. Wilds, 11 Barb. 520; Curtis v. Settle, 7 Mo. 452; Lee v. Peters, 1 Smedes & M. 503; Dandridge v. Stevens, 12 Smedes & M. 723; Wallis v. Wallace, 6 How. (Miss.) 254; Graham v. Ruff, 8 Ala. 171; Wiltse v. Stearns, 13 Iowa, 282; Runyan v. Morgan, 7 Humph. 210; Ware v. Todd, 1 Ala. 199; Parmele v. Johnson, 15 La. 429; Sawyer v. Arnold, 1 La. Ann. 315; Kennon v. Evans, 36 Ga. 89; Mandel v. Peet, 18 Ark. 236; Commercial Bank v. Ullman, 10 Smedes & M. 411; Bank of Alabama v. Berry, 2 Humph. 443; Boyd v. Buckingham, 10 Humph. 434; Frere v. Perret, 25 La. Ann. 500; Hatley v. Patterson, 47 Ala. 271; Free v. Hukill, 44 Ala. 197; Stevens v. Middleton, 26 Hun, 470; Creaser v. Young, 31 Ohio St. 57; Cheadle v. Riddle, 6 Ark. 480.

§ 3530. **Affidavit on "Knowledge," "Information," or "Belief."**—As to what is sufficient proof depends for the most part upon the language of the statutes. That the affiant "believes" the ground to exist has been held sufficient,<sup>1</sup> and under other statutes, insufficient.<sup>2</sup> If the statute requires a fact to be sworn to in direct terms, it will not do for the affiant to swear that he is "informed and believes," or "verily believes," or "has reason to apprehend" the fact to be so.<sup>3</sup> Where the statute requires the affiant to state that the facts are within his knowledge, or he is "informed and believes" that they are true, a positive oath that the facts are true is sufficient.<sup>4</sup> Under a statute requiring an affidavit on "knowledge and belief," an affidavit stating the affiant's belief alone,<sup>5</sup> or knowledge alone,<sup>6</sup> is insufficient, and a requirement that he "verily believes" is not satisfied by swearing "to the best of his knowledge and belief."<sup>7</sup> An affidavit which states that the "affiant knows, or has good reason to believe," is not sufficient under a statute which requires a statement that

<sup>1</sup> In re Fitch, 2 Wend. 298; Ex parte Haynes, 18 Wend. 611; Shoonmaker v. Spencer, 54 N. Y. 366; Decker v. Bryant, 7 Barb. 182; Carey v. Gunnison, 51 Iowa, 202; Mitchell v. Pitts, 61 Ala. 219; Claussen v. Fietz, 13 S. C. 476; Bennett v. Edwards, 27 Hun, 352; Ginnis v. Bacon, Dud. (S. C.) 195; Blanchard v. Brown, 42 Mich. 46. For a person to swear that he has reason to believe, and does verily believe, a thing to be true, is equivalent to swearing that it is true: Simpkins v. Malatt, 9 Ind. 543. Where the statute requires a fact to be "shown," an affidavit on "belief" is good: Trew v. Gaskill, 10 Ind. 265; McNamara v. Ellis, 14 Ind. 516.

<sup>2</sup> Steuben Co. Bank v. Alberger, 78 N. Y. 252; Smith v. Luce, 14 Wend. 237; Tallman v. Bigelow, 10 Wend. 420; In re Faulkner, 4 Hill, 598; In re Bliss, 7 Hill, 187; Pierse v. Smith, 1 Minn. 82; Morrison v. Lovejoy, 6 Minn. 183; Ex parte Robinson, 21 Wend. 672; Kingsland v. Cowman, 5 Hill, 608; Claflin v. Baere, 57 How. Pr. 78; Neal v. Gordon, 60 Ga. 112;

Brown v. Crenshaw, 5 Baxt. 584; King v. Southwick, 66 How. Pr. 282; Newman v. Hexter, 4 McAr. 88; Hudkins v. Haskins, 22 W. Va. 645; Brown v. Massman, 71 Ga. 859; Ross v. Steen, 20 Fla. 443; Green v. Tripp, 11 R. I. 424; Garner v. White, 23 Ohio St. 192; Hunt v. Stein, 39 Mich. 368. An affidavit on information or belief is not good in Illinois: Dyer v. Flint, 21 Ill. 80; 74 Am. Dec. 73; Archer v. Claflin, 31 Ind. 316; Rowland v. Carroll, 81 Ill. 227; Bassett v. Bratton, 86 Ill. 158.

<sup>3</sup> Deupree v. Eisenach, 9 Ga. 598; Greene v. Tripp, 11 R. I. 424; Brown v. Crenshaw, 5 Baxt. 584; Wilson v. Arnold, 5 Mich. 98; Williams v. Martin, 1 Met. (Ky.) 42; Dyer v. Flint, 21 Ill. 80; 74 Am. Dec. 73; Archer v. Claflin, 31 Ill. 306; Cadwell v. Colgate, 7 Barb. 253; Ex parte Haynes, 18 Wend. 611.

<sup>4</sup> Jones v. Leake, 11 Smedes & M. 591.

<sup>5</sup> Bergh v. Jayne, 7 Mart. (N. S.) 609.

<sup>6</sup> Cobb v. Force, 6 Ala. 468.

<sup>7</sup> Stadler v. Parmlee, 10 Iowa, 23.

the "plaintiff knows or believes."<sup>1</sup> A statute authorizing an attachment, where there is "good reason to believe" a fact, does not authorize it on an affidavit that "it is the plaintiff's belief" that the fact exists.<sup>2</sup> An affidavit that the affiant "thinks" the plaintiff ought to recover the sum claimed is not equivalent to an affidavit that he "believes" he ought to recover such sum.<sup>3</sup>

§ 3531. Debtor "About" to do Certain Act — Construction of "About." — It is a common ground of attachment, given by the statutes of perhaps all the states, that the debtor is about to do a certain act, — "about" to abscond; "about" to remove his property; "about" to dispose of his goods, as the case may be. The construction to be given to the word "about," in this connection, has been before the courts, and has resulted in a difference of judicial opinion, one court holding that, to justify the allegation, the debtor must be on the very eve of doing the act;<sup>4</sup> another court holding that no such nearness of action on his part is necessary, if the debtor has formed the intention.<sup>5</sup>

<sup>1</sup> Dean v. Oppenheimer, 25 Md. 368.

<sup>2</sup> Stevenson v. Robbins, 5 Mo. 18;  
Hunt v. Shaw, 39 Mich. 368.

<sup>3</sup> Rittenhouse v. Harman, 7 W. Va.  
380.

<sup>4</sup> Jackson v. Burke, 4 Heisk. 610.

<sup>5</sup> In Myers v. Farrell, 47 Miss. 281, the supreme court of Mississippi say: "What is the meaning of the terms 'about to remove'? 'About,'—does that imply the next hour, or day, or week, or month? Does the statute convey the idea that necessarily the act must be done within any definite space of time? The implication is quite strong that the 'removal' will shortly occur, but no more definiteness and precision is set forth than the word 'about' imports. Among the definitions or senses in which the word is used, given by lexicographers, are 'near to, in performance of some act,' 'concerned in,' 'engaged in.' It is an ordinary word of no artificial or

technical signification, and should receive the rendering which is given to it in common parlance. If the debtor is engaged in the act, or is near to the performance of the act, 'of removal,' if he entertains the purpose, and is making preparations to carry it out, then the creditor is entitled to the writ. It would be hurtful in practice to attempt to declare precisely what is implied in the terms 'about to remove.' For experience would show that many meritorious cases would fall within the intendment of the remedy which might be excluded by a rule laid down in advance. We think it wiser and safer, in the administration of practical justice, to leave each case, as it arises, to be governed by its own special facts." The court held it error to refuse an instruction "that the jury may infer the purpose to remove, at the date of the attachment, from the previous expressions of such

§ 3532. **Several Grounds may be Alleged in One Affidavit.** — The plaintiff may allege any number of grounds of attachment he pleases;<sup>1</sup> and if one of them is proved, it will support the writ, though the others are disproved or not properly sustained.<sup>2</sup> But the grounds must not be inconsistent with each other, or both will fail.<sup>3</sup>

§ 3533. **Grounds must not be Stated in Alternative—Exception.** — But the statement of two grounds of attachment in the alternative is bad;<sup>4</sup> as that the defendant "has transferred or secreted" his property;<sup>5</sup> or that he "has assigned, or is about to assign, his property";<sup>6</sup> or "that the payment of the same has not been secured by any mortgage or lien on real or personal property, or any pledge upon personal property; 'or,' if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become valueless."<sup>7</sup> Where, however, the disjunctive "or" is used, "not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same results," the affidavit is good;<sup>8</sup> as that the defendants "were

design, and the acts of the debtor; nor is it necessary that the defendant purposed immediate removal, if the evidence [showed] that the design existed, and his actions purposed to carry that design into execution, at some short time thereafter, and as soon as he had prepared his affairs for removal, and without paying his debts."

<sup>1</sup> *Kennon v. Evans*, 36 Ga. 89; *Irvin v. Howard*, 37 Ga. 18.

<sup>2</sup> *McCollem v. White*, 23 Ind. 43; *Lawver v. Langhans*, 85 Ill. 138; *Rosenheim v. Fifield*, 12 Ill. App. 302; *Keith v. Stetter*, 25 Kan. 100; *Dunlap v. McFarland*, 25 Kan. 488; *Tucker v. Frederick*, 28 Mo. 574; 75 Am. Dec. 139.

<sup>3</sup> An affidavit set forth as one ground that the defendant had disposed of his property, and as another that he was about to dispose of it. Held, in-

consistent and bad: *Dunnenbaum v. Schram*, 59 Tex. 281. But see *Nelson v. Munch*, 23 Minn. 239.

<sup>4</sup> *Hagood v. Hunter*, 1 McCord, 511; *Devall v. Taylor*, Cheves, 5; *Haynes v. Powell*, 1 Lea, 347; See *Jewel v. Howe*, 3 Watts, 144; *Wray v. Gilmore*, 1 Miles, 75; *Hawley v. Delmas*, 4 Cal. 195; *Wilke v. Cohn*, 54 Cal. 212; *Carpenter v. Pridgen*, 40 Tex. 32; *Kegeln Schrenkheisen*, 37 Mich. 175; *Dunnenbaum v. Schram*, 59 Tex. 281. *Contra*, *Hawley v. Trabue*, 4 D. R. 644; *Wood v. Wells*, 2 Bus. 11.

<sup>5</sup> *Hopkins v. Nichols*, 22 Tex. 206; *Garner v. Burdison*, 26 Tex. 348; *Culbertson v. Cabeen*, 29 Tex. 247.

<sup>6</sup> *Miller v. Munson*, 34 Wis. 579; 17 Am. Rep. 461.

<sup>7</sup> *Wilke v. Cohn*, 54 Cal. 212.

<sup>8</sup> *Drake on Attachment*, sec. 102; *Cannon v. Logan*, 5 Port. 77; *Bosbyshell v. Emanuel*, 12 Smedes & M. 63;

about to convert their property, or a part thereof, into money, for the purpose of placing it beyond the reach of creditors;<sup>1</sup> or that the party "has property or rights in action which he conceals";<sup>2</sup> or that the defendant "is indebted to said defendant, or has in his hands effects of said defendant."<sup>3</sup>

§ 3534. **Affidavit must not be Uncertain.**—The affidavit is bad if uncertain.<sup>4</sup> The facts must be alleged positively; not left to be gathered from recitals or by inference.<sup>5</sup> An affidavit alleging indebtedness of the defendant to the plaintiff upon a contract, express or implied, is insufficient.<sup>6</sup> So is an affidavit stating that defendant has disposed of "his property, or any part thereof."<sup>7</sup> So is an allegation that "said defendant is in some manner about to dispose of his property without leaving sufficient remaining for the payment of his debts."<sup>8</sup> An affidavit is bad which

Van Alstyne v. Erwine, 11 N. Y. 331; Parsons v. Stockbridge, 42 Ind. 121; Klenk v. Schwalm, 19 Wis. 111; Morrison v. Fake, 1 Pinn. 133; McCraw v. Welch, 2 Col. 284; Blum v. Davis, 56 Tex. 423; Wilke v. Cohn, 54 Cal. 212; Stokes v. Potter, 10 R. I. 576; Penniman v. Daniel, 90 N. C. 154; Kuhn v. Embry, 35 La. Ann. 488; Howard v. Oppenheimer, 25 Md. 350; Dean v. Oppenheimer, 25 Md. 368; Irvin v. Howard, 37 Ga. 18; Hawley v. Trabue, 4 Bush, 644. An affidavit charged that the defendant "so absconds 'or' conceals himself that process cannot be served on him," held bad: Conrad v. McGee, 9 Yerg. 428. "Although," said the court, "the two words are connected by 'or' instead of 'and,' yet the sense of the sentence shows that 'or' is used copulatively, constituting both 'absconds' and 'conceals,' or either of them, a sufficient cause for suing out the attachment. In the nature of things, a plaintiff cannot tell whether a party absconds or conceals himself. He may suppose he absconds, when he only conceals himself, and vice versa. To compel him to swear that the party is doing

the one only would involve the plaintiff in endless difficulty. Besides, the question of conscience that must always exist with the party about to take the oath, he would be constantly in danger of having his attachment abated on the plea of the defendant, who, though he might not have absconded, was nevertheless concealed, or if not concealing himself, may have been absconding. We think, therefore, that the words 'so absconds or conceals himself' constitute but one cause."

<sup>1</sup> Blum v. Davis, 56 Tex. 423.

<sup>2</sup> Sandheger v. Hosey, 26 W. Va. 221.

<sup>3</sup> White v. Lynch, 26 Tex. 195.

<sup>4</sup> Jacoby v. Gogell, 5 Serg. & R. 450; Friedlander v. Myers, 2 La. Ann. 920; Quarles v. Robinson, 1 Chaud. 29; Munroe v. Cocke, 2 Cranch C. C. 465; Merrill v. Lowe, 1 Pinn. 221; Neal v. Gordon, 60 Ga. 112; Pomeroy v. Ricketts, 27 Hun, 242; Bruce v. Conyers, 54 Ga. 678.

<sup>5</sup> Manton v. Poole, 67 Barb. 330.

<sup>6</sup> Hawley v. Delmas, 4 Cal. 195.

<sup>7</sup> Goodyear Rubber Co. v. Knapp, 61 Wis. 103.

<sup>8</sup> Mingus v. McLeod, 25 Iowa, 452.



charges inconsistent things, as that the debtor has secreted his property, and that he has disposed of it.<sup>1</sup> An affidavit that defendant is about to dispose of his property with intent to defraud creditors, and that he is about to convert his property into money to place it beyond the reach of creditors, shows no inconsistency.<sup>2</sup>

**§ 3535. At What Time Affidavit to be Made—And Filed.**—The affidavit<sup>3</sup> may be made a reasonable time before the writ is issued; it need not be made on the very day,<sup>3</sup> unless the statute, by implication or by express words, requires it.<sup>4</sup> It may be filed within a reasonable time after it is made.<sup>5</sup>

**§ 3536. How Objection that Affidavit Insufficient Raised.**—The method of objecting to an attachment on the ground that there is no affidavit, or that the affidavit is defective, is in some states by a motion to quash or dissolve the attachment;<sup>6</sup> in others, by a plea in abatement.<sup>7</sup> A defective affidavit may be taken advantage of on appeal or writ of error where the judgment was rendered upon default.<sup>8</sup> One desiring to have an irregularity in an attachment corrected must proceed at the first opportunity, or offer a reasonable excuse for not having done so.<sup>9</sup>

**§ 3537. Waiver of Defects in Affidavit or Process.**—But by appearing and answering, the defendant waives

<sup>1</sup> *Pearre v. Hawkins*, 62 Tex. 435.

<sup>2</sup> *Cleveland v. Boden*, 63 Tex. 103.

<sup>3</sup> *Creagh v. Delane*, 1 Nott & McC. 189; *Graham v. Bradbury*, 7 Mo. 281; *Wright v. Ragland*, 18 Tex. 289; *Adams v. Lockwood*, 30 Kan. 373.

Where an affidavit was made two days before the writ issued, it was held that judgment could not be supported: *Fessenden v. Hill*, 6 Mich. 242. So of an interval of eleven days between the making of the affidavit and the commencement of the attachment proceedings: *Foster v. Illinski*, 3 Ill. App. 345.

<sup>4</sup> *Drew v. Dequindre*, 2 Doug. (Mich.)

93; *Wilson v. Arnold*, 5 Mich. 98; *Fessenden v. Hill*, 6 Mich. 242.

<sup>5</sup> *Foster v. Illinski*, 3 Ill. App. 345.

<sup>6</sup> *Watson v. McAllister*, 7 Mart. (La.) 368.

<sup>7</sup> *Lowry v. Stowe*, 7 Port. 483; *Jones v. Pope*, 6 Ala. 154; *Burt v. Parish*, 9 Ala. 211; *Kirkman v. Patton*, 19 Ala. 32; *Garmon v. Barringer*, 2 Dev. & B. 502.

<sup>8</sup> *Adams v. Merritt*, 10 Ill. App. 275.

<sup>9</sup> *Smith v. Walker*, 6 Rich. 169.

defects in the preliminary proceedings.<sup>1</sup> So by giving a bail bond.<sup>2</sup> An attachment is valid though there was no service on defendant, provided he appears voluntarily.<sup>3</sup> But appearing merely to move for the dismissal of the attachment or to object to the jurisdiction of the court does not waive preliminary defects.<sup>4</sup>

§ 3538. **Defective Affidavit may be Amended.**—A defective affidavit cannot be amended, unless the statute specifically authorizes it.<sup>5</sup> But in several states it is enacted that the affidavit may be amended or a new one filed.<sup>6</sup> A motion to amend may be granted, even after a motion has been made to quash the proceedings for the defect.<sup>7</sup>

<sup>1</sup> *Burt v. Parish*, 9 Ala. 211; *McDonald v. Fist*, 60 Mo. 172; *Garmon v. Barringer*, 2 Dev. & B. 502; *Stoney v. McNeill*, Harp. 156; *Bishop v. Fennerty*, 46 Miss. 570; *Watson v. McAllister*, 7 Mart. (La.) 368; *Enders v. The Henry Clay*, 8 Rob. (La.) 30; *Symons v. Northern*, 4 Jones, 241; *Woodruff v. Sanders*, 18 Wis. 161; *Blackwood v. Jones*, 27 Wis. 498; *Anderson v. Coburn*, 27 Wis. 558; *Orear v. Clough*, 52 Mo. 55; *Ryon v. Bean*, 2 Met. (Ky.) 137; *Payment v. Church*, 38 Mich. 776; *Brayton v. Freeze*, 1 Ind. 121. *Contra*, *Taylor v. Smith*, 17 B. Mon. 536.

<sup>2</sup> *Hill v. Harding*, 93 Ill. 77.

<sup>3</sup> *Pomeroy v. Ricketts*, 2, Hun, 242.

<sup>4</sup> *Johnson v. Buell*, 26 Ill. 66; *Blackwood v. Jones*, 27 Wis. 498; *Crary v. Barber*, 1 Col. 172; *Graham v. Spencer*, 14 Fed. Rep. 603; *Bonner v. Brown*,

10 La. Ann. 334; *Inman v. Allport*, 65 Ill. 540.

<sup>5</sup> *Wade on Attachment*, sec. 72; *Brown v. McCluskey*, 26 Ga. 577; *Cohen v. Manco*, 28 Ga. 27; *Marx v. Abramson*, 53 Tex. 264; *Slaughter v. Bevans*, 1 Pinn. 348; *Lillard v. Carler*, 7 Heisk. 664; *Hall v. Brazelton*, 46 Ala. 359.

<sup>6</sup> *Bunn v. Pritchard*, 6 Iowa, 56; *Watt v. Carnes*, 4 Heisk. 532; *Graves v. Cole*, 1 G. Greene, 405; *Hall v. Brazelton*, 40 Ala. 406; 46 Ala. 359; *Maples v. Tunis*, 11 Humph. 108; 53 Am. Dec. 779; *Allen v. Brown*, 4 Met. 342; *Campbell v. Whitstone*, 4 Ill. 361; *Tourney v. Gamble*, 66 Ala. 469; *Brown v. Hawkins*, 65 N. C. 645; *Rogers v. Cooper*, 33 Ark. 406; *Sherill v. Bench*, 37 Ark. 560; *Wiley v. Bennett*, 2 Baxt. 581. See *Greenvault v. Bank*, 2 Doug. (Mich.) 498.

<sup>7</sup> *Struthers v. McDowell*, 5 Neb. 491.

## CHAPTER CLXXVII.

## THE ATTACHMENT BOND.

- § 3539. Bond required of plaintiff in attachment suit.
- § 3540. Who to execute bond.
- § 3541. Sureties required.
- § 3542. The obligee in the bond.
- § 3543. Amount of bond.
- § 3544. When defects in bond must be taken advantage of.
- § 3545. Amendment of bond — When allowed.
- § 3546. Action on bond — Damages.
- § 3547. When attachment not “wrongful” — Belief — Facts.
- § 3548. Presumption that writ was rightfully sued out.
- § 3549. Actual damages recoverable on bond — Exemplary damages.
- § 3550. Damages to property.
- § 3551. Remote and speculative damages not recoverable.

**§ 3539. Bond Required of Plaintiff in Attachment Suit.**

—As a preliminary to the issuance of the writ, most of the states require the giving of a bond by the plaintiff.<sup>1</sup> But a voluntary bond not required by statute is good as a common-law bond.<sup>2</sup> A deposit of money cannot be taken in lieu of it.<sup>3</sup> An attachment issued and executed before filing the bond is fatally defective, though the bond is afterwards filed before motion to quash.<sup>4</sup> But the failure of the plaintiff to file a bond, in a proceeding by attachment, is no ground of demurrer to the cause of action.<sup>5</sup> The bond must be conditioned to prosecute the suit with effect, or pay all costs and damages that may be recovered in any suit that may be brought for wrongfully suing out the attachment; but no condition is necessary that the

<sup>1</sup> *Horne v. Mitchell*, 7 Bush, 131; 18 La. Ann. 305; 89 Am. Dec. 651; *Ballinger v. Lantier*, 15 Kan. 608; *United States v. Ottman*, 3 McAr. 73; *Jeffreys v. Dancy*, 44 Miss. 693; <sup>2</sup> *Barnes v. Webster*, 16 Mo. 258; 57 Am. Dec. 232; *Dawson v. Morton*, 22 La. Ann. 535. If issued without the required bond, the attachment is void: *Ford v. Woodward*, 10 Miss. 260. It cannot be required from the United States as a plaintiff: *United States v. Murdock*,  
<sup>3</sup> *Bate v. McDowell*, 48 N. Y. Sup. Ct. 219.  
<sup>4</sup> *Osborn v. Schiffer*, 37 Tex. 434.  
<sup>5</sup> *Alexander v. Pardue*, 30 Ark. 359.

obligor shall pay such damages whether the suit is prosecuted with effect or not.<sup>1</sup> So if the statute prescribes a certain form for the bond, that form must be strictly followed;<sup>2</sup> and always, if it follows the form prescribed it will be sufficient.<sup>3</sup> It must be sealed.<sup>4</sup> It is no objection that the condition is written beneath the signs and seals of the obligors.<sup>5</sup> It need not be given in the presence of nor approved by the magistrate who issues the attachment.<sup>6</sup> Where the statute requires the bond to be given before the writ issues, a failure to give it at that time is fatal.<sup>7</sup>

The giving of an attachment bond does not take away from the defendant the common-law action for damages for a malicious and causeless attachment.<sup>8</sup> But the bond gives the defendant a remedy against the plaintiff for a wrongful attachment, where no malice in suing it out existed.<sup>9</sup>

**§ 3540. Who to Execute Bond.**—If the statute requires the plaintiff to execute the bond, a bond executed by a stranger will be invalid.<sup>10</sup> Some states permit it to be executed by his agent, attorney, or other person.<sup>11</sup> Though

<sup>1</sup> *Lucky v. Miller*, 8 Yerg. 90.

<sup>2</sup> *Wade on Attachment*, secs. 103 et seq.; *Bank of Alabama v. Fitzpatrick*, 4 Humph. 311. But it will not be held void where the conditions are easier for the obligors: *Hibbs v. Blair*, 14 Pa. St. 413.

<sup>3</sup> *Prosky v. West*, 16 Miss. 711; *Love v. Fairfield*, 10 Ill. 303.

<sup>4</sup> *State v. Chamberlin*, 54 Mo. 338. But a statute dispensing with seals or scrolls to bonds applies to attachment bonds: *Bernhard v. De Forest*, 36 Tex. 518.

<sup>5</sup> *Melvin v. S. B. General Shields*, 15 Ark. 207.

<sup>6</sup> *Smith v. Joiner*, 27 Ga. 65.

<sup>7</sup> *Bank v. Fitzpatrick*, 4 Humph. 311; *Didier v. Galloway*, 3 Ark. 501; *Kellogg v. Miller*, 6 Ark. 468; *Stevenson v. Robbins*, 5 Mo. 18; *Bradley v. Kroft*, 19 Fed. Rep. 295; *Van Loon v.*

*Lyons*, 61 N. Y. 22; *Benedict v. Bray*, 2 Cal. 251; 56 Am. Dec. 332; *Boyd v. Boyd*, 2 Nott & McC. 125; *Starr v. Lyon*, 5 Conn. 538; *Thompson v. Arthur*, Dud. (Ga.) 253; *Cousins v. Brashier*, 1 Blackf. 85.

<sup>8</sup> *Sanders v. Hughes*, 2 Brev. 495; *Smith v. Story*, 4 Humph. 169; *Smith v. Eakin*, 2 Sneed, 456; *Churchill v. Abraham*, 22 Ill. 455; *Senecal v. Smith*, 9 Rob. (La.) 418; *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59; *Pettit v. Mercer*, 8 B. Mon. 51; *Bruce v. Coleman*, 1 Handy, 515; *Sledge v. McLaren*, 29 Ga. 64.

<sup>9</sup> *Drake on Attachment*, secs. 153 et seq.

<sup>10</sup> *Wade on Attachment*, secs. 105 et seq.

<sup>11</sup> *Wade on Attachment*, sec. 106; *Myers v. Lewis*, 1 McMull. 54; *Pope v. Ford*, 10 Miss. 266.

it is not proper that an attachment bond should be given in the firm name, yet as the firm would be bound thereby, especially after they have gone on and prosecuted the suit, the attachment will not be dissolved as for want of a bond.<sup>1</sup> A subsequent ratification by the plaintiff of an unauthorized act of a party in signing his name to a bond will make it valid.<sup>2</sup>

§ 3541. **Sureties Required.**—Where a bond is required with "sureties," without saying how many, a bond with one surety is sufficient.<sup>3</sup> Where there are several sureties, each, as a rule, must be good for the whole amount required.<sup>4</sup> The insufficiency of a surety at the time the attachment is issued will not render it void, but additional security may be required and taken by the court.<sup>5</sup> The surety must reside within the jurisdiction of the court which grants the writ.<sup>6</sup>

§ 3542. **The Obligee in the Bond.**—In some states the obligee is the defendant; in others, the state.<sup>7</sup> The obligee should be properly named in the bond.<sup>8</sup> The obligee may be a firm described by the firm name,<sup>9</sup> or the "owner" of a vessel.<sup>10</sup> The surviving obligees may sue upon the bond.<sup>11</sup>

§ 3543. **Amount of Bond.**—The bond may be in a greater sum than that required by statute without any harm;<sup>12</sup> but if it is in a less sum, it will be fatal;<sup>13</sup> and if

<sup>1</sup> Danforth v. Carter, 1 Iowa, 546.  
See Jones v. Anderson, 7 Leigh, 308.

<sup>2</sup> Bank of Augusta v. Conrey, 28 Miss. 667; Peiser v. Cushman, 13 Tex. 390; Mandel v. Peet, 18 Ark. 236.

<sup>3</sup> Elliott v. Stevens, 10 Iowa, 418.

<sup>4</sup> Lockett v. De Neufville, 55 Ga. 453.  
See May v. Gamble, 14 Fla. 467.

<sup>5</sup> Bunberger v. Gerson, 24 Fed. Rep. 257.

<sup>6</sup> Bres v. Booth, 1 La. Ann. 307.

<sup>7</sup> Wade on Attachment, sec. 107;  
Taaffe v. Rosenthal, 7 Cal. 514. Or  
the United States in the federal court:  
Barnes v. Webster, 16 Mo. 258; 57  
Am. Dec. 232.

<sup>8</sup> Drake on Attachment, sec. 137.

<sup>9</sup> De Caussey v. Bailey, 57 Tex. 665;  
Alexander v. Jacobs, 23 Ohio St. 559.

<sup>10</sup> Bryan v. The Enterprise, 8 Jones, 260.

<sup>11</sup> Donnell v. Manson, 109 Mass. 577.

<sup>12</sup> Fellows v. Miller, 8 Blackf. 231;  
Bourne v. Hocker, 11 B. Mon. 21;  
Shockley v. Davis, 17 Ga. 175; 63 Am.  
Dec. 233.

<sup>13</sup> Martin v. Thompson, 3 Bibb, 252;  
Samuel v. Brite, 3 A. K. Marsh. 317;  
Marnine v. Murphy, 8 Ind. 272; Wil-  
liams v. Barrow, 3 La. 57. Unless it  
is a very small sum less: Bodet v.  
Nibourel, 25 La. Ann. 499.

the bond be defective in this respect, it cannot afterwards be remedied by substitution of a regular bond.<sup>1</sup> The statutes generally require a bond in an amount at least double the debt sworn to. This contemplates not only that the bond shall be for that amount, but that the security shall be good for the like amount.<sup>2</sup> If it be for less than double the debt demanded, it is illegal.<sup>3</sup> If the action is *assumpsit*, the bond should be for double the amount of damages laid in the writ; if debt, and damages only nominal can be recovered, the bond should be for double the amount of the debt only; but if damages are laid to cover interest, then the bond should be for double the amount of the debt and damages.<sup>4</sup> The penalty should be double the amount of the value of the property which the sheriff may attach, and not double the amount of the claim sworn to be due.<sup>5</sup> Where the affidavit states the debt to be a certain sum, and the bond is given in double that sum, although it recites a larger sum as the debt, it is sufficient.<sup>6</sup>

§ 3544. **When Defects in Bond must be Taken Advantage of.**—Defects in the bond to defeat the action must be taken advantage of *in limine*;<sup>7</sup> it is too late after appearance and plea, or in an appellate court.<sup>8</sup>

§ 3545. **Amendment of Bond — When Allowed.**—A court has no inherent power to allow an amendment of an insufficient bond.<sup>9</sup> But such power has been given by statute in many of the states.<sup>10</sup> The statutes of some

<sup>1</sup> Bradley v. Kroft, 19 Fed. Rep. 295.

<sup>2</sup> Lockett v. De Neufville, 55 Ga. 454.

<sup>3</sup> Martin v. Thompson, 3 Bibb, 252.

<sup>4</sup> Brown v. Whiteford, 4 Rich. 327;

Campbell v. Conner, 41 N. Y. Sup. Ct. 459.

<sup>5</sup> Churchill v. Fulliam, 8 Iowa, 45; Hammill v. Phenicie, 9 Iowa, 525.

<sup>6</sup> Lawrence v. Featherston, 18 Miss. 345.

<sup>7</sup> Enders v. The Henry Clay, 8 Rob. (La.) 30; Watson v. McAllister, 7

Martin, 368; Garmon v. Barringer, 2 Dev. & B. 502; Stoney v. McNeill, Harp. 156; Beecher v. James, 3 Ill. 462; Voorhees v. Hoagland, 6 Blackf. 232.

<sup>8</sup> Young v. Grey, Harp. 38; Bryant v. Hendee, 40 Mich. 543; Conklin v. Harris, 5 Ala. 213; Kritzer v. Smith, 21 Mo. 296.

<sup>9</sup> Roulhac v. Rigby, 7 Fla. 336.

<sup>10</sup> Drake on Attachment, sec. 146; Van Arsdale v. Krum, 9 Mo. 397; Lowry v. Stowe, 7 Port. 483.

states permit the plaintiff to file a second bond, when the first is insufficient,<sup>1</sup> or amend the first one.<sup>2</sup> If a defective bond is filed and approved, and subsequently a good bond is filed and approved by way of amendment, the proceeding thereby becomes valid from the beginning. And in a collateral suit, both the original and amended bonds may be received in evidence, to show the regularity of the attachment proceedings.<sup>3</sup>

§ 3546. **Action on Bond—Damages.**—The bond is for the benefit of the defendant, and not for the benefit of the officer serving the writ, or a third person whose property may have been mistakenly or wrongly attached. The defendant alone can sue on it.<sup>4</sup> No action lies on the bond until the attachment has been discharged,<sup>5</sup> unless the defendant was not served, and the proceeding was *ex parte*.<sup>6</sup> In order to maintain an action on the bond, the damages have not first to be recovered in a distinct action.<sup>7</sup> The bond usually provides for the payment of costs and damages to the defendant if the attachment has been "wrongfully issued or obtained." Under this phrase a mere failure to prosecute the attachment suit does not give an action on the bond;<sup>8</sup> nor the failure of the suit on technical grounds.<sup>9</sup> The defendant must show a judg-

<sup>1</sup> Wood v. Squires, 28 Mo. 528; KISSAM v. Marshall, 10 Abb. Pr. 424; Lowry v. Stowe, 7 Port. 483; State Bank v. Morris, 13 Iowa, 136; Winkle v. Stevens, 9 Iowa, 264; Beardslee v. Morgan, 29 Mo. 471.

<sup>2</sup> Lea v. Vail, 3 Ill. 473. But see Hunter v. Ladd, 2 Ill. 551.

<sup>3</sup> McCraw v. Welch, 2 Col. 284.

<sup>4</sup> Davis v. Com., 13 Gratt. 139; Mitchell v. Chancellor, 14 W. Va. 22; Raspillier v. Brownson, 7 La. 231; Edwards v. Turner, 6 Rob. (La.) 382.

<sup>5</sup> Nolle v. Thompson, 3 Met. (Ky.) 121; State v. Williams, 48 Mo. 210.

<sup>6</sup> Bliss v. Heasty, 61 Ill. 338.

<sup>7</sup> Herndon v. Forney, 4 Ala. 243; Boatwright v. Stewart, 37 Ark. 614; Churchill v. Abraham, 22 Ill. 455; Bruce v. Coleman, 1 Handy, 515;

Smith v. Eakin, 2 Sneed, 456; Dickinson v. McGraw, 4 Rand. 158. *Contra*, Sterling City Mining Co. v. Cook, 2 Col. 24; Sterling City Mining Co. v. Hughes, 3 Col. 229; Sledge v. Lee, 19 Ga. 411; Holcomb v. Foxworth, 34 Miss. 265.

<sup>8</sup> Pettit v. Mercer, 8 B. Mon. 51; Cooper v. Hill, 3 Bush, 319; Noekles v. Eggspeiler, 47 Iowa, 400; Smith v. Story, 4 Humph. 169. *Contra*, Cox v. Robinson, 2 Rob. (La.) 313.

<sup>9</sup> Boatwright v. Stewart, 37 Ark. 614. In Sharpe v. Hunter, 16 Ala. 765, the court says: "What is meant by the term 'wrongful,' as used in the statute to which this bond conforms? Was it, as is contended, designed to apply to defects in the form of the proceeding on account of

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ment in his favor.<sup>1</sup> A judgment on the merits for the defendant authorizes a suit on the bond.<sup>2</sup> It is not, however, conclusive evidence that the plaintiff in the attachment acted wrongfully and willfully in suing out the writ, and that he had no reasonable grounds for believing his affidavit true.<sup>3</sup>

**§ 3547. When Attachment not Wrongful — Belief — Facts.** — In a suit on the bond, if the plaintiff in the attachment suit had good cause to believe the grounds for attachment true, or if they were true in fact, the attachment is not wrongful.<sup>4</sup> A finding by the jury that it was sued out without reasonable grounds for believing the allegations on which it was based is necessary to support a verdict for the actual damages sustained. But the same facts will not raise a presumption of malice, and justify the allowance of exemplary damages; to authorize their recovery, it must appear, in addition, that there was an intent to injure the debtor.<sup>5</sup> An attachment sued out on a ground which did not exist is wrongful, without regard to the belief of the person making the affidavit.<sup>6</sup> The defendant may sustain an action, if the prosecution of the attachment can be shown to be wrongful and oppressive, even though the plaintiff in the attachment succeeded in that proceeding.<sup>7</sup> Suing out an attachment when nothing is due renders the party liable for such damages as

which the attachment should be quashed as well as the ground upon which it was to be issued? or was the object of the framers of the act merely to provide a remedy against persons who should resort to this extraordinary remedy to the prejudice of another without cause or sufficient ground therefor? . . . We think that by the wrongful suing out of the attachment is meant, not the omissions, irregularities, or informalities which the officer issuing the process may have committed in its issuance, but that the party resorted to it without sufficient ground."

<sup>1</sup> *Sloan v. McCracken*, 7 Lea, 626; *Pellersells v. Allen*, 56 Iowa, 717.

<sup>2</sup> *State v. Beldsmeier*, 56 Mo. 226; *Harper v. Keys*, 43 Ind. 220.

<sup>3</sup> *Raver v. Webster*, 3 Iowa, 502; 66 Am. Dec. 96.

<sup>4</sup> *Vorse v. Phillips*, 37 Iowa, 428; *Carey v. Gunnison*, 51 Iowa, 202; *Nordhaus v. Peterson*, 54 Iowa, 68; *Raver v. Webster*, 3 Iowa, 502; 66 Am. Dec. 96; *Jacobs v. Crim*, 62 Tex. 401; *Mitchell v. Shook*, 72 Ill. 492.

<sup>5</sup> *Nordhaus v. Peterson*, 54 Iowa, 68.

<sup>6</sup> *Christian v. Seeligson*, 63 Tex. 405; *Sublette v. Wood*, 76 Va. 318.

<sup>7</sup> *Harper v. Keys*, 43 Ind. 220.



the levy may cause.<sup>1</sup> The facts that the demand on which a creditor sued out an attachment was groundless, or was not due, and that there was no intent of the debtor to avoid it, are evidence tending to show, though not conclusive of, malice in the attachment suit.<sup>2</sup> The jury may presume malice if defendant had no probable cause for believing that the facts alleged by him in the affidavit for attachment were true.<sup>3</sup> That the defendant acted under advice of counsel, and the nature and amount of indebtedness on which the attachment was issued, may be taken into account in determining the question of malice or good faith.<sup>4</sup> Where property is wrongfully seized under an attachment, its subsequent seizure by another creditor, and its appropriation to the payment of the debt due such creditor, may ordinarily be shown in mitigation of damages in a suit for the wrongful attachment; but not where such subsequent seizure was made in collusion with the wrong-doer, or by a participator with him in the original wrongful act.<sup>5</sup>

**§ 3548. Presumption that Attachment was Rightfully Sued out.**—The presumption—the proceedings being regular—is that the attachment was rightfully sued out; and in an action on the bond the burden is on the defendant in the attachment suit to prove that it was wrongful.<sup>6</sup> Until reversed, the decision of the trial judge, upon due hearing, dissolving an attachment, is conclusive, in an action on the bond, that the attachment was wrongfully obtained.<sup>7</sup> It is a good defense that the suit in which the attachment is issued is still pending; and this, though the plaintiff's complaint in the attachment suit was dismissed, if an appeal from the judgment of dis-

<sup>1</sup> *Harger v. Spofford*, 46 Iowa, 11;  
*Tucker v. Adams*, 52 Ala. 254.

<sup>2</sup> *Lemay v. Williams*, 32 Ark. 166;  
*Nelson v. Danielson*, 82 Ill. 545.

<sup>3</sup> *Bozeman v. Shaw*, 37 Ark. 160.

<sup>4</sup> *Myers v. Wright*, 44 Iowa, 38.

<sup>5</sup> *Wehle v. Spelman*, 25 Hun, 99.

<sup>6</sup> *Wade on Attachment*, sec. 300;  
*Dent v. Smith*, 53 Iowa, 262.

<sup>7</sup> *Hoge v. Norton*, 22 Kan. 374.

missal has been duly taken, and the appeal be pending undetermined.<sup>1</sup>

§ 3549. **Actual Damages Recoverable on Bond — Exemplary Damages.** — The defendant is entitled to recover the actual damages the natural result of the wrongful suing out of the writ. "Actual damage may be properly comprehended under two heads: 1. Expense and losses incurred by the party in making his defense to the attachment proceedings; 2. The loss occasioned by his being deprived of the use of his property during the pendency of the attachment, or by an illegal sale of it, or by injury thereto, or loss or destruction thereof."<sup>2</sup> If he is a merchant, the effect of the attachment upon his credit is a proper matter for consideration in assessing damages, as is the motive and good faith of the plaintiff in suing out the attachment.<sup>3</sup> An action does not lie for seizing property lawfully subject to attachment, upon an attachment regularly sued out and founded on a just debt, even though the attaching creditor acted maliciously, and procured the officer to take perishable property, and instructed him to refuse to give it up to receiptors.<sup>4</sup> Vindictive damages cannot be recovered, unless the creditor acted with malice against the plaintiff himself.<sup>5</sup> In an action for a wrongful attachment made by an agent or attorney, the principal is not liable for exemplary damages on account of the malice of his agent, unless he participated in the malice, or afterwards ratified, adopted, or approved the malicious act.<sup>6</sup>

As to costs of defense, the following have been held proper: The costs and expenses of discharging the attach-

<sup>1</sup> Peck v. Hotchkiss, 52 How. Pr. 226.

<sup>2</sup> Drake on Attachment, sec. 175; Campbell v. Chamberlain, 10 Iowa, 337; Lawrence v. Hagerman, 56 Ill. 68; 8 Am. Rep. 674; Offut v. Edwards, 9 Rob. (La.) 90; Kelly v. Beauchamp, 59 Mo. 178.

<sup>3</sup> Kennedy v. Meacham, 18 Fed. Rep. 312.

<sup>4</sup> Batchelder v. Frank, 49 Vt. 90.

<sup>5</sup> Wood v. Barker, 37 Ala. 60; 76 Am. Dec. 346.

<sup>6</sup> Willis v. McNeill, 57 Tex. 465.

ment;<sup>1</sup> costs of suit, generally, in the trial and appellate court;<sup>2</sup> counsel fees in the attachment suit;<sup>3</sup> obtaining testimony as to the falsity of the affidavit.<sup>4</sup> But the court has refused to allow costs of an independent suit,<sup>5</sup> and counsel fees for services in the action on the bond,<sup>6</sup> and for time and expenses of defendant in attending court.<sup>7</sup>

ILLUSTRATIONS.—The jury found specially that defendant was entitled to damages for the wrongful suing out of an attachment, and that plaintiff's claim was not yet due. *Held*, that a judgment for the amount of damages found, not diminished by the amount of plaintiff's claim, was correctly rendered: *Wetherell v. Sprigley*, 43 Iowa, 41.

§ 3550. **Damages to Property.**—As to damages to or on account of the taking of the property, the plaintiff in the suit on the bond may recover any depreciation in the market value during the time he is dispossessed of it,<sup>8</sup> or the cost of replacing it at the place where it was levied on.<sup>9</sup> Where the goods of a retail dealer are wrongfully taken in attachment and carried away, he is entitled to

<sup>1</sup> *Alexander v. Jacoby*, 23 Ohio St. 358.

<sup>2</sup> *Dunning v. Humphrey*, 24 Wend. 31; *Trapnall v. McAfee*, 3 Met. (Ky.) 34; *Bennett v. Brown*, 31 Barb. 153; 20 N. Y. 99; *Winsor v. Orcutt*, 11 Paige, 578; *Hughes v. Brooks*, 36 Tex. 379.

<sup>3</sup> *Offut v. Edwards*, 9 Rob. (La.) 90; *Littlejohn v. Wilcox*, 2 La. Ann. 620; *Phelps v. Coggeshall*, 13 La. Ann. 440; *Accessory Transit Co. v. McCerren*, 13 La. Ann. 214; *Morris v. Price*, 2 Blackf. 457; *Trapnall v. McAfee*, 3 Met. (Ky.) 34; *Seay v. Greenwood*, 21 Ala. 491; *Burton v. Smith*, 49 Ala. 293; *Higgins v. Mausfield*, 62 Ala. 267; *Dothard v. Sheid*, 69 Ala. 135; *Raymond v. Green*, 12 Neb. 215; 41 Am. Rep. 763; *Swift v. Plessner*, 39 Mich. 178; *Vorse v. Phillips*, 37 Iowa, 428; *Northrup v. Garrett*, 17 Hun, 497; *Baere v. Armstrong*, 26 Hun, 19; *Wilson v. Root*, 43 Ind. 486. *Contra*, *Heath v. Lent*, 1 Cal. 410; *Hughes v. Brooks*, 36 Tex. 379.

<sup>4</sup> *Hayden v. Sample*, 10 Mo. 215.

<sup>5</sup> *White v. Wyley*, 17 Ala. 167;

*Johnson v. Farmers' Bank*, 4 Bush, 283; *Alexander v. Jacoby*, 23 Ohio St. 358.

<sup>6</sup> *Offut v. Edwards*, 9 Rob. (La.) 90; *Plumb v. Woodmansee*, 34 Iowa, 116; *Vorse v. Phillips*, 37 Iowa, 428; *Hays v. Anderson*, 57 Ala. 374; *Copeland v. Cunningham*, 63 Ala. 394. Even when a statute provides that reasonable attorney's fees may be recovered, only attorney's fees in the attachment proceeding are recoverable, not fees for service in defending the whole case: *Porter v. Knight*, 63 Iowa, 365.

<sup>7</sup> *Harris v. Finberg*, 46 Tex. 79; *Craddock v. Goodwin*, 54 Tex. 578. He cannot recover for his voluntary appearance and defense, there having been no levy: *Flournoy v. Lyon*, 70 Ala. 308.

<sup>8</sup> *Fleming v. Bailey*, 44 Miss. 132; *Franklin v. Stern*, 44 Cal. 168; *Lowenstein v. Munroe*, 55 Iowa, 82; *Horn v. Bayard*, 11 Rob. (La.) 259.

<sup>9</sup> *Selz v. Belden*, 48 Iowa, 451; *Hoge v. Norton*, 22 Kan. 374.

recover, as a part of his damages, the fair retail value of the goods thus taken.<sup>1</sup> And the damages extend to the value of the use of the property while it was withheld, and this is so notwithstanding it was replevied by a co-defendant.<sup>2</sup> So loss of business as to goods seized is properly included.<sup>3</sup> Failure of cattle to make the ordinary and expected increase of weight, by reason of their removal by the sheriff from their wonted range to a new range with limited grass and water, is a gain prevented, for which the owner is entitled to compensation.<sup>4</sup> One who has been prevented from completing work he had undertaken to do, by an attachment upon his tools and materials, is entitled to recover consequential damages for the injury sustained; and it is competent for him to show that, when his work was suspended by the attachment, he had on hand a quantity of stone, cut and dressed, for use in the completion of the work, which was not of equal value for any other purpose.<sup>5</sup> Where an attachment of corn for rent has been discharged, the measure of the tenant's damages is the injury sustained by the detention of the corn, and any deterioration of value resulting from the attachment.<sup>6</sup>

**§ 3551. Remote and Speculative Damages not Recoverable.** — Remote and speculative damages resulting from injury to his credit, business, character, or feelings cannot be recovered,<sup>7</sup> nor prospective profits in business.<sup>8</sup> In an Iowa case, where a writ of attachment was levied upon a house which was being taken to pieces for removal to

<sup>1</sup> *Wehle v. Butler*, 61 N. Y. 245.

<sup>2</sup> *Munnerlyn v. Alexander*, 38 Tex. 125.

<sup>3</sup> *Marqueze v. Sontheimer*, 59 Miss. 430.

<sup>4</sup> *Hoge v. Norton*, 22 Kan. 374.

<sup>5</sup> *Carpenter v. Stevenson*, 6 Bush, 259.

<sup>6</sup> *Patton v. Garrett*, 37 Ark. 605.

<sup>7</sup> *Wade on Attachment*, sec. 301; *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59; *Floyd v. Hamilton*, 33 Ala.

235; *Higgins v. Mansfield*, 62 Ala. 267; *Pollock v. Gantt*, 69 Ala. 373; 44 Am. Rep. 519; *Holliday v. Cohen*, 34 Ark. 707; *Campbell v. Chamberlain*, 10 Iowa, 337; *Oberne v. Gaylord*, 13 Ill. App. 30; *Reidhar v. Berger*, 8 B. Mon. 160; *State v. Thomas*, 19 Mo. 613; *Myers v. Farrell*, 47 Miss. 281; *Hurd v. Barnhart*, 53 Cal. 97; *Mitchell v. Harcourt*, 62 Iowa, 349.

<sup>8</sup> *Holliday v. Cohen*, 34 Ark. 707.

and erection upon other premises, it was held, in an action on the bond, that the plaintiff could not recover,—

1. For damages caused to furniture removed from the building before the levy of the writ, by reason of its being exposed, in consequence of plaintiff being prevented or delayed by the attachment from rebuilding the house on the premises to which it was to be removed, and in which the furniture was to be placed;
2. For additional expenses incurred in building a new house on the premises, on which he intended to reconstruct the one levied upon;
3. For the rental value of the house per month before he commenced taking it down;
4. For what its rent would have been worth if he had been permitted to remove and rebuild it;
5. For loss of time by being deprived of the use of the house.<sup>1</sup>

<sup>1</sup> *Plumb v. Woodmansee*, 34 Iowa, 116.

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## CHAPTER CLXXVIII.

## THE WRIT AND LEVY.

- § 3552. The writ in general — When a protection.
- § 3553. Form of writ — Amendments.
- § 3554. Officer may demand indemnity.
- § 3555. Duty of officer in making levy.
- § 3556. Levy by fraudulent or unlawful means void.
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- § 3571. Successive attachments on same property.
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- § 3573. Attachment of personal property — What interests and kinds may be attached.
- § 3574. Attached goods cannot be taken by another officer.
- § 3575. Rights of junior attaching creditor to set aside attachment.
- § 3576. Fraudulent attachment — Rights of creditors.
- § 3577. Officer must hold property — Abandonment.
- § 3578. Officer a bailee of the property.
- § 3579. Forthcoming bond to officer — Effect of.

**§ 3552. The Writ in General — When a Protection. —**

The power of an officer to make an attachment depends and comes from the writ. It does not exist until the writ is in his hands.<sup>1</sup> An officer cannot execute a writ in a suit in which he is interested;<sup>2</sup> nor can a party interested

<sup>1</sup> *Wales v. Clark*, 43 Conn. 183. In Kentucky no declaration is required; the warrant is a complaint as well as a process: *Moore v. Hawkins*, 6 Dana, 289.

<sup>2</sup> *Evarts v. Georgia*, 18 Vt. 15; *Lyman v. Burlington*, 22 Vt. 131; *MeLeod v. Harper*, 43 Miss. 42.

be deputed to execute it.<sup>1</sup> An attachment, unlike a summons, must be executed by the officer to whom it is directed.<sup>2</sup> The authority of the officer continues only until the return day of the writ; a levy made after the return day will be of no force as against a third person.<sup>3</sup> If no return day or place of return is named in the writ, it is void.<sup>4</sup> Writs of attachment do not fall within the rule of personal writs, but may run until executed, or at least until by reasonable diligence they can be executed.<sup>5</sup> An attachment issued before summons has been issued on the petition is void.<sup>6</sup> But the writ of attachment may be served before actual service of the summons, if the latter has been previously made out and placed in the proper hands, with a *bona fide* intent that it shall be served.<sup>7</sup> If the goods are not attached, the attaching creditor cannot hold the officer for any surplus money he may have realized from a prior attachment.<sup>8</sup>

If the writ is issued by an officer not having jurisdiction, it is void, and will afford no protection to the officer issuing it or the one acting under it.<sup>9</sup> So all the parties procuring the issuance of a void attachment against A, and directing C, a constable, to levy on A's property, are liable as trespassers to B, whose property C has seized as being that of A.<sup>10</sup> A writ absolutely void need not be set aside before bringing an action for acts done under it.<sup>11</sup> But if the writ is from a court having jurisdiction to issue it, and is valid and regular on its face, it will protect the officer, even if it has been wrongfully issued.<sup>12</sup> But such

<sup>1</sup> *Dyson v. Baker*, 54 Miss. 24; *Boykin v. Edwards*, 21 Ala. 261.

<sup>2</sup> *Menderson v. Specker*, 79 Ky. 509; *Porter v. Stapp*, 6 Cal. 32.

<sup>3</sup> *Courtney v. Carr*, 6 Iowa, 238; *Dame v. Fales*, 3 N. H. 70; *Peters v. Conway*, 4 Bush. 566.

<sup>4</sup> *Washington v. Sansters*, 2 Dev. 343; 21 Am. Dec. 336.

<sup>5</sup> *Will v. Whitney*, 15 Ind. 194.

<sup>6</sup> *Hall v. Grogan*, 78 Ky. 11.

<sup>7</sup> *Bell v. Olmsted*, 18 Wis. 69.

<sup>8</sup> *Denny v. Willard*, 11 Pick. 519; 22 Am. Dec. 389.

<sup>9</sup> *Drake on Attachment*, sec. 184; *Goldsmith v. Steison*, 39 Ala. 183; *Kerr v. Mount*, 28 N. Y. 663; *Adkins v. Brewer*, 3 Cow. 206; 15 Am. Dec. 264; *Barkeloo v. Randall*, 4 Blackf. 476; 32 Am. Dec. 46; *City of Lowell v. Parker*, 10 Met. 309; 43 Am. Dec. 436.

<sup>10</sup> *Vose v. Woods*, 26 Hun. 486.

<sup>11</sup> *Day v. Bach*, 87 N. Y. 56; *In re Bradner*, 87 N. Y. 171.

<sup>12</sup> *Kirksey v. Dubose*, 19 Ala. 43; *Fulton v. Heaton*, 1 Barb. 552; *Banta v. Reynolds*, 3 B. Mon. 80; *Garnet v.*

an irregular writ will not protect the party issuing it.<sup>1</sup> But the plaintiff in attachment is not liable as a trespasser for the omissions of the officer to serve the writ properly, or to give defendant an opportunity to select such property as he was entitled to under the statutory exemption. If the writ was valid when issued, the officer's subsequent acts or omissions will not render plaintiff a trespasser *ab initio*.<sup>2</sup>

§ 3553. **Form of Writ—Amendments.**—The writ must follow the requirements of the statute.<sup>3</sup> It must be under the seal of the court.<sup>4</sup> A writ of attachment which does not run in the name of "the people of the state," as required by statute, is voidable only; the defect is curable by amendment.<sup>5</sup> The date of a summons not being a necessary part of it, an attachment thereon is not irregular and void because it bears date two days before the date of the summons. The existence of the summons at

Wimp, 3 B. Mon. 360; Owens v. Starr, 2 Litt. 230; Lovier v. Gilpin, 6 Dana, 321; Lashus v. Matthews, 75 Me. 446; Ela v. Shepard, 32 N. H. 277; Booth v. Rees, 26 Ill. 45; State v. Foster, 10 Iowa, 435; Walker v. Woods, 15 Cal. 66; Babe v. Coyne, 53 Cal. 261; Kerr v. Mount, 28 N. Y. 663; Parker v. Walrod, 16 Wend. 514; 30 Am. Dec. 124.

<sup>1</sup> Hall v. Waterbury, 5 Abb. N. C. 374; Wehle v. Butler, 61 N. Y. 245. In Kerr v. Mount, 28 N. Y. 663, the court say: "It having been set aside as irregular, it afforded no justification afterwards for acts previously done under it to the party in whose favor it was issued. If issued by competent authority, and regular upon its face, it might afford protection to the officer for his acts previously done under it, but none whatever to the party. As to him, it was then as though no process whatever had been issued, and the goods had been taken and detained by his order without any process: Chapman v. Dyett, 11 Wend. 31; 25 Am. Dec. 598; Smith v. Shaw, 12 Johns. 257; Hayden v. Shad, 11 Mass. 500; Codrington v. Lloyd, 8 Ad. & E. 449; Parsons v. Lloyd, 2 Black, 845."

<sup>2</sup> Michels v. Stork, 44 Mich. 2.

<sup>3</sup> Barber v. Swan, 4 G. Greene, 352; 61 Am. Dec. 124; the court saying: "The paper in this case called a writ of attachment could not easily be recognized as such. It contains but few of the material requisites of such a writ. It does not state any action pending for the recovery of money, nor give the names of the parties to the suit. It does not state the grounds which authorized the court to issue the writ, nor does it even give the name of the plaintiff to the proceeding. It does not show that the indispensable conditions of the code had been performed before the process could be legally issued, and does not therefore confer authority upon an officer to attach property. Such a writ should show *prima facie* a compliance with the code sufficient to confer authority upon the clerk to issue the writ. If materially defective, as in this case, it may with propriety be quashed."

<sup>4</sup> Foss v. Isett, 4 G. Greene, 76; 61 Am. Dec. 117; Shaffer v. Sundwall, 33 Iowa, 579.

<sup>5</sup> Livingston v. Coe, 4 Neb. 379.



the date of the attachment may be shown by evidence *aliunde*.<sup>1</sup> Clerical defects in writs may be amended, even in the absence of statutes expressly authorizing it;<sup>2</sup> or where it bears a wrong date;<sup>3</sup> or when it adds a wrong party;<sup>4</sup> or is not properly attested;<sup>5</sup> or is returnable to the wrong term of court.<sup>6</sup> Thus it may be amended to correct a clerical error in the amount stated in the writ;<sup>7</sup> or where it is in the firm name of the plaintiffs instead of the full names of the members;<sup>8</sup> or where it bears, by mistake, the seal of the circuit instead of the district court.<sup>9</sup> In the absence of some positive rule of state practice, the power of the United States courts to allow amendments is the same in attachment suits as in others.<sup>10</sup> But in Iowa it was held that the defect of the want of a seal could not be supplied.<sup>11</sup>

§ 3554. **Officer may Demand Indemnity.**—Where the officer has good reason to believe that the goods pointed out to him are not the defendant's, he may, to protect himself from an action of trespass, demand of the plaintiff a bond of indemnity.<sup>12</sup> And where the plaintiff gives the officer a writ, with directions to serve it in a particular manner, an implied promise of indemnity arises.<sup>13</sup> Where the statute provides that the officer shall require a bond of the applicant for attachment, the writ is invalid

<sup>1</sup> Smith v. Walker, 6 Rich. 169.

<sup>2</sup> Warren v. Pintell, 63 Ga. 428; Blair v. Miller, 42 Ala. 308; Livingston v. Coe, 4 Neb. 379; Covington v. Cothrans, 35 Ga. 156. In Iowa by statute after a levy: Atkins v. Womeldorf, 53 Iowa, 150. Where a statute permits amendments in "proceedings," an application for a writ of attachment is amendable: Langstaff v. Miles, 5 Mont. 554.

<sup>3</sup> McCoy v. Boyle, 10 Md. 391.

<sup>4</sup> Johnson v. Huntington, 13 Conn. 47.

<sup>5</sup> Skinner v. Beshoar, 2 Col. 383.

<sup>6</sup> Archibald v. Thompson, 2 Col. 388.

<sup>7</sup> Gourley v. Carmody, 23 Iowa, 212.

<sup>8</sup> Clayburg v. Ford, 3 Ill. App. 542.

<sup>9</sup> Murdough v. McPherrin, 49 Iowa, 479.

<sup>10</sup> Tilton v. Cofield, 93 U. S. 163.

<sup>11</sup> Foss v. Isett, 4 G. Greene, 76; 61 Am. Dec. 117.

<sup>12</sup> Chamberlain v. Beller, 18 N. Y. 115; Sibley v. Brown, 15 Me. 185; Ranlett v. Blodgett, 17 N. H. 298; 43 Am. Dec. 603; Perkins v. Pittman, 34 N. H. 261; Smith v. Osgood, 46 N. H. 178; Smith v. Cicotte, 11 Mich. 383; Shriver v. Harbaugh, 37 Pa. St. 399; Bond v. Ward, 7 Mass. 123; 5 Am. Dec. 28. *Contra*, Shaw v. Holmes, 4 Heisk. 692.

<sup>13</sup> Ranlett v. Blodgett, 17 N. H. 298; 43 Am. Dec. 603.

unless such bond be given.<sup>1</sup> But if the officer does not demand indemnity, he cannot urge that he received none, in an action for not making the levy.<sup>2</sup> An officer who fails to return the writ under which an attachment has been made cannot maintain an action on his bond of indemnity,<sup>3</sup> nor where the bond contains a provision that notice shall be given by the officer, and he fails to do so.<sup>4</sup>

ILLUSTRATIONS. — A sheriff attached gold coin, which was claimed by one S. The sheriff demanded indemnity, and plaintiff gave him a bond, and for additional security, permission to retain, for a reasonable time, any money coming to his hands by virtue of attachment or execution; plaintiff recovered judgment, but a suit by S. against the sheriff was still pending. *Held*, that plaintiff was not entitled to an order on the sheriff to pay the money into court upon receipt of a substituted bond, that the sheriff, under the agreement, had the right to retain it for a reasonable time: *Scherr v. Little*, 60 Cal. 614. A sheriff attached goods as the goods of B, in an action by A against B. C afterwards claimed the goods, and although A offered a bond of indemnity, the sheriff surrendered them. The statute made no provision for a bond of indemnity in such cases. A recovered judgment in the attachment suit, and being unable to make anything on the execution, brought action against the sheriff. *Held*, that although the offered bond of indemnity was good at common law, the sheriff was not liable at all events, but that the burden was on him to show that the goods did not belong to B: *Wadsworth v. Walliker*, 45 Iowa, 395; 24 Am. Rep. 788.

§ 3555. **Duty of Officer in Making Levy.** — It is the duty of the officer, on receiving a writ of attachment, to levy on any property of the defendant he can find;<sup>5</sup> to follow the plaintiff's instructions as to the mode of service;<sup>6</sup> to execute the writ as soon as he reasonably can;<sup>7</sup>

<sup>1</sup> *Rogers v. E. M. Birdsall Co.*, 72 Ga. 133.

<sup>2</sup> *Bond v. Ward*, 7 Mass. 123; 5 Am. Dec. 28; *Ranlett v. Blodgett*, 17 N. H. 298; 43 Am. Dec. 603.

<sup>3</sup> *Wiggin v. Atkins*, 136 Mass. 292.

<sup>4</sup> *Preston v. Yates*, 24 Hun, 534.

<sup>5</sup> *Drake on Attachment*, sec. 188; *Fitzgerald v. Blake*, 42 Barb. 513; *Howes v. Spicer*, 23 Vt. 508.

<sup>6</sup> *Ranlett v. Blodgett*, 17 N. H. 298; 43 Am. Dec. 603.

<sup>7</sup> *Drake on Attachment*, sec. 191; citing *Kennedy v. Brent*, 6 Cranch, 187, where the diligence in the service of a subpoena was held to be required of a marshal. In *Whitney v. Butterfield*, 13 Cal. 336, 73 Am. Dec. 584, the court said: "The sheriff's liability rests on his breach of official duty. As he is bound to perform his duty, so is he responsible to every one who may be injured by his failure to discharge it. In respect to the execution of

and to levy on sufficient property of the defendant to satisfy the plaintiff's claim.<sup>1</sup> An officer may attach an article of property for a sum much less than its value, without waiting to see whether another article, nearer the amount of the claim in value, is free from encumbrances and may be held. He is not bound to take a receipt for property attached; if he does, without the creditor's consent, he becomes liable to the creditor, at all events, for the property, although the contract would be a legal one if a receipt were taken. Nor is he bound, upon request, either to accept the deposit of a sum of money for his security equal to the claim from a third party, or to take other property of the debtor as a substitute for that attached, and release it. If directed, he must attach personal property, and cannot excuse himself by attaching real property, although the debtor owns such property. If he should fail, by delay in examining title, to secure the debt, he would become responsible to the creditor.<sup>2</sup> An officer who enters a house and attaches goods, but

process, these official duties are well defined by law. The law is reasonable in this, as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence; but it requires no impossibilities, and imposes no unconscionable exactions. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency of the writ. He must, in such cases, execute the writ with all reasonable celerity. Whenever he can make the money on execution, or secure the debt by attachment, he must do it. But he is not held to the duty of starting on the instant, after receiving a writ, to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances. But this reasonable diligence depends upon the particular facts in connection with the duty. If, for example, a sheriff has execution against A, and has no special instruction to execute it at once,

and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligations to execute it instantaneously as if he were so instructed, and there were circumstances of urgency. So in respect to an attachment. If an attachment were sued out on the ground of a defendant's fraud, or his being in the act of leaving the state, or removing his property, the very fact of the issuance of the attachment, or the making of the affidavit, would seem to indicate to the officer the necessity of immediate action. But generally, in the absence of special circumstances, an attachment issued for the security of a debt, under the old statute authorizing such a process, does not stand upon a more favorable footing, so far as regards the necessity of immediate service, than an execution."

<sup>1</sup> *Fitzgerald v. Blake*, 42 Barb. 513; *Ransom v. Halcott*, 18 Barb. 56; *Howes v. Spicer*, 23 Vt. 508; *Bradford v. McLellan*, 23 Me. 302.

<sup>2</sup> *Moulton v. Chadborne*, 31 Me. 152.

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takes with him a drunken person, whom he leaves in charge, against the owner's protest, is guilty of trespass.<sup>1</sup>

§ 3556. **Levy by Fraudulent or Unlawful Means Void.**—A levy made by unlawful and fraudulent means is void.<sup>2</sup> Such, for example, is a levy made after entering a house against the will of the owner;<sup>3</sup> or fraudulently bringing or enticing property from another state and within the reach of process.<sup>4</sup>

§ 3557. **Property not Liable to Attachment—Property of Third Person.**—An officer is a trespasser who levies on property not liable to attachment;<sup>5</sup> or when he takes goods out of the possession of one who claims property in them;<sup>6</sup> or on goods not the property of the defendant.<sup>7</sup>

A sheriff who, by virtue of an attachment, seizes property in the possession of the judgment debtor may justify by producing the writ; but if he seizes property in the possession of a third person as the judgment debtor's, he must prove, when sued for damages, not only the attach-

<sup>1</sup> *Malcolm v. Spoor*, 12 Met. 279; 46 Am. Dec. 675.

<sup>2</sup> *Nason v. Esten*, 2 R. I. 337; *Met-calf v. Clark*, 41 Barb. 45; *Gilbert v. Hollinger*, 14 La. Ann. 441; *Pomroy v. Parmlee*, 9 Iowa, 140; *Parsons v. Dickinson*, 11 Pick. 352; *Bailey v. Wright*, 39 Mich. 96.

<sup>3</sup> *Hsley v. Nichols*, 12 Pick. 270; 22 Am. Dec. 425; *Swain v. Mizner*, 8 Gray, 182; *People v. Hubbard*, 24 Wend. 369.

<sup>4</sup> *Powell v. McKee*, 4 La. Ann. 108; *Paradise v. Farmers' Bank*, 5 La. Ann. 710; *Wingate v. Wheat*, 6 La. Ann. 238; *Myers v. Myers*, 8 La. Ann. 369; 58 Am. Dec. 689; *Timmons v. Garrison*, 4 Humph. 148; *Pomroy v. Parmlee*, 9 Iowa, 140; 74 Am. Dec. 328; *Deyo v. Jennison*, 10 Allen, 410.

<sup>5</sup> *Foss v. Stewart*, 14 Me. 312; *Gibson v. Jenney*, 15 Mass. 205; *Lynd v. Pickett*, 7 Minn. 184; 82 Am. Dec. 79; *Cooper v. Newman*, 45 N. H. 339;

*Bean v. Hubbard*, 4 Cush. 85; *Kiff v. R. R. Co.*, 117 Mass. 591; 19 Am. Rep. 429; *Rice v. Chase*, 9 N. H. 178; 32 Am. Dec. 346.

<sup>6</sup> *Moore v. Byne*, 1 Rich. 94.

<sup>7</sup> *Woodbury v. Long*, 8 Pick. 543; 19 Am. Dec. 345; *Meade v. Smith*, 16 Conn. 346; *Sangster v. Com.*, 17 Gratt. 124; *Bodega v. Perkerson*, 60 Ga. 516; *Ford v. Dyer*, 26 Miss. 243; *Caldwell v. Arnold*, 8 Minn. 265; *Owings v. Fisher*, 2 A. K. Marsh. 268; 12 Am. Dec. 393; *Rhodes v. Patterson*, 3 Cal. 369; *Van Pelt v. Littler*, 14 Cal. 194; *Carmick v. Com.*, 5 Binn. 184; *State v. Moore*, 19 Mo. 369; 61 Am. Dec. 563; *Archer v. Noble*, 3 Me. 418; *Harris v. Hanson*, 11 Me. 241; *State v. Fitzpatrick*, 64 Mo. 185. Under an attachment against one tenant in common of a chattel, the officer may seize the chattel: *Heald v. Sargent*, 15 Vt. 506; 40 Am. Dec. 694.

ment, but the proceedings on which it was based.<sup>1</sup> An officer about to levy on personal property is bound by actual notice of a prior mortgage, whether he receives notice before or after the writ is in his hands.<sup>2</sup> But an officer is not liable for attaching and selling property where the one claiming the property gave notice of his claim, but did not defend his title on the return of the attachment.<sup>3</sup> The owner has a choice of remedies; he may sue in trespass in trover, or in detinue,<sup>4</sup> or he may recover the property taken.<sup>5</sup> A person whose property is wrongfully attached as the property of another may sell it while under attachment, and his vendee may bring trespass in the vendor's name against the officer.<sup>6</sup> One claiming title to property sold under an attachment against another has no claim to the proceeds of sale in the sheriff's hands.<sup>7</sup>

ILLUSTRATIONS.—An officer stated to a party that he would take his property on an attachment against the property of A, but he left it with him, taking a receipt for it. *Held*, not a trespass: *Rand v. Sargent*, 23 Me. 326; 39 Am. Dec. 625. A illegally attached as B's cotton belonging to C. The cotton was sold by the sheriff by consent of all parties, and the sheriff defaulted with the proceeds. *Held*, in C's suit against A, that A was liable for expenses incurred by C in recovering the cotton, but not for the loss resulting from the default of the sheriff: *Frank v. Chaffe*, 34 La. Ann. 1203.

§ 3558. **Confusion of Property—Property of Defendant Mixed with Another's.**—Where the owner of chattels mixes them with those of another, so that they cannot be distinguished, the officer attaching them as the property of the latter is not liable in trespass.<sup>8</sup> The owner must demand

<sup>1</sup> *Horn v. Corvarubias*, 51 Cal. 524.

<sup>2</sup> *Stewart v. Smith*, 60 Iowa, 275.

<sup>3</sup> *Ranahan v. O'Neale*, 6 Gill & J. 298; 26 Am. Dec. 376.

<sup>4</sup> *Owings v. Frier*, 2 A. K. Marsh. 268; 12 Am. Dec. 393; *Yarborough v. Harper*, 32 Miss. 112; *Lyon v. Goree*, 15 Ala. 360. Trover lies without a

demand: *Woodbury v. Long*, 8 Pick. 543; 19 Am. Dec. 345.

<sup>5</sup> *Gimble v. Ackley*, 12 Iowa, 27.

<sup>6</sup> *Holly v. Huggefard*, 8 Pick. 73; 19 Am. Dec. 303.

<sup>7</sup> *Rodrigues v. Trevino*, 54 Tex. 198.

<sup>8</sup> *Shumway v. Rutter*, 8 Pick. 443; 19 Am. Dec. 340. See *Davis v. Stone*, 120 Mass. 228.

them from the officer, and cannot sue the officer before such demand.<sup>1</sup> But it is the duty of the officer to ascertain, if he can, what portion of the goods belongs to each; and not to attach the whole of them without making the inquiry.<sup>2</sup>

§ 3559. **Officer may Break into Store—But not into Dwelling-house.**—An officer may, on demand, break into a store to attach property there;<sup>3</sup> but he cannot force his way into a dwelling-house against the will of the owner.<sup>4</sup> An officer has no right to use the house for a longer time than that in which he can reasonably remove the goods therefrom.<sup>5</sup>

§ 3560. **Method of Making Levy.**—To constitute a good levy of personal property under an attachment, the officer must actually reduce it into his possession.<sup>6</sup> The custody should be such "as will enable the officer to retain and assert his power and control over the property so that it cannot probably be withdrawn or taken by another without his knowing it."<sup>7</sup> But the officer need not

<sup>1</sup> *Tufts v. McClintock*, 28 Me. 424; 48 Am. Dec. 501.

<sup>2</sup> *Shumway v. Rutter*, 8 Pick. 443; 19 Am. Dec. 340; *Carlton v. Davis*, 8 Allen, 94; *Lewis v. Whittemore*, 5 N. H. 364; 22 Am. Dec. 466; *Wilson v. Lane*, 33 N. H. 466.

<sup>3</sup> *Platt v. Brown*, 16 Pick. 553; *Messner v. Lewis*, 20 Tex. 221; *Fulleton v. Mack*, 2 Aiken, 415; *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145; *Perry v. Carr*, 42 Vt. 50. Or an outhouse; *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145.

<sup>4</sup> *Isley v. Nichols*, 12 Pick. 270; 22 Am. Dec. 425; *People v. Hubbard*, 24 Wend. 369; 35 Am. Dec. 628; *Swain v. Mizner*, 8 Gray, 182; 69 Am. Dec. 244; *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145.

<sup>5</sup> *Williams v. Powell*, 101 Mass. 467; 3 Am. Rep. 396.

<sup>6</sup> *Lane v. Jackson*, 5 Mass. 157; *Gale v. Ward*, 14 Mass. 352; 7 Am. Dec. 223; *Ashmun v. Williams*, 8 Pick. 402; *Taintor v. Williams*, 7

Conn. 271; *Hollister v. Goodale*, 8 Conn. 332; 22 Am. Dec. 674; *Lyon v. Rood*, 12 Vt. 233; *Blake v. Hatch*, 25 Vt. 555; *Learned v. Vandemburgh*, 7 How. Pr. 379; *Culver v. Rumsey*, 6 Ill. App. 598; *Smith v. Orser*, 43 Barb. 187; *Gates v. Flint*, 39 Miss. 365; *Odiorne v. Colley*, 2 N. H. 66; 9 Am. Dec. 40; *Huntington v. Blaisdell*, 2 N. H. 317; *Dunklee v. Fales*, 5 N. H. 527; *Chadbourn v. Sumner*, 16 N. H. 129; 41 Am. Dec. 720; *Bryant v. Osgood*, 52 N. H. 182; *State v. Poor*, 4 Dev. & B. 384; 34 Am. Dec. 357.

<sup>7</sup> *Drake on Attachment*, sec. 256; *Hemmenway v. Wheeler*, 14 Pick. 408; 25 Am. Dec. 411. As to manner of levying attachment upon a vessel, or share or interests in a vessel, see *Conn v. Caldwell*, 6 Ill. 531; *Taacks v. Schmidt*, 18 Abb. Pr. 307; *Seabrook v. Ruse*, *Riley Eq.* 127. Of a pew in a meeting-house: See *Perrin v. Leverett*, 13 Mass. 128; *Sargent v. Peirce*, 2 Met. 80.

touch the goods if he has them in his view, with power of controlling them and taking them into his possession.<sup>1</sup> A stricter rule on this point seems to be laid down in some cases.<sup>2</sup> To attach standing corn and potatoes in the

<sup>1</sup> Nichols v. Patten, 18 Me. 231; 36 Am. Dec. 713; Odiorne v. Colley, 2 N. H. 66; 9 Am. Dec. 39; Morse v. Hurd, 17 N. H. 246; Huntington v. Blaisdell, 2 N. H. 317; Cooper v. Newman, 45 N. H. 339; Dunklee v. Fales, 5 N. H. 527; Lyon v. Root, 12 Vt. 233; Newton v. Adams, 4 Vt. 437; Slate v. Barker, 26 Vt. 647; Denny v. Warren, 16 Mass. 420; Gordon v. Jenny, 16 Mass. 465; Shephard v. Butterfield, 4 Cush. 425; 50 Am. Dec. 797; Naylor v. Dennie, 8 Pick. 198; 19 Am. Dec. 320; Culver v. Rumsey, 6 Ill. App. 598; Runlett v. Bell, 5 N. H. 433; Chadbourne v. Sumner, 16 N. H. 129; 41 Am. Dec. 720; Young v. Walker, 12 N. H. 506; Weston v. Dorr, 25 Me. 176; 43 Am. Dec. 259; Bryant v. Osgood, 52 N. H. 185; In re Ashley, 19 Nat. Bank. Reg. 237; Westervelt v. Pinckney, 14 Wend. 123; 28 Am. Dec. 516; Rogers v. Gilmore, 51 Cal. 309; State v. Cornelius, 5 Or. 46; Harriman v. Gray, 108 Mass. 229; Tomlinson v. Collins, 20 Conn. 364; French v. Stanley, 21 Me. 512; Gates v. Flint, 39 Miss. 363; Levy v. Schockley, 29 Ga. 710. It is a sufficient taking if he informs the owner of goods that he has attached them, and forbids their removal: St. George v. O'Connell, 110 Mass. 475. If an officer enters a building in which property is stored, and makes a public declaration that all the property therein is attached, and locks up the building, and gives the key to a clerk of the owner, with directions, assented to by the clerk, to keep the property for the officer, these facts constitute a valid attachment of the property in the building: Shephard v. Butterfield, 4 Cush. 425; 50 Am. Dec. 796. It is a sufficient attachment of hay in a barn if an officer go within view of it, declare that he attaches it, and post on the barn-door a notification that it is attached: Merrill v. Sawyer, 8 Pick. 397.

<sup>2</sup> Connell v. Scott, 5 Baxt. 595; Hollister v. Goodale, 8 Conn. 332; 21 Am. Dec. 675; Tafts v. Manlove, 14 Cal.

47; Abrams v. Johnson, 65 Ala. 465; Cutter v. House, 122 Mass. 544; Goode v. Longmire, 35 Ala. 673; Havelly v. Lowry, 35 Ill. 450; Culver v. Rumsey, 7 Ill. App. 422. In Hollister v. Goodale, 8 Conn. 332, 21 Am. Dec. 675, it was said: "The word 'attach,' derived remotely from the Latin term '*attingo*,' and more immediately from the French '*attacher*,' signifies to take or touch, and was adopted as a precise expression of the thing: *nam qui nomina intelligit, res etiam intelligit*. The only object of attachment is to take out of the defendant's possession, and to transfer into the custody of the law, acting through its legal officer, the goods attached, that they may, if necessary, be seized in execution, and be disposed of and delivered to the purchaser. From both these considerations it is apparent that to attach is to take the actual possession of property. Hence the legal doctrine is firmly established that, to constitute an attachment of goods, the officer must have the actual possession and custody. It was laid down in these express words by Parsons, C. J., in Lane v. Jackson, 5 Mass. 157, 163, and by Parker, C. J., in Train v. Wellington, 12 Mass. 495, 497. Nor is there, so far as my investigations have enabled me to discover, a single determination opposed to the preceding principle. The case of Turner v. Austin, 16 Mass. 181, decided that no overt act by the sheriff was necessary to constitute an attachment of property previously in his custody on another attachment. But this is entirely consistent with the principle advanced. The sheriff already had the actual custody; and mere form or ceremony for form's sake, and not for the preservation of substance, can never be required. It was likewise adjudged in Denny v. Warren, 16 Mass. 420, that an officer who entered a store to attach goods, where there was no competition, received the key from the clerk, and locked up the store, having declared his intention to

ground, they must be gathered and put away.<sup>1</sup> An attachment of a stock of goods in a storeroom is not good where the officer simply barricades the front door, which he finds locked, and goes away leaving the back door, to which the owner of the goods has a key, unlocked.<sup>2</sup> Service of an attachment on a railroad company creates no lien on property not within the county at the time of the service.<sup>3</sup>

attach, had made a sufficient attachment. And in *Gordon v. Jenny*, 16 Mass. 465, the determination was to the same effect. So in *Naylor v. Denie*, 8 Pick. 198, 19 Am. Dec. 319, it was decided that inaccessible goods, covered up in the hold of a ship, were attached by the officer's going on board and leaving a keeper to take care of them; and in *Merrill v. Sawyer*, 8 Pick. 397, that hay in a barn was duly attached by putting a notification of the attachment on the barn-door. Now, in all these cases, the court went on the principle that the actual possession and custody were necessary to constitute an attachment; although there being no race for priority of attachment, they held that to be the actual custody and possession, which, perhaps, was constructive possession only. The analogous cases all demonstrate the necessity of actually taking the property. This is the established law concerning the levy of executions; that is, the property levied on is actually taken into the custody of law. So when an attachment or execution is levied on the body, it is effected by a corporal seizing or touching of the body, and thus putting it in the custody of the law: 3 Bla. Com. 288. Or by what is tantamount, a power of taking possession and the party's submission thereto: *Genner v. Sparkes*, 1 Salk. 79; *Horner v. Battyn*, Bul. N. P. 62. But if the person do not submit (and this dead property cannot do), the body must actually be seized. The question now arises, in view of the preceding facts and principles, whether the charge to the jury was correct. That the plaintiff was at the door of the carriage-house with a writ of attachment in his hand only proves his intention

to attach. To this no accession is made by the lawful possession of the key and the unlocking of the door. Suppose, what does not appear, that the key was delivered to him by the owner of the barouche, that he might attach the property; this would be of no amount. He might have the constructive possession, which, on a sale, as between vendor and vendee, would be sufficient; but an attachment can only be made by the taking of actual possession. As little importance is attached to the unlocking of the door, and the declaration that the plaintiff attached the carriage. This was not the touching of the property, or the taking of the actual possession. The removal of an obstacle from the way of attaching, as the opening of the door, is not at attachment, nor was the verbal declaration. An attachment is an act done, and not a mere oral announcement. From these various acts, taken separately or conjointly, the plaintiff did not obtain the possession and custody of the barouche, and therefore he did not attach the property. On the contrary, if the facts contended for by the defendant were proved, his defense was complete. Between two officers having separate attachments, there was a race for priority. They both had arrived at the carriage-house; and so soon as the door was opened, the defendant outstripped his competitor, and seized on the barouche. By this act he had the actual possession, and was successful in his intended prior attachment."

<sup>1</sup> *Heard v. Fairbanks*, 5 Met. 111; 38 Am. Dec. 394.

<sup>2</sup> *Bickler v. Kendall*, 66 Iowa, 703.

<sup>3</sup> *Sutherland v. Peoria Bank*, 78 Ky. 250.



As to heavy and bulky articles, no actual handling is necessary.<sup>1</sup> So where a removal of the property attached would be attended with great waste and expense, it may be dispensed with.<sup>2</sup> The same is true as to articles which he cannot take manual possession of; for instance, stock of a corporation.<sup>3</sup> Here the mode is to serve the proper officer with a writ, and notice that the shares are levied on.<sup>4</sup> But a bond, promissory note, or other instrument for the payment of money can be attached only by taking it into actual custody.<sup>5</sup> To attach real estate, the officer need not go upon the land, or even see it. It is sufficient for him to make return on the writ that he has attached it.<sup>6</sup> Such an attachment is entirely symbolical; the officer has no possession of it, nor is the tenant dispossessed.<sup>7</sup> An attachment upon machinery bolted to the freehold is binding if the sheriff obtains full control of it, and he need not detach and remove it.<sup>8</sup> He has no right to take actual possession of the land, or disturb the possession of the owner or occupant.<sup>9</sup> The levy, though not good against third persons, may be good against the defendant and purchasers with notice.<sup>10</sup>

<sup>1</sup> *Merrill v. Sawyer*, 8 Pick. 397; *Hemmenway v. Wheeler*, 14 Pick. 408; 25 Am. Dec. 411; *Polley v. Lenox Iron Works*, 4 Allen, 329; *Lewis v. Orpheus*, 3 Ware, 143; *Mills v. Camp*, 14 Conn. 219; 36 Am. Dec. 488; *Davidson v. Waldron*, 31 Ill. 120; 83 Am. Dec. 206; *Bryant v. Osgood*, 52 N. H. 185; *Grover v. Buck*, 34 Mich. 519; *Rogers v. Gilmore*, 51 Cal. 309; *Gallagher v. Bishop*, 15 Wis. 276. A levy on an iron safe and its contents is a levy on the contents, although the sheriff, for a considerable time thereafter, is unable to open the safe and take out the contents: *Elliott v. Bowman*, 17 Mo. App. 693.

<sup>2</sup> *Mills v. Camp*, 14 Conn. 219; 36 Am. Dec. 488; *Bicknell v. Trickey*, 34 Me. 273.

<sup>3</sup> *Stamford Bank v. Ferris*, 17 Conn. 259; *Moor v. Walker*, 46 Iowa, 164.

<sup>4</sup> *Stamford Bank v. Ferris*, 17 Conn. 259. See *O'Brien v. Mechanics' Bank*, 56 N. Y. 52.

<sup>5</sup> *Anthony v. Wood*, 96 N. Y. 180; 67 How. Pr. 424; *Caldwell v. Sibley*, 3 Minn. 406; *Erwin v. Commercial Bank*, 3 La. Ann. 186; 48 Am. Dec. 447.

<sup>6</sup> *Perrin v. Leverett*, 13 Mass. 128; *Taylor v. Mixer*, 11 Pick. 341; *Crosby v. Allyn*, 5 Me. 453; *Rodgers v. Bonner*, 55 Barb. 9; 45 N. Y. 379; *Burkhardt v. McClellan*, 1 Abb. App. 263; *Hancock v. Henderson*, 45 Tex. 479. A levy on real estate of an attachment from another county does not become a lien until a certificate of the levy is duly filed in the office of the recorder of the county in which the land is situated: *Hall v. Gould*, 79 Ill. 16.

<sup>7</sup> *Perrin v. Leverett*, 13 Mass. 128.

<sup>8</sup> *Patch v. Wessels*, 46 Mich. 249.

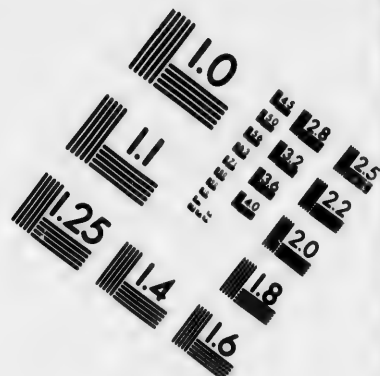
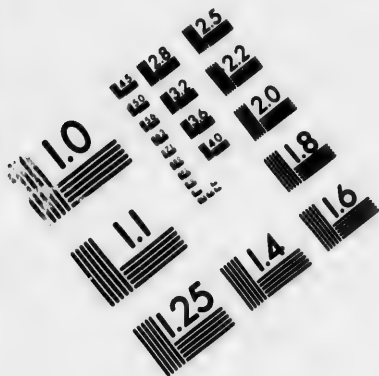
<sup>9</sup> *Wood v. Weir*, 5 B. Mon. 544.

<sup>10</sup> *Rogers v. Gilmore*, 51 Cal. 309; *Taft v. Manlove*, 14 Cal. 51; 73 Am. Dec. 610. In *Pettes v. Marsh*, 15 Vt. 454, 40 Am. Dec. 690, the court say: "The case shows that this defendant

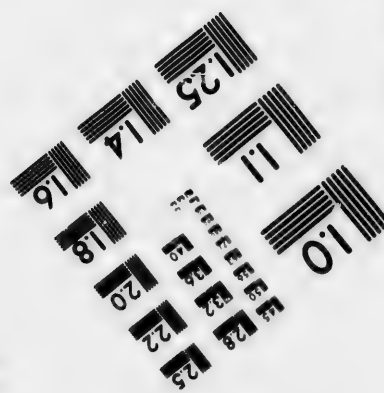
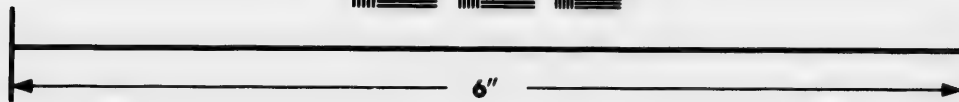
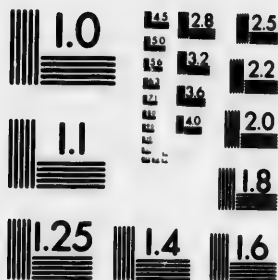
**ILLUSTRATIONS.**—An attachment was made on certain patterns in a foundry, confined under lock, with the key in possession of the defendant. *Held*, invalid, as the officer had no actual control of the property: *Rix v. Silknitter*, 57 Iowa, 262. An officer attached hewn stones by going among and upon them, and directed the creditor, who receipted for them, and whose place of business was fifty rods from the stones, to take charge of them; but the stones were not removed. *Held*, a valid attachment: *Hemmenway v. Wheeler*, 14 Pick. 408; 25 Am. Dec. 411. An officer indorsed upon a writ a levy of attachment upon certain grain in two cars twelve miles away, without going where they were. *Held*, void as against a subsequent levy which was properly made: *Culver v. Rumsey*, 6 Ill. App. 598. The sheriff, under an attachment, levied upon a portable steam thrashing-machine and appurtenant articles, by making a memorandum of the property, and delivered a copy of the attachment and of the summons and complaint to the defendant; he also verbally directed a person at work near the place where the property was to look after it, and if any one meddled with it, to tell him it was attached. *Held*, a sufficient taking

actually owned and had upon his farm five hundred sheep; that the officer went there to make service of the writ; and that, without requiring the ceremony of going to view the sheep or separating the flock, the defendant and another person executed a receipt for three hundred and fifty of the sheep, which the officer returned as being attached upon the writ. Now, there is no doubt but that the legal requisites of a valid attachment are such as the counsel has contended for. It is nothing less than the actual seizure of property, or having it within the power and control of the officer. But this definition is framed with reference to an attachment in the strict sense of a proceeding altogether *in invitum*, the power of the law operating against the will, or without the concurrence of the party affected by it. As against an unwilling party or a third person whose rights are affected, it must, doubtless, conform to this description. It is competent, however, for a party to dispense with forms or ceremonies which he might have insisted on, and still leave the attachment effectual as against himself. He may consent to be treated as being under arrest, when the officer has not acquired the actual control of his person; and so he may consent that

his goods shall be treated as being attached, when the officer has not actually seized them. In each case it is but submitting to the power of the law, without constraint. And if, under such circumstances, the officer returns the arrest or attachment with the party's assent, that return should be, as it legally is, conclusive evidence of the fact. And if the principle here advanced be a sound and just one, the present is surely a strong case in illustration of it. The property did exist and was attachable; and but for the voluntary arrangement between the defendant and the officer, it would have been regularly seized and removed. But the defendant chose to have it treated as being attached, waiving the ceremony of actual seizure and removal, and undertook to keep it for the officer, who, with his assent, charged himself with a liability for it. He cannot now say that his subsequent possession of the property was not subservient to the officer's right. It appears that the property was afterwards duly demanded, but having been previously disposed of, was not restored. We think that, upon such a state of facts, the action of trover can be maintained."



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of the property into the custody of the sheriff, as against purchasers from the defendant with knowledge of the attachment: *Rogers v. Gilmore*, 51 Cal. 309.

**§ 3561. Officer must Make Return—Requisites of.—**

The officer having levied the attachment must make a return on or before the return day of the writ; otherwise, the attachment will be dissolved,<sup>1</sup> and the officer will be liable in damages.<sup>2</sup> The return must be by the officer who made the levy, and to whom the writ was directed.<sup>3</sup> The return must be in proper form, and clearly show what has been done, by whom, and how done,<sup>4</sup> and the names of the persons in whose presence the writ was served.<sup>5</sup> But it need not set out all the acts necessary to make the levy valid.<sup>6</sup> Whether the return should state that the property levied on is the property of the defendant is disputed. In some states it is held that it should.<sup>7</sup> In others it is held not necessary, and the court will presume that

<sup>1</sup> *Williams v. Babbitt*, 14 Gray, 141; 74 Am. Dec. 670; *Tomlinson v. Stiles*, 28 N. J. L. 201; 29 N. J. L. 426; *Wilder v. Holden*, 24 Pick. 8; *Russ v. Butterfield*, 6 Cush. 242; *Paine v. Farr*, 118 Mass. 74; *Berry v. Spear*, 13 Me. 187. *Contra*, *Reed v. Perkins*, 14 Ala. 231; *Bancroft v. Sinclair*, 12 Rich. 617; *Ritter v. Scannell*, 11 Cal. 238; 70 Am. Dec. 775. Where a writ of attachment is returned before the return day without personal service, no further return can be made without leave of the court: *Myers v. Prosser*, 40 Mich. 644. An attachment is void, if made on a writ returnable, by mistake, to a court which is past: *Dame v. Fales*, 3 N. H. 70. The lien acquired by an attachment of land is not lost by delay in filing the return until after a term of court has passed, no intervening rights having been acquired: *City Bank v. Cupp*, 59 Tex. 268.

<sup>2</sup> *Clark v. Smith*, 10 Conn. 1; 25 Am. Dec. 47; *Lafin v. Willard*, 16 Pick. 64; 26 Am. Dec. 629.

<sup>3</sup> *Olney v. Shepherd*, 8 Blackf. 146.

<sup>4</sup> *Clymore v. Williams*, 77 Ill. 618; *Wilkins v. Tourtellott*, 28 Kan. 825; *Gibson v. Wilson*, 5 Ark. 422; *Desha*

*v. Baker*, 3 Ark. 509; *Jeffries v. Harvie*, 38 Miss. 97; *Rankin v. Dulany*, 43 Miss. 197. On an attachment against Henry F. Hawkins, the sheriff returned that he had attached the property of Henry M. Hawkins. Held, that the attachment was void: *Dutton v. Simmons*, 65 Me. 583; 20 Am. Dec. 729.

<sup>5</sup> *Cabeen v. Douglass*, 1 Mo. 336. See *Morgan v. Johnson*, 15 Tex. 568.

<sup>6</sup> *Ritter v. Scannell*, 11 Cal. 238; 70 Am. Dec. 775. But see *Page v. Genesee*, 6 La. Ann. 551. It is not necessary that the officer make a certificate of his proceedings on the precept previous to the return day: *Wilder v. Holden*, 24 Pick. 8. When a constable who has property in his possession under an attachment attaches it under a second writ, he need only return that he has attached the right, title, and interest of the defendant in the property, the same being in his possession: *O'Connor v. Blake*, 29 Cal. 312.

<sup>7</sup> *Clay v. Neilson*, 5 Rand. 596; *Mason v. Anderson*, 3 T. B. Mon. 293; *Anderson v. Scott*, 2 Mo. 15; *Meuley v. Zeigler*, 23 Tex. 88; *Repine v. McPherson*, 2 Kan. 340.

the property levied on was the defendant's.<sup>1</sup> The officer must give in or with his return a specific description of the property attached, its kind, quantity, number, size, etc., as the case may be.<sup>2</sup> No more particularity, however, is required than is necessary for the identification of the property.<sup>3</sup> If an officer return an attachment of land as

<sup>1</sup> Johnson v. Moss, 20 Wend. 145; Bickerstaff v. Patterson, 8 Port. 245; Lucas v. Godwin, 6 Ala. 831; Saunders v. Columbus Ins. Co., 43 Miss. 583; Rowan v. Lamb, 4 G. Greene, 468; Bannister v. Higginson, 15 Me. 73; 32 Am. Dec. 134.

<sup>2</sup> Haynes v. Small, 22 Me. 14; Toulmin v. Lesesne, 2 Ala. 359; Pearce v. Baldridge, 7 Ark. 413; Pierce v. Strickland, 2 Story, 292; Baxter v. Rice, 21 Pick. 197; Mesner v. Lewis, 20 Tex. 221; Bryant v. Osgood, 52 N. H. 182; Hathaway v. Larrabee, 27 Me. 449; Fitzhugh v. Hellen, 3 Har. & J. 206; Porter v. Byrne, 10 Ind. 146; 71 Am. Dec. 305; Meuley v. Zeigler, 23 Tex. 88; Henry v. Mitchell, 32 Mo. 512; Reid v. Kirkwood, 19 Ark. 332; Sanford v. Pond, 37 Conn. 588. But one who, with knowledge that property has been attached, removes and converts it, is liable to the officer therefor, notwithstanding a misdescription of the property in the officer's return: Smart v. Batchelder, 57 N. H. 140.

<sup>3</sup> Gary v. McCown, 6 Ala. 370; Wharton v. Conger, 9 Smedes & M. 510; Ela v. Shepard, 32 N. H. 277; Taylor v. Mixer, 11 Pick. 341; Howard v. Daniels, 2 N. H. 137; Whitaker v. Sumner, 9 Pick. 308; Bacon v. Leonard, 4 Pick. 277; Pratt v. Wheeler, 6 Gray, 520; Moore v. Kidder, 55 N. H. 488; Gilman v. Thompson, 11 Vt. 643; 34 Am. Dec. 714. In Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 614, the court said: "On the first day of January, 1836, Robert Farley caused all Greeley's 'right, title, and interest in and to any real estate in the county of Penobscot' to be attached, and afterwards obtained a judgment, and caused Greeley's right in equity to be seized and sold, and the plaintiff became the purchaser. It was decided in Crosby v. Allyn, 5 Greenl. 453, that an attachment of all the debtor's right, title, and interest to real estate in

Belfast and Thorndike was valid. In Whitaker v. Sumner, 9 Pick. 310, the officer returned: 'I attach all the right, title, and interest in and to a certain piece or parcel of land, with the buildings thereon, situate in Columbia Street, at the southerly part of Boston, and one piece of land, and the buildings thereon standing, being situate in Pleasant Street, in said Boston, which the within-named Benjamin Huntington has to the estates before mentioned.' And the court say: 'The return of the attachment on the plaintiff's writ against Huntington has as much certainty as returns in general of attachments on mesne process'; and it was decided to be good. In Taylor v. Mixer, 11 Pick. 341, the return was: 'I have attached all the right, title, and interest which the within-named Ruggles has to his homestead farm, on which he now dwells, together with all the land thereto belonging, lying in Enfield, in said county. Also all the right and interest which said Ruggles has to any lands lying in Enfield aforesaid.' It was decided to be a valid attachment of any other lands in Enfield which might not be a part of the farm. These cases sufficiently prove that an attachment is good, though made in as general language as the officer used in this case. And that it has been a common practice, sanctioned by the courts, for officers, when they intended to attach certain real estate as the property of the debtor, to make use of the words 'right, title, and interest' in and to it, for the purpose of accomplishing it. These words were probably introduced with a design to enlarge, and not to diminish, the effect of an attachment of a farm, or tract of land, so as to secure not only the fee, but whatever right the debtor might have in it, as an estate for life or for years, or by way of contract in writing, or the right to redeem it."

"supposed" to belong to the debtor, such qualifying term does not impair the effect of the attachment, where the land is, in fact, the property of the debtor.<sup>1</sup> Where an officer returns on a writ an attachment of certain goods only, without fixing their value, the presumption of law is, in the absence of all other testimony, that they were of the value commanded to be attached.<sup>2</sup> In serving an attachment on a garnishee, the sheriff is required to return a schedule of all visible, tangible property attached, but not of the credits or indebtedness of the garnishee to the defendant in the attachment, which latter may be attached, though no tangible property of the defendant should be found in the hands of the garnishee.<sup>3</sup>

**§ 3562. Officer's Return Conclusive against Him — Exception.** — The return of the officer is conclusive against him, and cannot be disproved by parol evidence,<sup>4</sup> except where his statement is simply a statement of opinion on his part.<sup>5</sup>

**§ 3563. Return may be Amended when.** — A court may permit the amendment of a return, but this is a matter in its discretion.<sup>6</sup> An officer may amend his return before it is filed, but not after.<sup>7</sup> Thus a return has been allowed to be amended by inserting a specific description of a lot of land omitted by mistake;<sup>8</sup> by insert-

<sup>1</sup> *Banister v. Higginson*, 15 Me. 73; 22 Am. Dec. 134.

<sup>2</sup> *Childs v. Ham*, 23 Me. 74.

<sup>3</sup> *Read v. Kirkwood*, 19 Ark. 332.

<sup>4</sup> *Paxton v. Steckel*, 2 Pa. St. 93; *Denny v. Willard*, 11 Pick. 519; 22 Am. Dec. 389; *French v. Stanley*, 21 Me. 512; *Haynes v. Small*, 22 Me. 14; *Brown v. Davis*, 9 N. H. 76; *Chadbourne v. Sumner*, 16 N. H. 129; 41 Am. Dec. 720; *State v. Penner*, 27 Minn. 269; *Clarke v. Gary*, 11 Ala. 98; *Fisher v. Bartlett*, 8 Me. 122; 22 Am. Dec. 225; *State v. Lawson*, 8 Ark. 380; 47 Am. Dec. 728. *Contra*, *Buckingham v. Osborne*, 44 Conn. 133.

<sup>5</sup> *Denton v. Livingston*, 9 Johns. 96; 6 Am. Dec. 264; *Pierce v. Strickland*, 2 Story, 292; *Williams v. Cheesborough*, 4 Conn. 356.

<sup>6</sup> *Planters' Bank v. Walker*, 3 Smeles & M. 409; *Hill v. Cunningham*, 25 Tex. 25; *Miller v. Shackelford*, 4 Dana, 264; *Palmer v. Thayer*, 28 Conn. 237; *Fowble v. Walker*, 4 Ohio, 64; *Cody v. Quinn*, 6 Ired. 191; 41 Am. Dec. 75; *Maris v. Schemerhorn*, 3 Whart. 13; *McKnight v. Strong*, 25 Ark. 212.

<sup>7</sup> *Welsh v. Joy*, 13 Pick. 477.

<sup>8</sup> *Vanderheyden v. Gary*, 38 How. Pr. 367.

ing a statement that the sheriff posted a copy of the attachment in the manner required by law;<sup>1</sup> by inserting the word "county" instead of "inferior" in the clause "returnable to the inferior court," where jurisdiction had recently been taken from the inferior court;<sup>2</sup> to show that the effects attached were the property of the defendant;<sup>3</sup> by specifying the particular articles attached;<sup>4</sup> by inserting a statement that the property was attached "as the property of A and B."<sup>5</sup> But an amendment of a return will not be permitted where it would affect injuriously the rights of third parties previously acquired without notice.<sup>6</sup>

§ 3564. **Lien Dates from Levy.**—The lien of an attachment as against both the defendant and third parties dates, not from the issue of the writ,<sup>7</sup> or its delivery to the officer to execute,<sup>8</sup> but from the time of its actual service.<sup>9</sup> The attaching creditor acquires by the levy the rights of the defendant in the property at the time the attachment took place.<sup>10</sup> No interest subsequently acquired by the

<sup>1</sup> *Wilson v. Ray*, 11 U. P. Charl. 109.

<sup>2</sup> *Covington v. Cothran*, 35 Ga. 156.

<sup>3</sup> *Mason v. Anderson*, 3 T. B. Mon. 295.

<sup>4</sup> *Baxter v. Rice*, 21 Pick. 197.

<sup>5</sup> *Bank of Northwest v. Taylor*, 16 Wis. 609.

<sup>6</sup> *Emerson v. Upton*, 9 Pick. 167; *Haven v. Snow*, 14 Pick. 28; *Johnson v. Day*, 17 Pick. 106.

<sup>7</sup> *Mears v. Winslow*, 1 Smedes & M. Ch. 449; *Wallace v. Forest*, 2 Har. & McH. 261; *Williamson v. Bowie*, 6 Munf. 176; *Tomlinson v. Stiles*, 28 N. J. L. 201. The mere filing of a bill in equity, praying for an attachment, creates no lien upon the property sought to be reached: *Sharp v. Hunter*, 7 Cold. 389.

<sup>8</sup> *Crowninshield v. Strobel*, 2 Brev. 80; *Lynch v. Crary*, 52 N. Y. 181. *Contra* by statute: *Bergman v. Sells*, 39 Ark. 97.

<sup>9</sup> *Rodgers v. Bonner*, 45 N. Y. 379; *Gates v. Bushnell*, 9 Conn. 530; *Fitch*

*v. Waite*, 5 Conn. 117; *Sewell v. Savage*, 1 B. Mon. 260; *Nutter v. Connett*, 3 B. Mon. 199; *Pond v. Griffin*, 1 Ala. 678; *Haldeman v. R. R. Co.*, 2 Handy, 101; *Kuhn v. Graves*, 9 Iowa, 303; *Stockley v. Wadman*, 1 Houst. 350; *Ensforth v. King*, 50 Mo. 477; *Hunt v. Strew*, 39 Mich. 368; *McCobb v. Tyler*, 2 Cranch C. C. 199; *Grigsley v. Love*, 2 Cranch C. C. 413; *Learned v. Vandenburg*, 8 How. Pr. 77; *Burkhardt v. McClellan*, 15 Abb. Pr. 243; *Lynch v. Crary*, 52 N. Y. 181; *Taft v. Manlove*, 14 Cal. 47; 73 Am. Dec. 610; *Crowninshield v. Strobel*, 2 Brev. 80; *Robertson v. Forrest*, 2 Brev. 466; *Zeigenhagen v. Doe*, 1 Ind. 296; *Mears v. Winslow*, 1 Smedes & M. Ch. 449; *Wallace v. Forest*, 2 Har. & McH. 261; *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54; *Martin v. Dryden*, 6 Ill. 187; *Redus v. Wafford*, 12 Miss. 579; *Lummis v. Boon*, 3 N. J. L. 734.

<sup>10</sup> *Wade on Attachment*, sec. 26; *Handley v. Pfister*, 39 Cal. 283; 2 Am. Rep. 449; *Plant v. Smythe*, 45



debtor in the property is affected.<sup>1</sup> And a previous assignment of the property is valid against a subsequent attachment.<sup>2</sup> The attachment creates an inchoate lien, which, on obtaining judgment, relates back to the levy, and is superior to all subsequent liens or transfers.<sup>3</sup>

**§ 3565. Levy is not a Satisfaction—Does not Change Ownership.**—The levy of an attachment is not a satisfaction of the plaintiff's demand.<sup>4</sup> But where property attached for a debt is lost during litigation, through the insolvency of the officer in whose custody it was, and of his sureties, the creditor cannot afterwards enforce his demand against other property of the creditor;<sup>5</sup> nor does the attachment transfer or change the ownership in the property.<sup>6</sup> The owner may transfer it subject to the

Cal. 161; *Cox v. Milner*, 23 Ill. 476; *Savery v. Browning*, 18 Iowa, 246; *Reed v. Ownby*, 44 Mo. 204; *Sappington v. Oeschli*, 49 Mo. 244; *Harrel v. Gray*, 10 Neb. 186; *United States v. Howgate*, 2 Mackey, 408; *Crocker v. Pierce*, 31 Me. 177; the court saying: "The purpose of an attachment upon mesne process is simply to secure to the creditor the property which the debtor has at the time it is made, so that it may be seized and levied upon in satisfaction of the debt, after judgment and execution may be obtained. The title to the property remains unchanged by the attachment. An attachment can operate only upon the right of the debtor existing at the time it is made. No interest subsequently acquired by the debtor can in any manner be affected by the return thereof, when none was in him at the time. We have been directed to no case, and it is believed that none can be found, where a title has been held to inure to a creditor from an attachment upon a writ by way of estoppel, as from a deed with covenants of warranty, where there is no title of the debtor upon which the attachment can operate. Upon the principle contended for, it would be in the power of a creditor, by a return of an attachment upon mesne process, to secure to himself any interest in real estate which

his debtor might obtain subsequently thereto if the interest should be attached."

<sup>1</sup> *Crocker v. Pierce*, 31 Me. 177; *Arrington v. Screws*, 9 Ired. 42; 49 Am. Dec. 408.

<sup>2</sup> *Nesmith v. Drum*, 8 Watts & S. 9; 42 Am. Dec. 260; *Sanborn v. Kittredge*, 20 Vt. 632; 50 Am. Dec. 58.

<sup>3</sup> *Scarborough v. Malone*, 67 Ala. 570.

<sup>4</sup> *Drake on Attachment*, sec. 222, citing *McBride v. Farmers' Bank*, 28 Barb. 476; *Maxwell v. Stewart*, 22 Wall. 77; *Cravens v. Wilson*, 48 Tex. 324. But *contra*, *Yourt v. Hopkins*, 24 Ill. 326.

<sup>5</sup> *Henrick v. Huff*, 71 Mo. 570.

<sup>6</sup> *Bigelow v. Willson*, 1 Pick. 485; *Blake v. Shaw*, 7 Mass. 505; *Merrick v. Hutt*, 15 Ark. 331; *Atkins v. Swope*, 38 Ark. 528; *Larimer v. Kelly*, 10 Kan. 298; *Scarborough v. Malone*, 67 Ala. 570; *Starr v. Moore*, 3 McLean, 354; *Tiernan v. Murrah*, 1 Rob. (La.) 443; *Crocker v. Pierce*, 31 Me. 177; *Wheeler v. Nichols*, 32 Me. 233; *Haldeman v. R. R. Co.*, 2 Handy, 101; *Oldham v. Scrivener*, 3 B. Mon. 579; *Perkins v. Nowell*, 6 Humph. 151; *Snell v. Allen*, 1 Swan, 208; *Lyon v. Sanford*, 5 Conn. 544; *Scott v. Manchester Print Works*, 44 N. H. 507; *Hubbard v. Hamilton Bank*, 7 Met. 343; *Coverdale v. Aldrich*, 19 Pick. 394.

lien.<sup>1</sup> But after the levy of an attachment upon land, the defendant cannot sell the land even for a valuable consideration, or *bona fide*, to pay a debt then due, so as to affect the lien of the attaching creditor.<sup>2</sup> The owner's assignment of personal property that has been attached and duly sold, and "of the proceeds thereof," vests the title to the proceeds in the assignee subject to the attachment; and on dissolution of the attachment, and due notice and demand by the assignee, the sheriff is liable to him for a failure to pay over the proceeds.<sup>3</sup> Property seized under attachment is only a legal deposit in the hands of the sheriff to abide the event of the action, and after judgment against the defendant he is entitled to the same exemptions in the property attached as he would have had had there been no attachment.<sup>4</sup> If the owner of property attached can, without a trespass, actually deliver it subject to the lien, a sale with such delivery will vest the property in the vendee, subject to the lien, so as to give him a title paramount to that of a subsequent attaching creditor.<sup>5</sup>

ILLUSTRATIONS.— Land descended to several children, one of whom was indebted to his father, the intestate, and they made partition by deed, assigning to the debtor less than an equal part by the amount of the debt, and a creditor of the same debtor, not having notice of the partition, attached all the

<sup>1</sup> Bigelow v. Willson, 1 Pick. 485; Warner v. Everett, 7 B. Mon. 262; Smith v. Clinton Bridge Co., 13 Ill. App. 572; Wheeler v. Nichols, 32 Me. 233; Klinek v. Kelly, 63 Barb. 622; Ware v. Russell, 70 Ala. 174; 45 Am. Rep. 82; Merrick v. Hutt, 15 Ark. 331; Calkins v. Lockwood, 17 Conn. 154; 42 Am. Dec. 729; Denny v. Willard, 11 Pick. 519; 22 Am. Dec. 389; Fettyplace v. Dutch, 13 Pick. 388; 23 Am. Dec. 688; Whipple v. Thayer, 16 Pick. 28; 26 Am. Dec. 626; Whitaker v. Sumner, 20 Pick. 405; Grant v. Lyman, 4 Met. 477; Arnold v. Brown, 24 Pick. 89; 35 Am. Dec. 296; Mann v. Huston, 1 Gray, 253; Parsons v. Merrill, 5 Met. 359; Appleton v. Bancroft, 10 Met. 235; Nichols v. Patton, 18 Me. 231; 36 Am. Dec. 713; State v.

Cornelius, 5 Or. 46; Starr v. Moore, 3 McLean, 354. In Bigelow v. Willson, 1 Pick. 485, Wilde, J., said: "The attachment did not change the estate of the debtor or take away his power of alienation, and the creditor acquired no property thereby. He had only a lien, and the debtor might legally convey the property subject to the lien. This lien the purchaser might discharge by payment of the debt before execution executed, or he might afterwards redeem the estate if it were by law redeemable."

<sup>2</sup> Ozmere v. Hood, 53 Ga. 114.

<sup>3</sup> First Ward Nat. Bank v. Thomas, 125 Mass. 278.

<sup>4</sup> Gamble v. Rhyne, 80 N. C. 183.

<sup>5</sup> Fettyplace v. Dutch, 13 Pick. 388; 23 Am. Dec. 688.

debtor's undivided share in the estate. *Held* that the attachment created a lien which was not defeated by the partition: *McMeehan v. Griffing*, 9 Pick. 537.

§ 3566. **Lien Destroyed only by Dissolution of Attachment.**—The lien of the attachment can only be destroyed by the dissolution of the attachment.<sup>1</sup> No subsequent act of the debtor can in any way impair it,<sup>2</sup> and even a state statute annulling it has been held *ultra vires* the power of the legislature.<sup>3</sup> By the levy of any attachment a party acquires a lien on real estate of which he cannot be divested without his voluntary act or day in court; such lien will not be affected by a decree subsequently rendered in a court of another state, in a proceeding to which the attachment plaintiff is not made a party.<sup>4</sup>

§ 3567. **Right of Attaching Creditor to Set Aside Fraudulent Conveyance of Property.**—In several states it has been held that an attaching creditor has by virtue of the attachment a right to maintain a creditor's bill in equity to set aside a fraudulent conveyance of or encumbrance on the attached property;<sup>5</sup> and that, in an action by a vendee or assignee of the goods attached, the attaching creditor may show that the sale or assignment was

<sup>1</sup> *Goore v. McDaniel*, 1 McCord, 480; *Peck v. Webber*, 7 How. (Miss.) 658; *People v. Cameron*, 7 Ill. 468; *Desha v. Baker*, 3 Ark. 509; *Frellson v. Green*, 19 Ark. 376; *Harrison v. Trader*, 29 Ark. 85; *Davenport v. Lacon*, 17 Conn. 278; *Woolfolk v. Ingram*, 53 Ala. 11; *McClellan v. Lipscomb*, 56 Ala. 255; *Griggs v. Banks*, 59 Ala. 311; *Ersline v. Staley*, 12 Leigh, 406; *Moore v. Holt*, 10 Gratt. 284; *Hervey v. Champion*, 11 Humph. 569; *Snell v. Allen*, 1 Swan, 208; *Pierson v. Robb*, 4 Ill. 139; *Martin v. Dryden*, 6 Ill. 187; *Lyon v. Sanford*, 5 Conn. 544; *Lackey v. Seibert*, 23 Mo. 85; *Ward v. McKenzie*, 33 Tex. 297; 7 Am. Rep. 291; *Chandler v. Dyer*, 37 Vt. 345; *Hannahs v. Felt*, 15 Iowa, 141.

<sup>2</sup> *McBride v. Floyd*, 2 Bail. 209; *Stevenson v. Prather*, 24 La. Ann. 434; *Ozmore v. Hood*, 53 Ga. 114; *Conway v. Butcher*, 8 Phila. 272; *Randolph v. Carlton*, 8 Ala. 606; *Bach v. Goodrich*, 9 Rob. (La.) 391; *Harvey v. Grymes*, 8 Mart. 395; *Franklin Fire Ins. Co. v. West*, 8 Watts & S. 350.

<sup>3</sup> *Hannahs v. Felt*, 15 Iowa, 141.

<sup>4</sup> *McBride v. Harn*, 48 Iowa, 151.

<sup>5</sup> *Stone v. Anderson*, 26 N. H. 506; *Dodge v. Griswold*, 8 N. H. 425; *Tappan v. Evans*, 11 N. H. 311; *Sheafe v. Sheafe*, 40 N. H. 516; *Hunt v. Field*, 9 N. J. Eq. 36; 57 Am. 365; *Ward v. McKenzie*, 33 Tex. 297; 7 Am. Rep. 291; *Castle v. Bader*, 23 Cal. 75. And see *McMinn v. Whelan*, 27 Cal. 300.

fraudulent.<sup>1</sup> Other courts, however, deny such right, treating the attaching creditor as a creditor at large until he has obtained judgment.<sup>2</sup> An attachment creditor is not entitled to an injunction restraining, on the ground of fraud, the disposition of his debtor's property in the sheriff's hands under judgments and executions.<sup>3</sup> An attaching creditor attacking a sale of the property must show that the officer had jurisdiction to issue the attachment.<sup>4</sup>

§ 3568. **Extent of Attachment as to Amount.** — The attachment covers not only the amount stated in the writ, but also the amount of the judgment and costs.<sup>5</sup> But it will not cover a judgment for a cause of action other than that for which the attachment was issued;<sup>6</sup> nor although the judgment may be for a larger amount by reason of costs, or of an increase of the demand.<sup>7</sup>

§ 3569. **Attachment not Consummated until Judgment — Judgment for Defendant Dissolves It.** — The lien of the attachment is consummated by judgment. It is of no practical effect to the defendant until that time.<sup>8</sup> Where lands of the defendant are attached, and judgment is afterwards rendered against him in the proceedings, the lien of the judgment will take relation back to the lien of the attachment.<sup>9</sup> But no process can issue for the sale

<sup>1</sup> Hall v. Stryker, 27 N. Y. 596; Riney v. Stryker, 28 N. Y. 45; 84 Am. Dec. 324; Greenleaf v. Munford, 30 How. Pr. 30; Angier v. Ash, 26 N. H. 99; Owen v. Dixon, 17 Conn. 492; Potter v. Mather, 24 Conn. 551; Dixon v. Hill, 5 Mich. 404.

<sup>2</sup> Martin v. Michael, 23 Mo. 50; 66 Am. Dec. 656; Weil v. Lankins, 3 Neb. 384; Tennant v. Battey, 18 Kan. 324.

<sup>3</sup> Martin v. Michael, 23 Mo. 50; 66 Am. Dec. 656.

<sup>4</sup> Van Etten v. Hurst, 6 Hill, 311; 41 Am. Dec. 748.

<sup>5</sup> Searle v. Preston, 33 Me. 214; Tilton v. Coffield, 2 Col. 392. A sheriff

has a lien for his costs, charges, and expenses upon property remaining in his hands after vacation of the attachment under which he seized the same, and he may sustain an action to enforce the same by a sale of the property: *Bowe v. U. S. Reflector Co.*, 66 How. Pr. 41; *Hall v. U. S. Reflector Co.*, 66 How. Pr. 31.

<sup>6</sup> *Syracuse Bank v. Coville*, 19 How. Pr. 335.

<sup>7</sup> *Hubbell v. Kingman*, 52 Conn. 17.

<sup>8</sup> *Wade on Attachment*, sec. 29; *Franklin Bank v. Bachelder*, 23 Me. 60; 39 Am. Dec. 601.

<sup>9</sup> *Hill v. Baker*, 32 Iowa, 302.

of property attached, unless the judgment so orders. A mere personal judgment releases the levy.<sup>1</sup> Where, in a suit in which real estate has been attached, the plaintiff takes a personal judgment only, this is an abandonment of the attachment lien, the judgment standing as if no attachment proceedings had been begun.<sup>2</sup> If judgment be given for the defendant, the lien is destroyed, and the parties are *in statu quo*.<sup>3</sup>

ILLUSTRATIONS. — There were several attachments, and the first attacher, whose claim covered the full value of the property, by agreement with the defendant, took all the property in satisfaction of his debt and dismissed his suit. *Held*, that as against subsequent attachers who perfected their liens by judgment and execution, he acquired no title to the property: *Brandon Iron Co. v. Gleason*, 24 Vt. 228.

§ 3570. **Precedence of Attachment over Executions and Encumbrances.** — An attachment has precedence over a later execution.<sup>4</sup> An attachment levied takes precedence over an earlier execution not levied;<sup>5</sup> it outranks an

<sup>1</sup> *Wasson v. Cone*, 86 Ill. 46.

<sup>2</sup> *Lowry v. McGee*, 75 Ind. 508.

<sup>3</sup> *Hale v. Cummings*, 3 Ala. 398; *Johnson v. Edson*, 2 Aiken, 299; *Lamb v. Belden*, 16 Ark. 539; *Clapp v. Bell*, 4 Mass. 99; *Snydam v. Huggefords*, 23 Pick. 465; *O'Connor v. Blake*, 29 Cal. 312.

<sup>4</sup> *Goore v. McDaniel*, 1 McCord, 480; *Pond v. Griffin*, 1 Ala. 678; *Husbands v. Jones*, 9 Bush, 218; *Harbison v. McCartney*, 1 Grant Cas. 172; *Stockley v. Wadman*, 1 Houst. 350; *Beck v. Brady*, 7 La. Ann. 1; *Van Loan v. Kline*, 10 Johns. 129; *Thoms v. Southard*, 2 Dana, 475; 26 Am. Dec. 467.

<sup>5</sup> *Field v. Milburn*, 9 Mo. 492; *Bourne v. Hocker*, 11 B. Mon. 23. In *Bourne v. Hocker* the court say: "It is to prevent an invasion of possession lawfully acquired under legal process, to remove all ground for such a struggle between independent officers of the law, and to avoid occasion for conflict between different authorities or tribunals competent to act upon the same party and the same

property, that the law has established the principle that the first execution of process in the hands of district officers, and emanating from distinct and competent authorities, shall give precedence. The fact that in the case of executions in distinct hands the priority of date is held to be of no force against the priority of actual execution shows that the principle above referred to, and the objects to be secured by it, are deemed of more consequence than the preservation or existence of the lien existing by delivery of the writ, but which, standing by itself, is scarcely more than nominal, and fades into nothing unless followed by an actual legal levy. An attachment is as imperative in requiring and as efficacious in authorizing a seizure of the defendant's goods as a *fiery facias*. And if the lien, whatever it be, of the senior execution leaves, while it is unlevied, such property or right in the defendant that a junior execution in distinct hands may not only be levied on it, but may by the first levy appropriate the property to

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unrecorded mortgage or conveyance.<sup>1</sup> An attachment or judgment, the creditor having, at the date of levying the one or docketing the other, notice of an unrecorded conveyance, does not prevail against such conveyance.<sup>2</sup> Delivering an attachment to the sheriff, with instructions not to levy it for the present, cannot create a lien on the defendant's property; and a mortgage he may execute meantime will be held superior to a lien acquired by an after-levy.<sup>3</sup> Where property is attached and sold under a judgment, the title acquired thereby relates back to the attachment, and has precedence over subsequent assignees or judgment creditors.<sup>4</sup>

ILLUSTRATIONS.—A was a *bona fide* purchaser from the grantee of a wife whose husband failed to join in the deed. *Held*, that A's title was superior to that of a creditor attaching against the husband and wife the day after her deed: *Canda v. Powers*, 38 N. J. Eq. 412. P. agreed to convey land to H., the standing timber to remain P.'s as security for the price. H., before paying for the land, and before receiving a conveyance, cut part of the timber and sold it to J. J. bought of P. his interest in land and timber. *Held*, that the timber could not be attached by H.'s creditors, even although J. had not recorded his conveyance: *Dickerman v. Ray*, 55 Vt. 65. A man conveyed land to one of his creditors in trust for that creditor and other creditors, in consideration of his indebtedness. The conveyance was made in good faith. *Held*, that it took precedence over a subsequent attachment made by another creditor: *Bean v. Patterson*, 4 McCrary, 179. A was in possession of property belonging to B and attached as B's. A refused to deliver the property to the sheriff, or to give the certificate required by law. The sheriff thereupon compelled delivery by an order of court. *Held*, that the sheriff's title related back to the time of de-

itself, to the exclusion of the senior execution, we do not perceive on what grounds the unlevied execution, or any lien attaching to it, can repel an attachment which is a process of equal authority with itself. True, the attachment gives no lien before it is levied; but this is substantially true with respect to the junior execution, as against the older one in the hands of the officer. And it is also substantially true with respect to the older one itself, as against a junior execu-

tion in the hands of a distinct officer acting under a distinct authority."

<sup>1</sup> *Bourne v. Hocker*, 11 B. Mon. 23; *Armisted v. Bowden*, 5 La. Ann. 263; 25 Am. Dec. 178; *Roberts v. Bourne*, 23 Me. 165; 39 Am. Dec. 614.

<sup>2</sup> *Lamberton v. Merchants' Bank*, 24 Minn. 281.

<sup>3</sup> *Gray v. Patton*, 13 Bush, 625.

<sup>4</sup> *Jackson v. Ramsay*, 3 Cow. 75; 15 Am. Dec. 242; *Tyrell v. Roundtree*, 7 Pet. 464; *Porter v. Pico*, 55 Cal. 165; *Lackey v. Seibert*, 23 Mo. 55.

mand, and was superior to the title of one claiming under an assignment from B, made between the time of demand and delivery: *Anthony v. Wood*, 29 Hun, 239. A conveyed land to B, and B, as part of the same transaction, reconveyed it to A. The first deed was at once put upon record, the second withheld that the record title might appear in B. B's right, title, and interest in the land were sold under an execution against him, the attachment having been made before and the levy after the recording of the deed to A. The sale was had under the Massachusetts Statutes of 1874, chapter 188. *Held*, that the purchaser's title was valid as against A: *Woodward v. Sartwell*, 129 Mass. 210. L., being indebted to D. and M., executed to D. a bill of sale of certain personal property, and agreed that L. should have possession of the property until the indebtedness to D. and M. was paid. Subsequently W. brought suit against L., and attached the property, it then being, as claimed by W., in the possession of L. The sheriff appointed D. as keeper. The property was afterwards taken to the ranch of M. by order of L., and thereafter D. conveyed his interest in the property and bill of sale to M. There was no proof that D. ever returned the property to the sheriff, or that he was ever released or discharged as keeper. *Held*, that W.'s rights as an attaching creditor, if his attachment lien was valid, were superior to the rights of D. as a mortgagee, or of M. as a subsequent purchaser: *Moresi v. Swift*, 15 Nev. 215. E. B. M., a married woman, was sued after her marriage under her maiden name of E. B. H., and her real estate standing in the latter name attached. Plaintiff was ignorant of the marriage, and defendant did not plead the misnomer, but the suit proceeded to judgment and execution, and her land was sold thereunder. After the attachment, and before judgment, defendant and her husband joined in the execution of a mortgage upon said land, the mortgage being recorded as from "C. O. M. and E. B. M. (formerly E. B. H.), his wife, in her right." *Held*, that the attachment took precedence of the mortgage, and that the fact of her having, before the attachment, conveyed other land in the same county by her married name did not charge the attaching creditor with notice of the marriage: *Cleaveland v. Savings Bank*, 129 Mass. 27.

**§ 3571. Successive Attachments on Same Property. —**

Where there are several attachments against the same property, they are entitled to satisfaction in the order of time of their service,<sup>1</sup> the second being entitled to the

<sup>1</sup> *Robertson v. Forest*, 2 Brev. 466; *Emerson v. Fox*, 3 La. 183; *Wallace v. Crowninshield v. Strobel*, 2 Brev. 80; *Forrest*, 2 Har. & McH. 261; *Farmers'*

surplus left after satisfying the first, and so on.' Where several attachments are levied on the same property on the same day, they have priority according to the actual time of service of each.<sup>2</sup> Where several attachments are

*Bank v. Day*, 6 Gratt. 360; *Greenleaf v. Munford*, 50 How. Pr. 30; *Jones v. Bonsall*, 11 Phila. 501; *Patterson v. Stephenson*, 77 Mo. 329. "Attachment on mesne process is to be considered as a remedy merely given and regulated by law to enable one creditor who is proceeding for himself alone to obtain satisfaction for his debt, and where several are proceeding, he who is first in time is prior in right": *Atlas Bank v. Nahant Bank*, 23 Pick. 483. The statute recognizes the right of an officer to levy on goods in the custody of another officer on a prior writ. A notification and indorsement is all that is necessary to the validity of the later attachment: *White v. Culter*, 12 Ill. App. 38. But one who has legally sued out an attachment cannot sue out a second against the same defendant on the same debt: *Wilson v. Stricker*, 66 Ga. 575.

<sup>1</sup> *Wehle v. Butler*, 34 N. Y. Sup. Ct. 215.

<sup>2</sup> *Lick v. Madden*, 36 Cal. 208; 95 Am. Dec. 175; *Stone v. Abbott*, 3 Baxt. 319; *Garity v. Gigie*, 130 Mass. 181. *Contra*, *Yelverton v. Burton*, 26 Pa. St. 351. And by statute: *Steffens v. Wanbocker*, 17 S. C. 475. In *Kenyon v. Ficklin*, 6 B. Mon. 414, 44 Am. Dec. 777, the court said: "While it is conceded that, in the case of distinct officers, the first levy gives the prior lien, yet in the case of the same officer, in the discharge of impartial justice between litigants, it is his duty and that of his deputies to levy that first which first came to his or their hands; and if his deputy levies the junior execution first, it is his duty, upon being apprised of the fact, to pay the money to the plaintiff in the senior execution, as was determined by this court in the case of *Million v. Commonwealth* for the Use of Withers, 1 B. Mon. 310; 38 Am. Dec. 580. Though there is not a perfect analogy between the execution of original process or process of attachment and the levy of an execution, as the officer of sheriff is one, and his

deputies his own agents, it is his duty, in the discharge of impartial justice between litigants, to execute and require his deputies to execute all process in the order in which it comes to the hands of either. And the statute, with a view to preserve the time, requires the sheriff to indorse on the process the time of its reception: 1 Stat. Law, 339. The junior process, it is true, where there are several deputies, may be sometimes first served without fault on the part of the principal or either of his deputies, as in the case before us, when the process in one case was placed in the hands of one deputy, and in other cases in the hands of another, the latter not knowing of the prior process in the hands of the former. Each are required to use due diligence in the execution of the process placed in his hands, and in the exercise of all reasonable diligence on the part of both, one may succeed in the execution of his process first. If that should be the junior process, it would be hard to make the principal liable to the plaintiff in the senior process; nor it is just, necessary, or proper, in such a case, to make him responsible. The process in all the cases being served, and the fund attached being in the power and under the control of the court, and all the parties before the court, the chancellor should, in the distribution of the fund, exercise that same impartial justice between the parties which should have been observed by the officer in the execution of the process. As with him the first come should be first served, if he or any of his deputies has been seduced, or by trick or stratagem deluded into the service of the junior first, or if this should happen in the exercise of due diligence on the part of the officers, the chancellor having the control of the fund should distribute it as it would have been distributed had the officer executed them in the order in which they came to hand."



simultaneously served on the same property, it is distributed among all.<sup>1</sup> This distribution in most states is not in proportion to the amount claimed under each attachment, but according to the number of the writs, each being entitled to an aliquot part.<sup>2</sup> In other states, on the other hand, the distribution is *pro rata*.<sup>3</sup> Where the return shows that several writs were served on the same day, without more, it will be presumed that they were served at the same time.<sup>4</sup>

§ 3572. **Attachment of Real Estate.**—The general rule is, that any property subject to execution is also subject to attachment, and therefore real estate—unless expressly prohibited by statute—may be attached.<sup>5</sup> The interest of a mortgagee is not attachable before entry by him for condition broken;<sup>6</sup> nor, it is held, in Maine, even after entry.<sup>7</sup> Undivided interests in lands are attachable as well as interests in severalty.<sup>8</sup> An attachment of land in a suit against the legal owner does not affect the rights of the equitable owners for whom the

<sup>1</sup> Wade on Attachment, sec. 217.

<sup>2</sup> True v. Emery, 67 Me. 28; Wilson v. Blake, 53 Vt. 305; Thurston v. Huntington, 17 N. H. 438; Nutter v. Connett, 3 B. Mon. 199; Davis v. Davis, 2 Cush. 111; Shove v. Dow, 13 Mass. 529; Rockwood v. Varnum, 17 Pick. 289; Durant v. Johnson, 19 Pick. 544; Hepp v. Glover, 15 La. 461; 35 Am. Dec. 206; Sigourney v. Eaton, 14 Pick. 414; 25 Am. Dec. 414; Shaw, C. J., saying: "The court are of opinion that as to the land levied on by execution, and also as to the equity of redemption, the parties, by their attachments, took in moieties, without regard to the amount of their respective executions. The principle is this, that each by his attachment obtained a lien on the property in security of his debt, which would be valid for the whole, but for the attachment of the other. But the attachments being simultaneous, as between themselves, neither can claim priority. They hold, not in shares or proportions, but *per*

*my et per tout*, and upon a division, neither can appropriate to himself more than a moiety. This principle is to be applied, of course, with this qualification, that as the attachment constitutes a lien in security of a debt, if the moiety which either can hold is more than sufficient to satisfy his debt, the surplus will go to the other."

<sup>3</sup> Porter v. Earthman, 4 Yerg. 358; Love v. Harper, 4 Humph. 113; Yelverton v. Burton, 26 Pa. St. 351; Hill v. Child, 3 Dev. 265; Freeman v. Grist, 1 Dev. & B. 217.

<sup>4</sup> Ginsberg v. Pohl, 35 Md. 505.

<sup>5</sup> Wade on Attachment, secs. 249, 261; Drake on Attachment, secs. 232 et seq.

<sup>6</sup> Drake on Attachment, sec. 235.

<sup>7</sup> Smith v. People's Bank, 24 Me. 185; Lincoln v. White, 30 Me. 291; Thornton v. Wood, 42 Me. 282.

<sup>8</sup> McMechan v. Griffin, 9 Pick. 537; Muirroe v. Luke, 19 Pick. 39; Crosby v. Allyn, 5 Me. 453; Argyle v. Dwinel, 29 Me. 29.

land is held in trust.<sup>1</sup> The execution and recording of a deed is valid against an attaching creditor of the grantor whose attachment is levied before actual delivery to the grantee.<sup>2</sup>

**§ 3573. Attachment of Personal Property—What Interests and Kinds may be Attached.**—Whatever kinds of personal property can be taken and sold under an execution may also be attached, and *vice versa*.<sup>3</sup> Property exempt from execution cannot be attached.<sup>4</sup>

**§ 3574. Attached Goods cannot be Taken by Another Officer.**—Where an officer has levied an attachment on goods and has them in his custody, no other officer can seize them under another writ.<sup>5</sup> If he does, he will be

<sup>1</sup> *De Celis v. Porter*, 59 Cal. 464.

<sup>2</sup> *Hedge v. Drew*, 12 Pick. 141; 22 Am. Dec. 416.

<sup>3</sup> *Wade on Attachment*, sec. 261; *Roby v. Labuzan*, 21 Ala. 60; 56 Am. Dec. 237.

<sup>4</sup> *Emerson v. Bacon*, 58 Mich. 526.

<sup>5</sup> *Vinton v. Bradford*, 13 Mass. 114; 7 Am. Dec. 119; *Burlingame v. Bell*, 16 Mass. 318; *Robinson v. Ensign*, 6 Gray, 300; *Beers v. Place*, 36 Conn. 578; *Oldham v. Scrivener*, 3 B. Mon. 579; *Burroughs v. Wright*, 16 Vt. 619; *West River Bank v. Gorham*, 38 Vt. 649; *Harbison v. McCartney*, 1 Grant Cas. 172; *Odiorne v. Colley*, 2 N. H. 66; 9 Am. Dec. 39; *Moore v. Graves*, 3 N. H. 408; *Walker v. Foxcroft*, 2 Me. 270; *Strout v. Bradbury*, 5 Me. 313; *Adler v. Roth*, 2 McCrary, 445; *Thompson v. Marsh*, 14 Mass. 269; *Hagan v. Lucas*, 10 Pet. 400; *Knap v. Sprague*, 9 Mass. 258; 6 Am. Dec. 64; *Blair v. Canty*, 2 Speers, 34; 42 Am. Dec. 361; *Corning v. Dreyfus*, 20 Fed. Rep. 426; *Watson v. Todd*, 5 Mass. 271; the court saying: "At common law, goods seized on a *fiery facias* cannot again be seized by the same sheriff on another *fiery facias*; because they must be sold on the first, and because the sheriff has already acquired in himself a special property by the seizure. But in this state the law of attachments is different. Originally the

defendant was attached by his goods to appear, and when he appeared, the attachment was dissolved. Afterwards the attachment was continued to the judgment, when it was dissolved. And finally, the property attached, if the plaintiff recovered, was to be held by the sheriff thirty days, that the plaintiff might out of the property satisfy his execution. But if he did not deliver his execution to the officer in thirty days, the attachment was finally dissolved. And on these principles the priority of attaching creditors is founded. But as the defendant might be attached by his lands or goods when in fact there was no cause of action, the same officer who had the goods in possession might again attach them, or rather continue to hold them, to compel the defendant to appear and satisfy the judgments of other plaintiffs. Hence a second attaching creditor may have the benefit of goods, or a balance in cash, remaining after the satisfaction of the first execution. As to lands, the practice is different. Originally, when a man was attached by his lands, the officer, to compel his appearance, ought to have taken the profits into his own hands. But in fact the defendant is never disturbed in the possession or pendency of the profits until the execution be levied. Different plaintiffs

liable in damages,' provided he had notice of the first attachment.<sup>2</sup> Goods under a subsisting valid attachment can be attached a second time only by the officer who already has possession of them.<sup>3</sup>

**§ 3575. Rights of Junior Attaching Creditor to Set Aside Attachment.**—A junior attaching creditor cannot defeat the proceedings of an earlier one by showing irregularities in the procedure.<sup>4</sup> But he may show that the earlier claim is fraudulent, illegal, or one not a statutory ground for the proceeding.<sup>5</sup>

**§ 3576. Fraudulent Attachment—Rights of Creditors.**—So a creditor injured by a fraudulent attachment may maintain an action against the plaintiff, or against the officer who made the levy knowing its fraudulent character.<sup>6</sup>

may therefore cause the same lands to be attached, and by different officers, as by a sheriff and by a coroner, and after enough has been taken by the first attaching creditor by appraisal, the second attaching creditor may take enough of the remainder by an appraisal, and so on to a third, until all the land be appraised. As to goods, the officer must hold them in his actual custody, so that he alone can control the possession; they cannot, therefore, be attached at the suit of a second creditor, but by a writ executed by the officer who already has the possession. For another officer, in order to attach, must lawfully take the possession; but he cannot lawfully take the goods from the officer who has first lawfully attached them, he having a special property by his prior attachment. When we speak of different officers, we do not mean different deputies of the same sheriff, for they are all servants of the sheriff, and the possession of any deputy by virtue of an attachment is the possession of the sheriff."

<sup>1</sup> Robinson v. Ensign, 6 Gray, 300; Scarborough v. Malone, 67 Ala. 570.

<sup>2</sup> Scarborough v. Malone, 67 Ala. 570.

<sup>3</sup> Watson v. Todd, 5 Mass. 274;

Vinton v. Bradford, 13 Mass. 114; 7 Am. Dec. 119; Thompson v. Marsh, 14 Mass. 270; Strout v. Bradbury, 5 Me. 313; Odiorne v. Colley, 2 N. H. 66; 9 Am. Dec. 39.

<sup>4</sup> Kincaid v. Neall, 3 McCord, 201; Camberford v. Hall, 3 McCord, 345; In re Griswold, 13 Barb. 412; Isham v. Ketchum, 46 Barb. 43; Ward v. Howard, 12 Ohio St. 158; Rudolf v. McDonald, 6 Neb. 163; McBride v. Floyd, 2 Bail. 209; Van Arsdale v. Krum, 9 Mo. 397; Walker v. Roberts, 4 Rich. 561; Fridenburg v. Pierson, 18 Cal. 152.

<sup>5</sup> Webster v. Harper, 7 N. H. 594; Buckman v. Buckman, 4 N. H. 319; Kimball v. Wellington, 20 N. H. 439; Walker v. Roberts, 4 Rich. 561; Henderson v. Thornton, 37 Miss. 448; 75 Am. Dec. 70; U. S. Express Co. v. Lucas, 36 Ind. 361; Lytle v. Lytle, 37 Ind. 281; Patrick v. Montader, 13 Cal. 434; Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184; McCluney v. Jackson, 6 Gratt. 96; Smith v. Gettinger, 3 Ga. 140; Hale v. Chandler, 3 Mich. 531; Ward v. Howard, 12 Ohio St. 158. *Contra*, Harrison v. Pender, Busb. 78; Bank v. Spurling, 7 Jones, 398; Whipple v. Cass, 8 Iowa, 126.

<sup>6</sup> Denny v. Warren, 16 Mass. 420; Fairfield v. Baldwin, 12 Pick. 388.

### § 3577. Officer must Hold Property—Abandonment.

—The duty of the officer after he has attached it is to retain possession of it.<sup>1</sup> If he gives it up to any one, he will be considered as having abandoned the attachment, and the lien will be lost.<sup>2</sup> He may, at his discretion, release it upon the claim of a third party that he is the owner; but the officer does so at his peril, and he has the burden of establishing that the attached property did not belong to the execution defendant.<sup>3</sup> But the officer is not estopped from showing that the property seized by him did not belong to the defendant.<sup>4</sup> He has no authority to deliver it to the plaintiff.<sup>5</sup> He has no right to allow the property to remain in the possession of the defendant;<sup>6</sup> nor can he constitute the defendant his agent to keep the property for him.<sup>7</sup> His possession, however, of goods attached need not be personal; he may place them in the custody of a servant or agent not the debtor; and the use by the debtor or his family of such articles as are not thereby injured, if by the officer's or his agent's permission, does not affect any rights acquired by the attachment.<sup>8</sup> If attached property is left on the defendant's premises in charge of a keeper, and the keeper departs,

<sup>1</sup> Wade on Attachment, sec. 230.

<sup>2</sup> Thompson v. Baker, 74 Me. 48; Weston v. Dorr, 25 Me. 176; 43 Am. Dec. 259; Gordon v. Jenney, 16 Mass. 465; Bagley v. White, 4 Pick. 395; 16 Am. Dec. 353; Boynton v. Warren, 99 Mass. 172; Sanderson v. Edwards, 16 Pick. 144; Bruce v. Holden, 21 Pick. 187; Baldwin v. Jackson, 12 Mass. 131; Nichols v. Patten, 18 Me. 231; 36 Am. Dec. 713; Waterhouse v. Smith, 22 Me. 337; Taintor v. Williams, 7 Conn. 271; Pomroy v. Kingsley, 1 Tyler, 294; Fitch v. Rogers, 7 Vt. 403; Chadbourne v. Sumner, 16 N. H. 129; 41 Am. Dec. 720; Sanford v. Boring, 12 Cal. 539; Hemmenway v. Wheeler, 14 Pick. 408; 25 Am. Dec. 411. Where a sheriff attaches a demand, it is his duty to collect and hold it, without waiting for an order of court, or the determination of the

suit in which the demand is attached: Davidson v. Chatham Bank, 32 Hun, 138. *Aliter*, as to bulky articles, by statute: Wentworth v. Sawyer, 76 Me. 434. Where mortgaged perishable property is sold under an attachment, the lien is released from the property and transferred to its proceeds: Welsh v. Lewis, 71 Ga. 387.

<sup>3</sup> Wadsworth v. Walliker, 45 Iowa, 395; 24 Am. Rep. 788.

<sup>4</sup> Arnold v. Brown, 24 Pick. 89; 35 Am. Dec. 296.

<sup>5</sup> Vanneter v. Crossman, 39 Mich. 310.

<sup>6</sup> Drake on Attachment, sec. 292 a; Burrows v. Stoddard, 3 Conn. 160. See Davis v. Stone, 120 Mass. 228.

<sup>7</sup> Gower v. Stevens, 19 Me. 92; 36 Am. Dec. 737.

<sup>8</sup> Baldwin v. Jackson, 12 Mass. 131; Train v. Wellington, 12 Mass. 495.

leaving it uncared for, this is an abandonment of the levy.<sup>1</sup> But a temporary exclusion of a keeper by fraud or violence raises no presumption of an abandonment of the attachment.<sup>2</sup> And as a rule, the officer has no right to remove the property out of the jurisdiction.<sup>3</sup>

A statutory authority to sell "perishable goods" is limited to such goods as are liable to perish before the time arrives at which they might be sold in the regular course of the proceedings.<sup>4</sup> Property is not "perishable" because it will depreciate in value by reason of changes of fashion. It must be inherently liable to deterioration and decay;<sup>5</sup> not property which by extraordinary exposure may be liable to loss or destruction if so situated that its safety can be provided for by the attaching officer.<sup>6</sup> Where the goods attached are ordered to be sold as perishable or chargeable, the title of the purchaser at such sale is indefeasible and unquestionable, whoever the former owner may have been, the order and sale being a proceeding *in rem*; but the sheriff, as defendant in an action of trespass by the real owner, cannot justify the taking of goods on the ground that by this peculiar rule of law the title of his vendee was validated.<sup>7</sup> A sale of perishable property under the statute does not bind the owner, unless the statute has been strictly complied with.<sup>8</sup>

ILLUSTRATIONS.—Wood and lumber on a wharf were attached and placed under care of a keeper, who, on a Sunday morning, left the wharf, fastening its gates, as was usual on Sundays, and returned in the afternoon. *Held*, that the attachment was not dissolved: *Fettyplace v. Dutch*, 13 Pick. 388; 23 Am. Dec. 688. After the sheriff who had levied an attachment on personal property had gone out of office, an execution was issued on the judgment, and delivered to his successor in office, who,

<sup>1</sup> *Boynton v. Warren*, 99 Mass. 172.

<sup>2</sup> *Harriman v. Gray*, 108 Mass. 229.

<sup>3</sup> *Drake on Attachment*, sec. 292 d; *Dick v. Bailey*, 2 La. Ann. 974; 46 Am. Dec. 561. See *Brownell v. Manchester*, 1 Pick. 232.

<sup>4</sup> *Henisler v. Friedman*, 5 Pa. L. J. 147. A horse and chaise were ordered

by the court to be sold as perishable in *Anonymous*, 18 N. J. L. 26.

<sup>5</sup> *Fisk v. Spring*, 25 Hun. 367; 62 How. Pr. 510.

<sup>6</sup> *Oneida Nat. Bank v. Paldi*, 2 Mich. 221.

<sup>7</sup> *Megee v. Beirne*, 39 Pa. St. 50.

<sup>8</sup> *Kirby v. Coldwell*, 26 Miss. 103.

with the knowledge and consent of the plaintiff in the execution, returned it "no property found." *Held*, an abandonment of the attachment: *Buller v. White*, 25 Minn. 432. A vessel was attached by a deputy sheriff in the state of Maine, was carried into New York, and while there the keeper temporarily left the property one night, and in his absence the master sailed the vessel into the state of Maryland. Several months afterwards she was retaken by the deputy sheriff in New York. *Held*, that the attachment was not dissolved: *Rhoads v. Woods*, 41 Barb. 471. Property in a building was attached, and the officer afterwards, without intending to abandon the attachment, took all the care and custody of the articles, which, from their bulky nature and small value, could reasonably be required, notwithstanding which the debtor obtained access to the building and mortgaged the property to a creditor, who, before recording his mortgage, had knowledge of the attachment. *Held*, no abandonment of the attachment which the mortgagee could take advantage of: *Shepherd v. Butterfield*, 4 Cush. 425; 50 Am. Dec. 796.

§ 3578. **Officer a Bailee of the Property.**—He becomes a bailee of the property, having a right to defend his possession, and being responsible for negligence in keeping it.<sup>1</sup> But he is not liable for the loss of property while in the hands of a bailee selected by the plaintiff.<sup>2</sup> An officer who has attached a horse, and placed it in charge of a stable-keeper, is not liable for an omission of extraordinary care on the part of the stabler to guard the horse against injury, by reason of any peculiar tricks, of which neither himself, the stabler, nor the party attaching had any knowledge.<sup>3</sup> Having the special property in the goods, he may maintain replevin, trespass, or trover against any one who violates his possession, or that of his servant or bailee.<sup>4</sup> He has no right to use the property.<sup>5</sup>

<sup>1</sup> See *ante*, Title Bailments. When an officer attaches cattle, the owner must provide for their support at his peril: *Sewall v. Mattoon*, 9 Mass. 535.  
<sup>2</sup> *Donham v. Wild*, 19 Pick. 520; 31 Am. Dec. 161.  
<sup>3</sup> *Parrott v. Dearborn*, 104 Mass. 104.  
<sup>4</sup> *Badlam v. Tucker*, 1 Pick. 389; 11 Am. Dec. 202; *Ludden v. Leavitt*, 9 Mass. 104; 6 Am. Dec. 45; *Perney v. Foster*, 9 Mass. 112; *Warren v. Le-lund*, 9 Mass. 265; *Gates v. Cates*, 15 Mass. 310; *Gibbs v. Chase*, 10 Mass. 125.  
<sup>5</sup> *Lamb v. Day*, 8 Vt. 407; 30 Am. Dec. 479.

ILLUSTRATIONS.—A musical instrument belonging to B.'s wife was attached as the property of B., the officer locking up the room containing it, and taking the key. Soon after, the building took fire, and the instrument was damaged by water in extinguishing it. B. requested the attaching plaintiff during the fire to allow him to remove the instrument, which could have been done; but he refused, and afterwards refused to allow its removal to a dry place, and it became greatly damaged. Soon after, the officer notified B. that he relinquished the attachment upon it, but did not otherwise return or offer to return it. In trespass by B., as trustee for his wife, *held*, 1. That the notice of the relinquishment of the attachment did not amount to a return of the property, nor to an unequivocal offer to return it; 2. That the defendant was liable for the damage done to the instrument after the relinquishment of the attachment; 3. That the sum for which the instrument was mortgaged to a third person at the time of the attachment was not to be deducted from its value in fixing the damages: *Becker v. Bailies*, 44 Conn. 167.

§ 3579. **Forthcoming Bond to Officer—Effect of.**—The officer may, instead of retaining possession of the property, intrust it to the defendant, taking from him a bond—called a forthcoming bond—by which the defendant binds himself, with sureties, to return the property to the officer in case judgment is rendered against him. By the giving of such bond the attachment is not dissolved or otherwise affected.<sup>1</sup> Sometimes, instead of a bond, a simple receipt is taken by the officer for the property.<sup>2</sup> In some states it is held that a receiptor, when called upon for the property, cannot show that the property he receipted for was not subject to attachment, or was not the defendant's.<sup>3</sup> In other states, however, the receiptor is

<sup>1</sup> "Here is the marked difference between the forthcoming bond and the bond to dissolve attachment: the first leaves the attachment intact, but the second dissolves it and reduces the suit to a personal proceeding; the obligation of the forthcoming bond is to return the property for execution, while that of the dissolution bond is to pay whatever judgment may be rendered. The former is not, but the latter is, a substitute for the attachment": *Waples on Attachment*, 397; *Goss v. Williams*, 46 Ind. 253; *Tyler v. Safford*, 24 Kan.

580. A forthcoming bond running to the officer, and not to the plaintiff in the attachment, is valid: *Johnson v. Weatherwax*, 9 Kan. 71.

<sup>2</sup> Nor does such receipt dissolve the attachment: *Perry v. Derby*, 57 Me. 552.

<sup>3</sup> *Cornell v. Dakin*, 38 N. Y. 253; *People v. Reeder*, 25 N. Y. 302; *Burrall v. Acker*, 23 Wend. 606; 35 Am. Dec. 582; *Dezell v. Odell*, 3 Hill, 215; 38 Am. Dec. 628; *Bacon v. Daniels*, 116 Mass. 474.

not estopped from showing that the property was his own, or that he had delivered it to a stranger to the writ, who was the true owner.<sup>1</sup> But the receiptor cannot set up that no goods were attached; or that the contract sued on was not legal;<sup>2</sup> or that the goods were not taken by the officer or delivered to him;<sup>3</sup> nor that he did not in fact receive so much property as is stated in the receipt, but signed for more than he received, upon representations of the officer that he would be holden for so much only as was actually delivered.<sup>4</sup> Giving a bond estops the obligor from denying the officer's right to the property,<sup>5</sup> or the validity of the levy.<sup>6</sup> But it does not preclude the defend-

<sup>1</sup> *Fisher v. Bartlett*, 8 Me. 122; 22 Am. Dec. 225; *Johns v. Church*, 12 Pick. 557; 23 Am. Dec. 651; *Penobscot Boom Co. v. Wilkins*, 27 Me. 345; *Learned v. Bryant*, 13 Mass. 224; *Burt v. Perkins*, 9 Gray, 317; *Barron v. Colleigh*, 11 N. H. 557; 35 Am. Dec. 505; *Dayton v. Merritt*, 33 Conn. 184; *Parks v. Sheldon*, 36 Conn. 466; 4 Am. Rep. 95; *Lathrop v. Cook*, 14 Me. 414; 31 Am. Dec. 62; *Torrey v. Otis*, 67 Me. 573; *Lewis v. Webber*, 116 Mass. 450; *Thayer v. Hunt*, 2 Allen, 449; *Fowler v. Bishop*, 31 Conn. 562; *Harmon v. Moore*, 59 Me. 428; *Bleven v. Freer*, 10 Cal. 176. But see *Dewey v. Field*, 4 Met. 381; 38 Am. Dec. 376; *Sawyer v. Mason*, 19 Me. 49; *Smith v. Cudworth*, 24 Pick. 196; *Bursley v. Hamilton*, 15 Pick. 40; 25 Am. Dec. 423. In *Lewis v. Webber*, 116 Mass. 450, the court said: "The question of the defendant's liability is to be settled by ascertaining from the terms of the contract, as applied to the circumstances under which it was executed, whether it is to be regarded as a contract of indemnity only, or as a receipt for specific articles actually attached, with an agreement for their safe-keeping and return. If it be the latter, then, by repeated decisions, the defendants are not estopped from showing in defense that the goods attached were all subject to prior mortgages, or to the prior right of the partnership creditors, and were, or ought to have been, applied to the

payment of those debts. It was early held that if an officer had wrongfully attached the goods of a third person as the property of the debtor, and had bailed them, the bailee might protect himself by a delivery to the true owner, for by such delivery the officer would be discharged from liability to the creditor, the debtor, and the real owner: *Learned v. Bryant*, 13 Mass. 224. And it is even held that the receiptor is not in all cases estopped to assert his own right of property in the goods attached merely by reason of having executed an accountable receipt for it to the officer. To have that effect, there must be the element of such conduct or such declarations as induced the officer to alter his condition or to forego some advantage which he might have had."

<sup>2</sup> *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653.

<sup>3</sup> *Spencer v. Williams*, 2 Vt. 209; 19 Am. Dec. 711; *Lowry v. Cady*, 4 Vt. 504; 24 Am. Dec. 628. When an officer brings suit upon a receipt for property attached by him, he need not show actual attachment of the property and delivery thereof to the receiptor by other evidence than his return and the receipt: *Stimson v. Ward*, 47 Vt. 624.

<sup>4</sup> *Bowley v. Angire*, 49 Vt. 41.

<sup>5</sup> *Morgan v. Furst*, 4 Mart., N. S., 116; 16 Am. Dec. 166.

<sup>6</sup> *Scanlan v. O'Brien*, 21 Minn. 434; *Crisman v. Matthews*, 2 Ill. 149; 26



ant from subsequently moving to set aside the attachment.<sup>1</sup> But the officer is still liable to the parties, by virtue of the attachment, for the safe-keeping and legal disposition of such property. Such receipt is a contract between him and the signer alone, and so long as his liability to either party continues, it can be discharged only by his consent.<sup>2</sup> After taking a receipt for the attached goods, the officer cannot retake them on the same writ against the consent of the receiptor.<sup>3</sup> Where the defendant gives a forthcoming bond, and thus retains possession, the property will be regarded as in the custody of the law, and not liable to levy and sale on other process against the defendant. If, notwithstanding, it is seized on execution against the attachment debtor, he should replevy the same, so as to be able to perform the condition of his bond, and if he does not, an action lies on the bond for the non-delivery of the property.<sup>4</sup> In an action on the undertaking, it must appear that such property was returned to the defendant, in order to recover.<sup>5</sup> The officer has a right to demand the goods of the receiptor at any time before a demand of payment on the execution, and even before judgment.<sup>6</sup> Where an attachment is dissolved, all the proceedings in attachment are quashed, including the delivery bond;<sup>7</sup> the receiptor may bring trover for the property against one who takes it out of his possession without color of right.<sup>8</sup> Giving bond to procure a discharge of property seized upon attachment has been held to be a waiver of the right to claim the time allowed for appearing and answering in cases of service by publication;<sup>9</sup>

Am. Dec. 417; *Mead v. Figh*, 4 Ala. 279; 37 Am. Dec. 742; *Haggart v. Morgan*, 5 N. Y. 422; 55 Am. Dec. 350.

<sup>1</sup> *Garbutt v. Hanff*, 15 Abb. Pr. 189.

<sup>2</sup> *Torrey v. Otis*, 67 Me. 573.

<sup>3</sup> *Weston v. Dorr*, 25 Me. 176; 43 Am. Dec. 259.

<sup>4</sup> *Roberts v. Dunn*, 71 Ill. 46.

<sup>5</sup> *McGonigle v. Gordon*, 11 Kan. 167; *Couse v. Phelps*, 12 Kan. 353.

<sup>6</sup> *Jones v. Gilbert*, 13 Conn. 507.

<sup>7</sup> *Gass v. Williams*, 46 Ind. 253; *Bildersee v. Aden*, 10 Abb. Pr., N. S., 163.

<sup>8</sup> *Thayer v. Hutchinson*, 13 Vt. 504; 37 Am. Dec. 607.

<sup>9</sup> *Shields v. Barden*, 6 Ark. 459.

of the right to move to vacate the attachment on the ground that the property was not liable;<sup>1</sup> of the right to move to quash or vacate the attachment generally;<sup>2</sup> of all objections to the attachment and proceedings under it, so that the cause stands as though it had been commenced as an ordinary summons.<sup>3</sup>

<sup>1</sup> *Morrison v. Alphin*, 23 Ark. 136.

<sup>2</sup> *Paddock v. Matthews*, 3 Mich. 18.

<sup>3</sup> *Payne v. Snell*, 3 Mo. 409.

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## CHAPTER CLXXIX.

## DISSOLUTION OF THE ATTACHMENT.

- § 3580. Dissolution of attachment — By giving bond — Payment of judgment.
- § 3581. By showing that grounds alleged do not exist.
- § 3582. By repeal of statute authorizing it.
- § 3583. By judgment for defendant.
- § 3584. By defects and irregularities in proceedings.
- § 3585. By altering process or changing demand.
- § 3586. Referring claims to arbitration.
- § 3587. By death of defendant.
- § 3588. By bankruptcy of defendant.
- § 3589. After dissolution of attachment, officer must deliver property to defendant.

**§ 3580. Dissolution of Attachment — By Giving Bond — Payment of Judgment.** — In most of the states the attachment may be dissolved by the defendant giving a bond, with security, for the payment of such judgment as may be recovered in the suit.<sup>1</sup> The giving of such bond releases the lien upon the property, and the suit continues as a personal action only, the ancillary or attachment proceeding being at an end.<sup>2</sup> But only a statutory bond

<sup>1</sup> In *Cole v. Parker*, 7 Iowa, 167, 71 Am. Dec. 439, it is said: "The only mode in which the officer could obey the exigency of the writ, in this case, was by seizing the property of the defendant therein, in the mode prescribed by the statute. He must take the property into the custody of the law. Any agreement to omit the performance of this duty, as by permitting the defendant to retain the possession and enjoy the use of the property levied on, after the seizure, is at common law illegal and void. The defendant, desiring so to do, may discharge the property from the attachment, by giving bond and security for the delivery of the same to the sheriff, to satisfy any judgment that may be obtained in the suit. This is the only mode pointed out by the statute in which the sheriff is authorized to re-

lease the property from seizure. He cannot take any other obligation or security from the defendant, in the place of levying the writ; neither to save himself harmless from the consequences of the failure, nor for the payment of whatever judgment may be rendered in the suit. Should he do so, the act is without authority; the officer will not be protected against the party at whose suit the writ has issued; the agreement or security, being without consideration, so far as the officer is concerned, cannot be enforced by him; and whether in his hands, or when attempted to be enforced for his benefit, is utterly void: *Winter v. Kinney*, 1 N. Y. 365."

<sup>2</sup> *Barry v. Foyles*, 1 Pet. 311; *Shirley v. Byrnes*, 34 Tex. 625; *Kennedy v. Morrison*, 31 Tex. 207; *Reynolds v. Jordan*, 19 Ga. 436; *Irvin v. Howard*,

will dissolve it.<sup>1</sup> If there is no legal right to attach, there is no right to take a bond; and the fact that the defendant has given a bond does not estop him.<sup>2</sup> It need not state a consideration. The release of the attached property is a sufficient consideration.<sup>3</sup> Its recitals are conclusive as between the parties, and the sureties cannot show that the property attached did not belong to the principal as whose property it was attached.<sup>4</sup>

A bond is not annulled by a *supersedeas* bond given on appeal taken from the judgment rendered against the attachment defendant;<sup>5</sup> nor is it invalidated by failure to make an appraisal prior to the making of the bond.<sup>6</sup> A bond will stand as security for any judgment which would have been satisfied out of the attached property, though there be, by leave of court, a discontinuance as to all the defendants named in the bond, except the administrator of one deceased.<sup>7</sup> In assessing the damages, the value of the property at the time the bond was given is to be taken, and not its value at the time of the judgment rendered or demand made.<sup>8</sup> Sureties who have only undertaken to prevent a levy of the writ of attachment are not to be liable for a release of the property after

37 Ga. 18; Payne v. Snell, 3 Mo. 409; Epstine v. Salorgue, 6 Mo. App. 352; Hills v. Moore, 40 Mich. 210; Buckingham v. Sweezy, 61 How. Pr. 266; Erwin v. Heath, 50 Miss. 795; Phillips v. Hines, 33 Miss. 163; Wharton v. Conger, 9 Smedes & M. 510; Ferguson v. Vance, 3 Lea, 90; Gillespie v. Clark, 1 Tenn. 2; Scanlon v. O'Brien, 21 Minn. 434; Dierolf v. Winterfield, 24 Wis. 143; Myers v. Smith, 29 Ohio St. 126; Eddy v. Morse, 23 Kan. 113; Endress v. Ent, 18 Kan. 236; Hill v. Harding, 93 Ill. 77; Albany City Ins. Co. v. Whitney, 70 Pa. St. 248; McCombs v. Allen, 82 N. Y. 114; Brenner v. Moyer, 98 Pa. St. 274. The defendant is entitled to possession of the property (live-stock) without payment of the charges already incurred for keeping the stock during the pen-

dency of the attachment: Milburn v. Marlow, 4 G. Greene, 17.

<sup>1</sup> Moore v. Allen, 55 Ga. 67. A bond given in a foreign attachment proceeding, if good at common law, may be enforced, though void as a statutory recognizance: Wright v. Keyes, 103 Pa. St. 567. In California it is held that the bond is not void for want of conformity to the requirements of a statute, which, while prescribing one form, does not prohibit another: Smith v. Fargo, 57 Cal. 157.

<sup>2</sup> Egan v. Lumsden, 2 Disn. 168; Williams v. Skipwith, 34 Ark. 529.

<sup>3</sup> Lightle v. Berning, 15 Nev. 389.

<sup>4</sup> Pierce v. Whiting, 63 Cal. 538.

<sup>5</sup> State v. McGlothlin, 61 Iowa, 312.

<sup>6</sup> Woodward v. Adams, 9 Iowa, 474.

<sup>7</sup> Inbusch v. Farwell, 1 Black, 566.

<sup>8</sup> Perry v. Post, 45 Conn. 354.

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the attachment had been levied.<sup>1</sup> But sureties on a bond in an attachment suit against several defendants are liable, though judgment is rendered against only one defendant.<sup>2</sup> Where an attachment is discharged upon the execution of a bond by the defendant, who afterwards appeals with *supersedeas* from a judgment rendered against him in the cause, and judgment is rendered in the appellate tribunal against him and the sureties on his appeal bond, the plaintiff has his election either to proceed by execution under the judgment against the defendant and the sureties on the appeal bond, or to sue the surety on the original discharging bond.<sup>3</sup> The bond is not discharged by the death of one of the defendants if the action continues and the cause of action survives against the survivor; and if a judgment is recovered against such survivor in such action, the sureties are liable to pay the amount.<sup>4</sup> The sureties of an attachment cannot show that no attachment was in fact issued; nor that they were induced to execute the undertaking by fraud of their principal, unless the plaintiff can be connected with the fraud.<sup>5</sup> They can set up no ground of defense to the judgment rendered against the principal which the principal could not set up.<sup>6</sup> It is immaterial that no warrant of attachment is shown, or any consideration for the undertaking.<sup>7</sup> But that one has given the bond required by law to secure the release of his property does not prevent his attacking the attachment for such irregularity as would have been sufficient to avoid it had no bond been given.<sup>8</sup> The sureties on a bond given to prevent the levy of an attachment, who undertake to pay on demand the judgment which may be obtained against the defendant in the attachment

<sup>1</sup> Laveaga v. Wise, 13 Nev. 296.

<sup>2</sup> McCutcheon v. Weston, 65 Cal. 37.

<sup>3</sup> Chrisman v. Rogers, 30 Ark. 351.

<sup>4</sup> Cockroft v. Claffin, 64 Barb. 464.

<sup>5</sup> Onderdonk v. Voorhis, 36 N. Y. 358; Coleman v. Bean, 1 Abb. App.

394; Kelly v. Christal, 16 Hun, 242.

<sup>6</sup> McCloskey v. Wingfield, 32 La. Ann. 38.

<sup>7</sup> Higgins v. Healy, 47 N. Y. Sup. Ct. 207; 89 N. Y. 636.

<sup>8</sup> Bates v. Killian, 17 S. C. 553.

suit, are not released by reason of the fact that the sheriff attached property before the bond was given, he having released it afterwards; nor by reason of judgment in the attachment suit having been entered by consent, and execution stayed for sixty days by stipulation between the parties to that suit.<sup>1</sup>

In an action upon the bond, not only the original plaintiffs in the attachment suit, but all creditors who afterwards made themselves parties to that proceeding, and were adjudged entitled to participate in the proceeds, should join as plaintiffs; or if any refuse to join, they should be made defendants, and the reason stated in the complaint. The undertaking inures to the benefit of persons who come in and make themselves parties to the attachment proceedings, and procure the adjustment of their claims and the proper order for the distribution of the proceeds of the property attached, as well as to that of the original plaintiffs; and it would manifestly be a perversion to permit the latter to exhaust the undertaking, to the exclusion of the other creditors.<sup>2</sup> The bond is properly made payable to the sheriff, and when assigned to the plaintiff, he may sue on it.<sup>3</sup>

The attachment is also dissolved by the payment of the judgment. But a mere deposit with the clerk of the court by a defendant in an attachment suit of the amount of the judgment rendered against him in the suit is not such a payment of the judgment as to entitle him to a release of the property attached in the suit.<sup>4</sup>

**§ 3581. By Showing that Grounds Alleged do not Exist.** — The defendant may have the attachment dissolved by showing that the facts alleged as a ground of attachment are not true.<sup>5</sup> Any person interested in the

<sup>1</sup> Preston v. Hood, 64 Cal. 405.

<sup>2</sup> Moore v. Jackson, 35 Ind. 360.

<sup>3</sup> Adkins v. Allen, 1 Stew. 130.

<sup>4</sup> Sagely v. Livermore, 45 Cal. 613.

<sup>5</sup> Lovier v. Gilpin, 6 Dana, 321;

Drake on Attachment, secs. 399 et seq. An affidavit for attachment alleged the debt sued for to have been fraudulently contracted, and, on a motion to dissolve, no testimony was

discharging of property from attachment may move the court therefor.<sup>1</sup>

**§ 3582. By Repeal of Statute Authorizing It.**—The attachment is dissolved by the repeal of the statute authorizing it. "If, during the progress of a suit by attachment, the law be repealed without authorizing the continued prosecution of pending suits, there can be no further proceeding, and the attachment is thereby dissolved."<sup>2</sup>

**§ 3583. By Judgment for Defendant.**—The attachment is dissolved by a final judgment for the defendant.<sup>3</sup> An attachment is a mere incident to the suit in which it was sued out, and if the suit abates, the attachment goes with it.<sup>4</sup> So a nonsuit dissolves the attachment,<sup>5</sup> and setting aside the nonsuit does not revive it.<sup>6</sup> So the rendition of a personal judgment against defendant is a dismissal of attachment proceedings.<sup>7</sup> A verdict in favor of the defendant on a plea in abatement releases the property attached, if no bill of exceptions is tendered at the term, though there has been no trial upon the issue of indebtedness.<sup>8</sup> But pending plaintiff's appeal from a judgment awarding him only part of his claim, defendant is not entitled to have the attachment vacated on payment of such part.<sup>9</sup> When judgment is rendered against the plaintiff and the attachment dissolved, and he takes an

offered to disprove the allegation. Held, that the motion to dissolve was wrongfully granted: *Keith v. Stetter*, 25 Kan. 100; *Simon v. Stetter*, 25 Kan. 155.

<sup>1</sup> *Long v. Murphy*, 27 Kan. 375.

<sup>2</sup> *Drake on Attachment*, sec. 412; *Stephenson v. Doe*, 8 Blackf. 508; 46 Am. Dec. 489. But see *Hannals v. Felt*, 15 Iowa, 141.

<sup>3</sup> *Clapp v. Bell*, 4 Mass. 99; *Suydam v. Huggeford*, 23 Pick. 465; *Brown v. Harris*, 2 G. Greene, 505; 52 Am. Dec. 535; *Harrow v. Lyon*, 3 G. Greene, 157; *Johnson v. Edson*, 2 Aiken,

299; *Hale v. Cummings*, 3 Ala. 398; *O'Connor v. Blake*, 29 Cal. 313; *Wheeler v. Nichols*, 32 Me. 233; *Ouzts v. Seabrook*, 47 Ga. 359.

<sup>4</sup> *Maxwell v. Lea*, 6 Heisk. 247.

<sup>5</sup> *Brown v. Harris*, 2 G. Greene, 505; 52 Am. Dec. 535; *Harrow v. Lyon*, 3 G. Greene, 157; *Danforth v. Carter*, 4 Iowa, 239.

<sup>6</sup> *Id.* But see *Hubbell v. Kingman*, 52 Conn. 17.

<sup>7</sup> *Sannes v. Ross*, 105 Ind. 558.

<sup>8</sup> *Ranscher v. McElhinney*, 11 Mo. App. 434.

<sup>9</sup> *Wright v. Rowland*, 4 Abb. App. 649.

appeal, which is dismissed for failure to file the transcript in time, after which he prosecutes a writ of error, and procures a reversal of the judgment below, without filing a *supersedeas* bound in either case, the lien of the attachment is preserved as between the parties.<sup>1</sup>

§ 3584. **By Defects and Irregularities in Proceedings.**—Defects and irregularities in the plaintiff's proceedings are grounds for dissolving the attachment;<sup>2</sup> though, as has been seen in a former section, the power of the court to allow amendments will generally be exercised.<sup>3</sup> A motion to discharge an attachment can be allowed only for defects apparent on the face of the proceedings.<sup>4</sup> A motion to quash an attachment for a substantial defect in the proceedings goes to the question of jurisdiction, and will be entertained at any stage of the trial.<sup>5</sup> Dissolving the attachment for irregularities in the proceedings is within the discretion of the court, whose decision will not be revised on appeal.<sup>6</sup> An attachment is dissolved by a failure to sell under the execution at the time appointed.<sup>7</sup> Removing the property from the state by the keeper does not dissolve the attachment.<sup>8</sup> But the officer removing it for an illegal purpose out of the state will dissolve it.<sup>9</sup>

§ 3585. **By Altering Process or Changing Demand.**—Altering the writ after the institution of the suit, or changing or increasing the demand upon which it is based, is a fraud upon subsequent attachers, and dissolves the attachment as to them.<sup>10</sup> A variance between the

<sup>1</sup> *Harrison v. Trader*, 29 Ark. 85.

<sup>2</sup> *Wade on Attachment*, sec. 284; *Clark v. Roberts*, 1 Ill. 285; *Bruce v. Conyers*, 54 Ga. 678.

<sup>3</sup> *Ferguson v. Durham*, 10 Kan. 396; *Branch v. Frank*, 81 N. C. 180; *Gosquet v. Collins*, 57 Tex. 340; *Hodgson v. Toothe*, 28 Kan. 317; *Livingston v. Coe*, 4 Neb. 379; *Rudolf v. McDonald*, 6 Neb. 163; *Albens v. Bedell*, 87 Mo. 183.

<sup>4</sup> *Cooper v. Reeves*, 13 Ind. 53.

<sup>5</sup> *Evesson v. Selby*, 32 Md. 340.

<sup>6</sup> *Ex parte Putnam*, 20 Ala. 597; *Massey v. Walker*, 8 Ala. 167; *Drake on Attachment*, sec. 420, and cases cited.

<sup>7</sup> *Croswell v. Tufts*, 76 Me. 295.

<sup>8</sup> *Utley v. Smith*, 7 Vt. 154; 29 Am. Dec. 152.

<sup>9</sup> *Dick v. Bailey*, 2 La. Ann. 974; 46 Am. Dec. 561.

<sup>10</sup> *Drake on Attachment*, sec. 282; *Peck v. Sill*, 3 Conn. 157; *Burrows v.*



cause of action stated in the affidavit and attachment, and the cause of action described in the complaint, may be pleaded in abatement.<sup>1</sup> An attachment is discharged by the plaintiff's discontinuing as to a defendant, though not a party to the bond, and summoning in a new defendant without notice to the surety.<sup>2</sup> It is dissolved by an amendment changing the name of the plaintiff,<sup>3</sup> but a mere amendment of the petition which does not increase the amount sued for, and does not introduce a new cause of action, will not dissolve the writ,<sup>4</sup> nor will mere verbal amendment.<sup>5</sup> So a mere amendment of the writ in form which does not change the action will not dissolve the attachment.<sup>6</sup>

ILLUSTRATIONS.—On trial of an action to recover freight claimed to be due plaintiffs as owners of a steamship, an amendment was allowed, against defendant's objection, making sixteen other persons, part owners of the steamer, co-plaintiffs. *Held*, that this amendment released the sureties on the bond to dissolve the attachment: *Furness v. Read*, 63 Md. 1. An attachment was issued in a suit commenced against A, but at the trial term it was agreed that B should be substituted for A, and the cause proceed against him. *Held*, that this was a dissolution of the attachment, and the cause stood upon the footing of an ordinary suit against B, with service waived: *Milledgeville Mfg. Co. v. Rives*, 44 Ga. 479.

§ 3586. **Referring Claims to Arbitration.**—Referring the demand to arbitration dissolves the attachment.<sup>7</sup>

*Stoddard*, 3 Conn. 431; *Starr v. Lyon*, 5 Conn. 538; *Willis v. Crocker*, 1 Pick. 204; *Freeman v. Creech*, 112 Mass. 180; *Fairfield v. Baldwin*, 12 Pick. 388; *Clark v. Foxcroft*, 7 Me. 348; *Putnam v. Hall*, 3 Pick. 445; *Denny v. Ward*, 3 Pick. 199; *Milledgeville Mfg. Co. v. Rives*, 44 Ga. 479.

<sup>1</sup> *Wright v. Snedecor*, 46 Ala. 92.

<sup>2</sup> *Richards v. Storer*, 114 Mass. 101.

<sup>3</sup> *Flood v. Randall*, 72 Me. 439. But not an amendment merely striking out the middle letter in the name of the defendant: *Wentworth v. Sawyer*, 76 Me. 434. Nor an amendment to a writ against "William Robinson," by

inserting the words "otherwise called William J. Robinson": *Diettrich v. Wolffsohn*, 136 Mass. 335. Nor an amendment making one who is a member of plaintiff's firm a party: *Henderson v. Stetter*, 31 Kan. 56; *Christal v. Kelly*, 88 N. Y. 285.

<sup>4</sup> *Drake on Attachment*, sec. 285; *Cain v. Rockwell*, 132 Mass. 193; *West v. Platt*, 116 Mass. 308.

<sup>5</sup> *Id.*

<sup>6</sup> *Wight v. Hale*, 2 Cush. 486; 48 Am. Dec. 677.

<sup>7</sup> *Clark v. Foxcroft*, 7 Me. 348; *Hill v. Hunnewell*, 1 Pick. 192. But see *Seeley v. Brown*, 14 Pick. 177.

§ 3587. **By Death of Defendant.**—The death of the defendant dissolves the attachment.<sup>1</sup> In Alabama, the death of the defendant, unless attended by the insolvency of his estate, judicially ascertained, does not dissolve it;<sup>2</sup> but if the levy is on lands, and the defendant dies before judgment, and the action is revived and prosecuted to judgment against his administrator, a sale of the lands under execution on such judgment conveys no title to the purchaser as against the heirs. Whether the plaintiff's remedy, in such case, is by *scire facias* against the heirs, or by bill in equity, is not decided.<sup>3</sup>

§ 3588. **By Bankruptcy of Defendant.**—Notwithstanding Mr. Justice Story's opinion to the contrary,<sup>4</sup> it is generally held that an attachment is not dissolved by the defendant's bankruptcy.<sup>5</sup> But a dissolution of the attachment, resulting from proceedings in bankruptcy, will not defeat an action on the indemnifying bond. The bond operates a complete conversion of the property if it belongs to plaintiff, and the only vital question to be tried is plaintiff's ownership.<sup>6</sup>

§ 3589. **After Dissolution of Attachment, Officer must Deliver Property to Defendant.**—When the attachment is dissolved, it is the duty of the officer to at once deliver the

<sup>1</sup> Davenport v. Tilton, 10 Met. 320; Vaughn v. Sturtevant, 7 R. I. 372; Fitch v. Ross, 4 Serg. & R. 557; Sweringen v. Eberius, 7 Mo. 421; 38 Am. Dec. 463; Myers v. Mott, 29 Cal. 359; Hensley v. Morgan, 47 Cal. 622; Upham v. Dodge, 11 R. I. 621. The same as to a defunct corporation, held in Bowker v. Hill, 60 Me. 172; Paschall v. Whitsett, 11 Ala. 472; Farmers' Bank v. Little, 8 Watts & S. 207; 42 Am. Dec. 293. *Contra*, Perkins v. Norvell, 6 Humph. 151; Moore v. Thayer, 10 Barb. 258; White v. Heavenr, 7 W. Va. 324; Lord v. Allen, 34 Iowa, 281; Smith v. Worden, 35 N. J. L. 346.

<sup>2</sup> Woolfolk v. Ingram, 53 Ala. 11.

<sup>3</sup> McClellan v. Lipscomb, 56 Ala. 255.

<sup>4</sup> Foster's Case, 2 Story, 131; Bel-  
low's Case, 3 Story, 428.

<sup>5</sup> Drake on Attachment, sec. 425, and cases cited: Franklin Bank v. Batchelder, 23 Me. 60; 39 Am. Dec. 601; Batchelder v. Putnam, 54 N. H. 84; 20 Am. Rep. 115; Munson v. R. R. Co., 120 Mass. 81; 21 Am. Rep. 499; Cerf v. Cerf, 59 Cal. 132. See Miller v. Mackenzie, 43 Md. 404; 20 Am. Rep. 111; Ray v. Wight, 119 Mass. 426; 20 Am. Rep. 333; People's Bank v. Mechanics' Bank, 62 How. Pr. 422.

<sup>6</sup> State v. Dodd, 4 Mo. App. 597.

property to the defendant.<sup>1</sup> But this right is suspended by the plaintiff taking an appeal or writ of error, and so notifying the officer.<sup>2</sup> The officer will not be charged as a wrong-doer for retaining the possession of property until satisfactory evidence has been given him that the attachment has been vacated, even though the debt may have been paid, and the attachment thereby discharged.<sup>3</sup> He is not required to return it to the place whence he removed it.<sup>4</sup>

<sup>1</sup> *Felker v. Emerson*, 17 Vt. 101; 428; *Danforth v. Carter*, 4 Iowa, 230; *McReady v. Rogers*, 1 Neb. 124; 93; *Caperton v. McCorkle*, 5 Gratt. 177; *Am. Dec.* 333; *Becker v. Bailies*, 44 *Jackson v. Holloway*, 14 B. Mon. 133.  
*Conn.* 167; *Livingston v. Smith*, 5 Pet. 90.

<sup>3</sup> *Wheeler v. Nichols*, 32 Me. 233.

<sup>2</sup> *Drake on Attachment*, secs. 427,

<sup>4</sup> *Clark v. Wilson*, 14 R. I. 13.

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## PART IV.—GARNISHMENT.

### CHAPTER CLXXX.

#### GARNISHMENT.

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- § 3636. Set-off by garnishee.
- § 3637. Pendency of suit by defendant against garnishee.
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§ 3590. **Garnishment Defined.** — Garnishment is a notice given by the plaintiff to a third person who is indebted to the defendant, or has effects of his in his hands, to retain the debt or hold the property and bring it into court to abide the result of the suit. It is, in short, the attachment of property in the hands of a stranger to the suit.<sup>1</sup> The stranger is called a garnishee. In Massachusetts the process is styled trustee process, and the stranger a trustee. In Connecticut the process is called factorizing, and the stranger a factor.<sup>2</sup> A court of equity has no jurisdiction to assist the garnishment.<sup>3</sup>

§ 3591. **The Creature of Statute — Statutory Forms must be Strictly Pursued.** — Garnishment is a statutory proceeding,<sup>4</sup> and the statutory forms must be strictly followed.<sup>5</sup> Garnishment is a proceeding *quasi in rem*, and two services are required, — one to bring the garnishee

<sup>1</sup> Waples on Attachment, p. 341.

Nat. Bank, 62 Mo. 17; 21 Am. Rep. 407.

<sup>2</sup> See Drake on Attachment, sec. 451.

<sup>3</sup> Wolf v. Tappan, 5 Dana, 361; Arthur v. Battle, 42 Tex. 159; Bigelow v. Andress, 31 Ill. 322; Jones v. Huntington, 9 Mo. 249. See Gregg v. Nelson, 8 Phila. 91; Sheedy v. Second

<sup>4</sup> Illinois Cent. R. R. Co. v. Weaver, 54 Ill. 319; Sheedy v. Second Nat. Bank, 62 Mo. 17; 21 Am. Rep. 407.

<sup>5</sup> Black v. Brisbin, 3 Minn. 360; 74 Am. Dec. 762; Gibbon v. Bryan, 3 Ill. App. 298.

and another to bring the property before the court.<sup>1</sup> Therefore the process cannot be aided or expedited by the garnishee.<sup>2</sup> The garnishee cannot waive service of the proceedings required by law to make a seizure of effects or property in his hands, and if the garnishee is not legally served, nothing is attached in his hands.<sup>3</sup> If the affidavit is defective, a voluntary appearance by the defendant and submission to examination do not waive the defect or give jurisdiction.<sup>4</sup>

§ 3592. **Garnishment a "Suit."**—Garnishment is a "suit," as that word is used in the statutes.<sup>5</sup> The plaintiff has all the rights of any other plaintiff, and may discontinue it.<sup>6</sup> Process may be served upon the garnishee without notice to the principal defendant.<sup>7</sup> The defendant to the original suit is under no legal obli-

<sup>1</sup> *Epstein v. Salorgne*, 6 Mo. App. 352; *Mosher v. Bartholow*, 6 Mo. App. 598.

<sup>2</sup> *Schindler v. Smith*, 18 La. Ann. 476; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Northern Cent. R. R. Co. v. Rider*, 45 Md. 24; *Raymond v. Rockland Co.*, 40 Conn. 401. In *Hebel v. Amazon Ins. Co.*, 33 Mich. 400, the court say: "Many things may take place in the course of such [garnishment] proceedings which the garnishee on the one hand, or the garnishor on the other, may be bound or estopped by, as between themselves, but which the garnishee may not be able to urge as matter of defense against the suit of the principal defendant. Still, there is no question of the right of one prosecuted as garnishee to make many admissions and waivers without endangering his protection. He need not wait to be led by the shoulder into the court. He need not wage battle at every step. The law itself not only recognizes his right to suffer default, but provides what the practice shall be in such case, and invests the judgment with the same protective force as it does one awarded after vigorous contest." But "independent and spontaneous submission by the custodian or debtor

of the right belonging to the principal defendant cannot bind him. The intervention of the law, according to its own substantial appointments, can alone initiate compulsory novation. A garnishee may admit away his own right, over which he has power, but he cannot admit away another right, over which he has no power. It is a plain proposition that one against whom there is an existing claim cannot, by his own act alone, transfer it into an obligation to another."

<sup>3</sup> *Phelps v. Boughton*, 47 La. Ann. 592; *Epstein v. Salorgne*, 6 Mo. App. 352; *Raymond v. Rockland Co.*, 40 Conn. 401; *Schindler v. Smith*, 18 La. Ann. 476. The writ may be served by reading it to the garnishee: *Pike v. Lytle*, 6 Ark. 212. It is not necessary that the notice served on the garnishee should be signed by any one: *Moore v. Stainton*, 22 Ala. 831.

<sup>4</sup> *Steen v. Norton*, 45 Wis. 412; *Rasmussen v. McCabe*, 46 Wis. 600. See *Rindge v. Green*, 52 Vt. 204.

<sup>5</sup> *Moore v. Stanton*, 22 Ala. 831; *Tunstall v. Worthington*, Hemp. 662. And the summons therein is "process": *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. Rep. 252.

<sup>6</sup> *Griel v. Loftin*, 65 Ala. 591.

<sup>7</sup> *Phillips v. Germon*, 43 Iowa, 101.

gation to defend the garnishee. It is the garnishee's duty to see that he is not adjudged to pay otherwise than according to law.<sup>1</sup> The death of the plaintiff before judgment against the garnishee is rendered does not render the judgment void.<sup>2</sup> The execution against the garnishee should recite the form of the judgment, and contain a demand to the constable in substantial conformity with it. A further command should be inserted that, in the event of levy and sale of the goods and chattels of the garnishee, if the proceeds exceed the amount for which the execution issued, the overplus, less the costs of sale, should be returned to the garnishee.<sup>3</sup>

§ 3593. **Nature of the Garnishment Lien.**—It is said in many cases that by garnishment the plaintiff acquires a lien on the debt due from the garnishee to the defendant.<sup>4</sup> The better view, however, is, that there is no real lien, but that the plaintiff simply acquires by the garnishment the right to personally hold the garnishee liable for the debt or its value, and to restrain the garnishee from paying the debt to the defendant.<sup>5</sup> In Ohio, a gar-

<sup>1</sup> *Pounds v. Hamner*, 57 Ala. 342.

<sup>2</sup> *Coleman v. McNulty*, 16 Mo. 173; 57 Am. Dec. 229.

<sup>3</sup> *Masters v. Turner*, 10 Phila. 482.

<sup>4</sup> See *Drake on Attachment*, secs. 453 et seq.

<sup>5</sup> *Bigelow v. Andress*, 31 Ill. 322. In *Cottrell v. Varnum*, 5 Ala. 229, 39 Am. Dec. 323, the court say: "By the service of a garnishment on a debtor of a defendant, the plaintiff acquires a lien on the debt for the satisfaction of his demand, which cannot be divested by any arrangement between the defendant and garnishee; and the judgment only consummates the legal transfer of so much of the garnishee's indebtedness as is condemned thereby to the payment of the plaintiff's demand. In this view, the argument that the rendition of the judgment previous to the maturity of the debt would prevent a rescission of the contract between the defendant and gar-

nishee, out of which the liability of the latter arose, can have no influence, since a rescission as against the plaintiff could have no effect. If anything should occur subsequent to the garnishee's examination which would furnish a legal defense to an action against him by the defendant, if remediless at law, he might resort to a court of equity, and there have the benefit of that defense by perpetually enjoining the plaintiff's judgment against him. And this would be the garnishee's only mode of redress if the proceedings against him were to be stayed until the debt matures, unless the court in its discretion were to permit an amendment of his answer. So that, whatever practice be adopted in a case like the present, the garnishee is not foreclosed from any defense arising after his answer, which he could have successfully urged against the defendant."

nishee summoned before a justice of the peace is not a party to the action, and an order by the justice that he pay a certain sum on a note when due is not a judgment charging him, or determining the ultimate rights of the parties. In effect, it is only an assignment of defendant's right in the claim to plaintiff, and authorizes him to sue thereon if the order be not complied with.<sup>1</sup> The garnishee's paying money under an execution after service of the garnishment is no defense for him. He should have asked for a stay of execution.<sup>2</sup> But one who has in good faith contracted to buy land, and has no notice of any claims existing against the other party, nor any knowledge as to his ability to meet them, is not bound to await process on being afterwards notified that the latter's creditors wish to garnish him, but may complete the purchase and pay over the consideration, without reference to the creditors.<sup>3</sup> Where the garnishee is discharged, but on a writ of error the judgment of the lower court is reversed, his payment to his creditor in the interim will stand.<sup>4</sup> A person who has been served as garnishee in an original attachment proceeding, and who at the time of service has money in his possession belonging to the attachment defendant, cannot deliver the money to the attorney of the defendant on being informed by the attorney of the plaintiff that the proceedings have been compromised and dismissed, and by such delivery be released from his liability as garnishee to another creditor of the defendant who has commenced proceedings by filing under the original suit, though the garnishee has not had actual notice of such filing.<sup>5</sup>

**§ 3594. Who may be Garnished — Corporations. —**  
Even though not specially mentioned in the statute, a cor-

<sup>1</sup> *Secor v. Witter*, 39 Ohio St. 218.

<sup>2</sup> *Skipper v. Foster*, 29 Ala. 330; 65 Am. Dec. 405.

<sup>3</sup> *Fisher v. Hall*, 44 Mich. 493.

<sup>4</sup> *Webb v. Miller*, 24 Miss. 638; 57 Am. Dec. 189.

<sup>5</sup> *Ryan v. Burkham*, 42 Ind. 507.



poration is liable to the process like a natural person.<sup>1</sup> The unpaid assessments or calls on a stockholder's shares are garnishable.<sup>2</sup> Whether corporate shares may be garnished for debts of the stockholder depends altogether on the statute. In Virginia they may be, in law or in equity. Presumably, the corporation is the proper garnishee; but if, along with the answer of the corporation in such proceeding, an affidavit is filed, alleging that some third person claims the said stock, and that the corporation claims no interest therein, nor colludes with such claimant, but is ready to dispose of the stock as the court shall direct, the court should require such third person to appear and state the nature of his claim, and maintain or relinquish the same.<sup>3</sup>

§ 3595. **Non-residents.**— Whether the defendant do or do not reside in the state in which the process is obtained, a non-resident cannot be subjected to garnishment there,<sup>4</sup> unless when garnished he have in that state property of the defendant in his hands, or he is bound to pay the defendant money or deliver him goods within the state.<sup>5</sup> This exemption applies to a foreign corporation.<sup>6</sup> But a foreign company doing business in the state is subject

<sup>1</sup> *Baltimore etc. R. R. Co. v. Gallahue*, 12 Gratt. 655; 65 Am. Dec. 256; *Boyd v. R. R. Co.*, 17 Md. 195; 79 Am. Dec. 646; *Knox v. Protection Ins. Co.*, 9 Conn. 430; 25 Am. Dec. 33; *Taylor v. R. R. Co.*, 5 Iowa, 114; *Wales v. Muscatine*, 4 Iowa, 302; *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581; *Pennsylvania R. R. Co. v. Peoples*, 31 Ohio St. 537. Notice to a clerk has been held sufficient: *Davidson v. Donovan*, 4 Cranch C. C. 578. Or a general agent: *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65. Where the writ is served on an agent of a corporation while the property is in the actual possession of another agent, if the latter deliver it to the owner before the first agent can, with reasonable diligence, notify the other, the corporation is not liable: *Bates v.*

*R. R. Co.*, 60 Wis. 296; 50 Am. Rep. 369.

<sup>2</sup> *In re Glen Iron Works*, 17 Fed. Rep. 324; *Faull v. Alaska Mining Co.*, 14 Fed. Rep. 657; *Parse v. Underwriter's Union*, 1 Ill. App. 287; *Langford v. Ottumwa Water Co.*, 59 Iowa, 283. But see *McKelvey v. Crockett*, 18 Nev. 238.

<sup>3</sup> *Chesapeake etc. R. R. Co. v. Paine*, 29 Gratt. 502. A certificate of membership in a board of trade was held by defendant. Held, that the board could not be made a garnishee on account thereof: *Netter v. Chicago Board of Trade*, 12 Ill. App. 607.

<sup>4</sup> *Wade on Attachment*, sec. 344; *Cronin v. Foster*, 13 R. I. 196.

<sup>5</sup> *Young v. Ross*, 31 N. H. 201.

<sup>6</sup> *Wade on Attachment*, sec. 344.

to the process;<sup>1</sup> or one qualified to do business in the state by having complied with the statutory requisites.<sup>2</sup> But a New York corporation operating as lessee railroads running into Vermont cannot there be charged as trustee in an action for a debt payable in New York, where plaintiff and defendant both reside.<sup>3</sup>

ILLUSTRATIONS. — A foreign insurance company had no agency in Georgia, and did no business there. An agent lived there, and there audited and approved, and sometimes paid, claims growing out of business in adjacent states, where the company took risks. *Held*, that the Georgia courts had no jurisdiction of the company, nor could a garnishment be served on the agent in Georgia: *Schmidlapp v. La Confiance Ins. Co.*, 71 Ga. 246.

§ 3596. **Judgment Debtors.** — Whether a judgment debtor can be held as garnishee of the judgment creditor is a question on which there has been a great difference of opinion, — some courts holding that he can,<sup>4</sup> and others, on the contrary, that he cannot.<sup>5</sup>

§ 3597. **Executors, Administrators, and Guardians.** — In the absence of statutory permission, an administrator cannot be garnished;<sup>6</sup> nor can an executor,<sup>7</sup> unless, it

<sup>1</sup> *Weed Sewing Machine Co. v. Boutelle*, 56 Vt. 570; *Darlington v. Rogers*, 13 Phila. 102; *Pennsylvania R. R. Co. v. Peoples*, 31 Ohio St. 537.

<sup>2</sup> *Barr v. King*, 96 Pa. St. 485.

<sup>3</sup> *Towle v. Wilder*, 57 Vt. 622.

<sup>4</sup> *Gager v. Watson*, 11 Conn. 168; *Calhoun v. Whittle*, 56 Ala. 138; *Webster v. McDaniel*, 2 Del. Ch. 297; *Halbert v. Stinson*, 6 Blackf. 398; *Minard v. Lawler*, 26 Ill. 301; *Keith v. Harris*, 9 Kan. 386; *Fithian v. R. R. Co.*, 31 Pa. St. 114; *Gray v. Henby*, 1 Smedes & M. 598; *Skipper v. Foster*, 29 Ala. 330; 65 Am. Dec. 405; *Phillips v. Germon*, 43 Iowa, 101. Where the two actions are in the same court: *Keith v. Harris*, 9 Kan. 386.

<sup>5</sup> *Sharp v. Clark*, 2 Mass. 91; *Prescott v. Parker*, 4 Mass. 170; *Franklin v. Ward*, 3 Mason, 136; *Trowbridge v. Means*, 5 Ark. 135; 39 Am. Dec. 368; *Tunstall v. Means*, 5 Ark. 700; *Shinn v. Zimmerman*, 33 N. J. L. 150; 55

Am. Dec. 260; *Black v. Black*, 32 N. J. Eq. 74; *Norton v. Winter*, 1 Or. 47; 62 Am. Dec. 297; *Elizabethtown Sav. Inst. v. Gerber*, 35 N. J. Eq. 159; *Clodfelter v. Cox*, 1 Sneed, 330; 60 Am. Dec. 157; *Sievers v. Woodburn Wheel Co.*, 43 Mich. 275. A recovery for libel does not furnish an indebtedness which can be garnished until judgment is entered on the verdict: *Detroit Post etc. Co. v. Reilly*, 46 Mich. 459.

<sup>6</sup> *Brooks v. Cook*, 8 Mass. 246; *Waite v. Osborne*, 11 Me. 185; *Conway v. Armington*, 11 R. I. 116; *Lyons v. Houston*, 2 Harr. (Del.) 349; *Parker v. Donnally*, 4 W. Va. 648; *Thorn v. Woodruff*, 5 Ark. 55; *Parks v. Cushman*, 9 Vt. 320; *Nickerson v. Chase*, 122 Mass. 296. *Contra*, *Simonds v. Harris*, 92 Ind. 505.

<sup>7</sup> *Barnes v. Treat*, 7 Mass. 271; *Picquet v. Swan*, 4 Mason, 443; *Winchell v. Allen*, 1 Conn. 385; *Shewell v.*

seems, in some states, when he has been ordered by the court to pay a certain sum to a creditor of the estate,—in such case he may be as garnishee of such party.<sup>1</sup> So after distribution has been decreed, an executor or administrator may be garnished; or, if judgment has been already obtained against the distributee, the money in his hands may be reached by execution, or by proceedings supplementary thereto.<sup>2</sup> Where an estate has been settled, and the administrator holds funds in his hands belonging thereto, he is chargeable as trustee of one entitled to a share therein, on trustee process, which summons him in his personal and not in his representative capacity.<sup>3</sup> A person who is to pay a legacy under a will is chargeable as trustee of the legatee, whenever an action can be maintained by such legatee for the legacy.<sup>4</sup> If after an executor has been summoned as trustee of a devisee of his testator he obtains leave to sell real estate to pay debts, and after the sale pays the surplus to the devisee, he is not chargeable as trustee for that sum.<sup>5</sup>

Nor can a guardian be garnished<sup>6</sup> until his accounts have been adjusted in the probate court and a balance found in his hands.<sup>7</sup>

**§ 3598. Sheriffs and Officers of Court.**—A sheriff or other officer of the law cannot be garnished as to money

Keen, 2 Whart. 332; 30 Am. Dec. 266; Whitehead v. Coleman, 31 Gratt. 784; Case T. M. Co. v. Miracle, 54 Wis. 295; Sime's Estate, Myrick Prob. Rep. 100; Post v. Love, 19 Fla. 634; Norton v. Clark, 18 Nev. 247. *Contra*, Palmer v. Noyes, 45 N. H. 174; Stratton v. Ham, 8 Ind. 84; 65 Am. Dec. 754. See Dudley v. Falkner, 49 Ala. 148.

<sup>1</sup> Adams v. Barret, 2 N. H. 374; Curling v. Hyde, 10 Mo. 374; Richards v. Griggs, 16 Mo. 416; 57 Am. Dec. 240; Case Thrashing Mach. Co. v. Miracle, 54 Wis. 295; Bartell v. Bauman, 12 Ill. App. 450.

<sup>2</sup> Nerac's Estate, 35 Cal. 392; 95 Am. Dec. 111.

<sup>3</sup> Hoyt v. Christie, 51 Vt. 48.

<sup>4</sup> Piper v. Piper, 2 N. H. 439.

<sup>5</sup> Capen v. Duggan, 136 Mass. 501.

When a garnishee dies before the return day of the protest, his administrator cannot be compelled to answer the garnishment: Tate v. Morehead, 65 N. C. 681.

<sup>6</sup> Gassett v. Grout, 4 Met. 486;

Davis v. Drew, 6 N. H. 399; 25 Am. Dec. 467; Hansen v. Butler, 48 Me. 81; Godbold v. Bass, 12 Rich. 202; Vielheller v. Brutto, 6 Ill. App. 95; Perry v. Thornton, 7 R. I. 15.

<sup>7</sup> Davis v. Drew, 6 N. H. 399; 25 Am. Dec. 467.

of the defendant in his hands in his official capacity.<sup>1</sup> So as to fees due a juror;<sup>2</sup> or property delivered to an officer by a prisoner arrested for larceny of other property.<sup>3</sup> So money in the hands of a trustee or receiver appointed by the court cannot be garnished.<sup>4</sup> The purchase-money of land sold by a commissioner under order of court is not garnishable in his hands until after confirmation of the sale and an order of distribution.<sup>5</sup>

Whenever the liability of a sheriff, master in chancery, or other agent of the law becomes changed from an official to a personal one in holding funds, he is amenable to garnishee process.<sup>6</sup> A receiver is amenable to garnishee process in the absence of statutory provision, and when the process does not tend to disturb his rights under the general orders of the appointing court.<sup>7</sup> A surplus in a sheriff's hands after satisfaction of an execution is garnishable.<sup>8</sup> So of a balance in the hands of a register in

<sup>1</sup> Wilder v. Bailey, 3 Mass. 289; Pollard v. Ross, 5 Mass. 319; Farmers' Bank v. Beaton, 7 Gill & J. 421; 28 Am. Dec. 226; Burrell v. Letson, 2 Speers, 378; Drane v. McGavock, 7 Humph. 132; Marvin v. Hawley, 9 Mo. 382; 43 Am. Dec. 547; Clymer v. Willis, 3 Cal. 363; 58 Am. Dec. 414; Hill v. R. R. Co., 14 Wis. 291; 80 Am. Dec. 783; Waite v. Osborne, 11 Me. 185; Zurcher v. Magee, 2 Ala. 253; Alston v. Clark, 2 Hayw. (N. C.) 171; Blair v. Cante, 2 Speers, 34; 42 Am. Dec. 360; Voorhees v. Sessions, 34 Mich. 99. *Contra*, Hurlburt v. Hicks, 17 Vt. 193; 44 Am. Dec. 329; Gray v. Maxwell, 50 Ga. 108; Storm v. Adams, 56 Wis. 137. Money of an absconding debtor in the hands of a clerk of court may in North Carolina be garnished; Gaither v. Ballew, 4 Jones, 488; 69 Am. Dec. 763. A trustee appointed by the orphans' court to make partition is not a public officer in whose hands the interest of any party to the proceedings is not subject to attachment; Fenton v. Fisher, 106 Pa. St. 418.

<sup>2</sup> Simons v. Whartenahy, 2 Pa. L. J. 438. *Contra*, Wardwell v. Jones, 53 N. H. 305.

<sup>3</sup> Morris v. Penniman, 14 Gray, 220; 74 Am. Dec. 675. But *aliter* as to the same property; Reifsnnyder v. Lee, 44 Iowa, 101; 24 Am. Rep. 733.

<sup>4</sup> Glenn v. Gill, 2 Md. 1; Taylor v. Gillian, 23 Tex. 508; Tremper v. Brooks, 40 Mich. 333; Field v. Jones, 11 Ga. 413; Bentley v. Shreive, 4 Md. Ch. 412; Cockey v. Leister, 12 Md. 124; 71 Am. Dec. 588; People v. Brooks, 40 Mich. 333; 29 Am. Rep. 534; Adams v. Haskell, 6 Cal. 113; 65 Am. Dec. 491; McGowan v. Myers, 66 Iowa, 99; Mattingly v. Grimes, 48 Md. 102. Money due on a decree of a court of equity is not a subject of attachment; Black v. Black, 32 N. J. Eq. 74.

<sup>5</sup> Fearing v. Shafner, 62 Miss. 791.

<sup>6</sup> Weaver v. Davis, 47 Ill. 235. A sheriff who, at the expiration of his office, has a balance belonging to an execution debtor can only be made liable as a private person, and not on his official bond, by a garnishment served after expiration of his office; Graham v. Endicott, 7 Cal. 144.

<sup>7</sup> Phelan v. Ganobin, 5 Col. 14.

<sup>8</sup> Tucker v. Atkinson, 1 Humph. 300; 34 Am. Dec. 650; King v. Moore, 6 Ala. 160; 41 Am. Dec. 44.

chancery after paying off a mortgage.<sup>1</sup> A constable may be garnished for money he has collected by virtue of an execution, and which he is bound to pay over to the plaintiff in execution.<sup>2</sup> Money deposited with a clerk of court, in the place of an undertaking on appeal, is liable to attachment by a third person against the depositor.<sup>3</sup> Money held

<sup>1</sup> *Langdon v. Lockett*, 6 Ala. 727; 41 Am. Dec. 78.

<sup>2</sup> *Burleson v. Milan*, 56 Miss. 399.

<sup>3</sup> *Dunlop v. Patterson*, 74 N. Y. 145; 30 Am. Rep. 283. In this case the authorities were reviewed at length. "There is another class of cases," said Folger, J., "which comes nearer to that in hand. It is held by them, in general terms, that money in the hands of a public officer is not the subject of attachment. In some of them the decision is put upon the phrases of the statute allowing the process: *Chealy v. Brewer*, 7 Mass. 259, where the words of the statute required an intrusting and deposit by the debtor with the officer, which words are not in our code; and if they were, are met by the facts of our case. Or the money was part of a mass of public money held by the officer for public purposes, the right to which in the attachment debtor did not have the character of a private claim against the officer: *Bulkley v. Eckert*, 3 Pa. St. 368; 45 Am. Dec. 650. It is not to be denied, however, that a broader rule has been laid down; that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority: See *Drake on Attachment*, secs. 434 et seq., and cases cited. I have examined enough of those cases to perceive the rules laid down by them. In all which I have read, however, there is this to be noticed: that the money in the hands of the officer of the law did not go there directly from the debtor in the attachment, but from some other, and original and independent, source, over which the attachment debtor had no control as an owner: *Coppell v. Smith*, 4 Term Rep. 313. In this there is a material distinction from our case. Here the

money was the absolute property of the attachment debtor, and always continued to be its property, subject to the express and limited right of the clerk over it, conferred principally by the act of the attachment debtor. As, when the right of the clerk to withhold the whole or a part of it ceased, that debtor could demand and have the whole or a part of it, why, as above suggested, might not the debtor have its right of proceeding as against the clerk? and if so, why not be able to transfer that right? and if so, why may not the law transfer it? Even in some of the cases above referred to, there is a distinction taken which makes for our view; as if money is collected by a sheriff in excess of the needs of the execution, that excess is attachable: *Pierce v. Carlton*, 12 Ill. 358; 54 Am. Dec. 405; *Lightner v. Steinagel*, 33 Ill. 510; 85 Am. Dec. 292. And the reason given is, that such excess is so much money in the hands of the officer, had and received for the use of the debtor in the execution. The same reason applies here to any portion of the deposit with the clerk in excess of the amount needed to satisfy the claim of Redfield. It is further said that if anything arises to change the relation of the officers from an official obligation to personal liability, he will be amenable to the process of garnishment. It will be seen further on herein that this change was effected in the case in hand. And it is to be seen, on examination, that many of the reasons given against the power to attach moneys, or the right to money in the hands of an officer, do not apply to the case before us. In addition to those already given is this: that it would lead to litigation in one suit over the effects in another, and would produce embarrassment and confusion, to permit one process to intercept money raised on another while

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by a trustee appointed by a court of chancery, and belonging to a non-resident, may be attached by his creditors, where the final audit has been ratified by the court and the amount belonging to the debtor has been ascertained, and an order passed directing the trustee to pay it over.<sup>1</sup>

§ 3599 **Public Disbursing Officers.**—Money in the hands of a public disbursing officer cannot be garnished by a creditor of the person to whom it is due or about to be paid;<sup>2</sup> as the salary of a public officer.<sup>3</sup> Even statutory provisions for attachment of money in the hands of a "sheriff or other officer" applies only to money belonging to private individuals, and cannot be extended to the

in the hands of the officer; and that it might often lead to injustice, inasmuch as often the names of persons who have the real right to money raised by process do not appear upon the process by which the money was got: *Ross v. Clarke*, 1 Dall. 354; *Crane v. Freese*, 13 Pa. St. 305. Yet, notwithstanding this, in the case last cited, it was held that the attachment was well levied on the rights and credits of the attachment debtor in the hands of the sheriff, and a feasible way was pointed out of avoiding the difficulties spoken of, viz., for the officer to bring the money into court, which can control the application of the funds. In the case in hand, the money is already in court, susceptible of the treatment indicated."

<sup>1</sup> *Williams v. Jones*, 38 Md. 555.

<sup>2</sup> *Allen v. Russell*, 78 Ky. 105; *Triebel v. Colburn*, 64 Ill. 376; *Bulkley v. Eckert*, 3 Pa. St. 368; 45 Am. Dec. 650; *Hightower v. Slaton*, 54 Ga. 108; 21 Am. Rep. 273; *Mayor of Baltimore v. Root*, 8 Md. 95; 63 Am. Dec. 693. In *Buchanan v. Alexander*, 4 How. 20, the court said: "The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legiti-

mate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy, and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service. The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen. It is not doubted that cases may have arisen in which the government, as a matter of policy or accommodation, may have aided a creditor of one who received money for public services; but this cannot have been under any supposed legal liability, as no such liability attaches to the government or to its disbursing officers."

<sup>3</sup> *Oliver v. Athey*, 11 Lea, 149.

salary or compensation of public officers in the hands of disbursing officers.<sup>1</sup> An agent of a town appointed to distribute a certain sum of money among the inhabitants is not a public officer within the rule.<sup>2</sup>

**§ 3600. Attorneys at Law — Justice of the Peace.** — Money of a client in the hands of an attorney at law is garnishable,<sup>3</sup> and the same is held of money collected by and in the hands of a justice of the peace.<sup>4</sup> An attorney cannot be charged as garnishee on a note or judgment held by him for collection.<sup>5</sup> Under the New York code, a judgment cannot be subjected to attachment for a debt by serving the warrant upon the attorney holding the judgment. He is not an "individual holding such property," within the language of the code; and a sale under execution based upon proceedings thus begun is invalid.<sup>6</sup>

**§ 3601. States and State Officers — Municipal Corporations.** — A state cannot be sued by process of garnishment without its consent, nor can it be indirectly garnished by making one of its officers the nominal garnishee.<sup>7</sup> Therefore, money in the hands of the state

<sup>1</sup> *Pruitt v. Armstrong*, 56 Ala. 306.

<sup>2</sup> *Wendell v. Pierce*, 13 N. H. 502.

<sup>3</sup> *Coburn v. Ansart*, 3 Mass. 319; *Riley v. Hirst*, 2 Pa. St. 346; *Mann v. Buford*, 3 Ala. 312; 37 Am. Dec. 691; *Tucker v. Butts*, 6 Ga. 580; *Woodbridge v. Morse*, 5 N. H. 519; *Staples v. Staples*, 4 Me. 532; *Thayer v. Sherman*, 12 Mass. 441. In *Mann v. Buford*, 3 Ala. 312, 37 Am. Dec. 691, the court say: "An attorney is not exempt from garnishee process in consequence of the connection which exists between him and the courts of law. He is not an officer of the law, although the courts frequently exercise a summary control over him, but this is only for the advancement of justice, by compelling the performance of well-known duties to his clients, who are suitors in the courts. For every other purpose, he is the mere agent for his client, and when he also becomes his debtor, he may be garnished, as any other person."

<sup>4</sup> *Clark v. Boggs*, 6 Ala. 809; 41

Am. Dec. 85. A claim pending before a justice of the peace cannot be garnished in a proceeding before another justice: *Noyes v. Foster*, 48 Mich. 273; *Custer v. White*, 49 Mich. 262.

<sup>5</sup> *Mayes v. Phillips*, 60 Miss. 547.

<sup>6</sup> *In re Flandrow*, 84 N. Y. 1.

<sup>7</sup> *McMeekin v. State*, 9 Ark. 553; *Dobbins v. R. R. Co.*, 37 Ga. 240; *Divine v. Harvey*, 7 T. B. Mon. 439; 18 Am. Dec. 194; *Tracy v. Hornbuckle*, 8 Bush, 336; *Bank v. Dibrell*, 3 Sneed, 379; *Rollo v. Andes Ins. Co.*, 23 Gratt. 509; 60 Am. Dec. 147; *Wild v. Ferguson*, 23 La. Ann. 752; *Pierson v. McCormack*, 1 Pa. L. J. 260; *Wilson v. Bank*, 55 Ga. 98; *Dewey v. Garvey*, 130 Mass. 86. But the United States or a state may sue out a garnishment: *United States v. Murdock*, 18 La. Ann. 305; 89 Am. Dec. 651; *People v. Johnson*, 14 Ill. 342.

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treasurer, due to a non-resident debtor, cannot be attached at the suit of a creditor.<sup>1</sup> And the wages of a common-school teacher have been held not liable to be intercepted by attachment, with the result of depriving the commonwealth of his services.<sup>2</sup> The salaries of officers of towns and cities may be attached and subjected to the payment of their debts by the coercive process of the law. But the salary of a state officer cannot be attached, because the state, being a necessary party, cannot be sued.<sup>3</sup> Where a township clerk deposits public funds in his individual name, it amounts to conversion, and the funds become his individual property, subject to garnishment by a creditor who has no knowledge that they are public funds.<sup>4</sup> Where a county treasurer is forbidden to deposit public funds in any bank, funds so deposited by him may be garnished at the suit of one of his individual creditors.<sup>5</sup>

In most of the states it is held that a city,<sup>6</sup> a town,<sup>7</sup> a county, or other municipal corporation<sup>8</sup> cannot be gar-

<sup>1</sup> *Lodor v. Baker*, 39 N. J. L. 49.

<sup>2</sup> *Allen v. Russell*, 78 Ky. 105; *Hightower v. Slaton*, 54 Ga. 188; 21 Am. Rep. 273. *Contra*, *Seymour v. School District*, 53 Conn. 502.

<sup>3</sup> *Rodman v. Musselman*, 12 Bush, 354; 23 Am. Rep. 724. *Contra*, *Wallace v. Sawyer*, 54 Ind. 501; 23 Am. Rep. 661.

<sup>4</sup> *Long v. Emsley*, 57 Iowa, 11.

<sup>5</sup> *South Bend Bank v. Gaudy*, 11 Neb. 431.

<sup>6</sup> *Waldman v. O'Donnell*, 57 How. Pr. 215; *Erie v. Knapp*, 29 Pa. St. 173; *Greer v. Rowley*, 1 Pittsb. Rep. 1; *Merrell v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785; *Merwin v. Chicago*, 45 Ill. 133; *People v. Omaha*, 2 Neb. 166; *Fortune v. St. Louis*, 23 Mo. 239; *Hawthorn v. St. Louis*, 11 Mo. 59; 47 Am. Dec. 141; *Mobile v. Rowland*, 26 Ala. 498; *Clark v. Mobile*, 36 Ala. 621; *Chicago v. Hasley*, 25 Ill. 595; *Hadley v. Peabody*, 13 Gray, 200; *Burnham v. Fond du Lac*, 15 Wis. 193; *Buffham v. Racine*, 26 Wis. 449; *McClellan v. Young*, 54 Ga. 399; 21 Am. Rep. 276; *City of Memphis v. Laski*, 9 Heisk. 511; 24 Am. Rep. 327. *Contra*, *Wales*

*v. Muscatine*, 4 Iowa, 302; *Wilson v. Lewis*, 10 R. I. 285; *City of Newark v. Funk*, 15 Ohio St. 452; *Rodman v. Musselman*, 12 Bush, 354; 23 Am. Rep. 724; *Mayor v. Horton*, 38 N. J. L. 88. A municipal corporation may, by appearing and submitting to the liability, waive its exemption from garnishment; *Las Animas County Comm'r's v. Bond*, 3 Col. 411.

<sup>7</sup> *Bradley v. Richmond*, 6 Vt. 121; *Memphis v. Laski*, 9 Heisk. 511; 24 Am. Rep. 327; *Spencer v. School District*, 11 R. I. 537; *Walker v. Cook*, 129 Mass. 577. *Contra*, *Whidden v. Drake*, 5 N. H. 13. But see *Wendell v. Pierce*, 13 N. H. 502; *Brown v. Heath*, 45 N. H. 168.

<sup>8</sup> *Ward v. Hartford*, 12 Conn. 401; *Van Volkenburgh v. Earley*, 9 Luz. Leg. Reg. 257; *State v. Eberly*, 12 Neb. 616; *Commissioners v. Bond*, 3 Col. 411; *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661; *Boone Co. v. Keck*, 31 Ark. 387; *McDougal v. Hennepin Co.*, 4 Minn. 184; *Clark v. Mobile School Comm'r's*, 36 Ala. 621; *Derr v. Luby*, 1 McAr. 187; *Hunsaker v. Borden*, 5 Cal. 290; 63 Am. Dec. 130;



nished. One indebted to a municipal corporation for unpaid taxes cannot be garnished by a judgment creditor of said corporation, even though he has given his note therefor, on which judgment has been recovered.<sup>1</sup>

**§ 3602. Garnishee must be a "Third Person"—Agents.**

—The garnishee must be a "third person"; i. e., he must not stand in such a relation to the defendant that his garnishment will be in effect the garnishment of the defendant himself.<sup>2</sup> Therefore one of several defendants cannot be held as the garnishee of the others;<sup>3</sup> nor an agent for moneys in his hands of his principal.<sup>4</sup> An agent who has collected rents for a trustee is not liable to process of garnishment for a debt against the beneficiary.<sup>5</sup> A cashier of a bank in which are deposited the funds of a corporation cannot be held as trustee of the corporation, although he is also treasurer of said corporation, and deposited the funds in the bank as such treasurer.<sup>6</sup> The treasurer of a

*Chealy v. Brewer*, 7 Mass. 259; *Gilman v. Contra Costa Co.*, 8 Cal. 52; *Brashers v. Root*, 8 Md. 95; *Bulkley v. Eckert*, 3 Pa. St. 368; *Emeric v. Gilman*, 10 Cal. 404; 70 Am. Dec. 742; *Randolph v. Ralls*, 18 Ill. 29; *Moore v. Mayor*, 8 Heisk. 850; *School District v. Gage*, 39 Mich. 484; 33 Am. Rep. 421; *Hightower v. Slaton*, 54 Ga. 188; 21 Am. Rep. 273; *Jenks v. Osceola Township*, 45 Iowa, 554; *Edmonson v. De Kalb Co.*, 51 Ala. 103; *Parsons v. McGavock*, 2 Tenn. Ch. 581; *Pottier Mfg. Co. v. Taylor*, 3 McAr. 4; *Brown v. Finley*, 3 McAr. 77; *Merrell v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785.

<sup>1</sup> *Underhill v. Calhoun*, 63 Ala. 216.

<sup>2</sup> *Wade on Attachment*, sec. 341; *Crosby v. Harlow*, 21 Me. 499; 38 Am. Dec. 276. A plaintiff cannot, by process of foreign attachment, garnish himself: *Knight v. Clyde*, 12 R. I. 119. But under a statute which declares that any person or corporation is liable as garnishee upon due service of such, a plaintiff in attachment may garnish himself: *Norton v. Norton*, 43 Ohio St. 509.

<sup>3</sup> *Bailey v. Lacey*, 27 La. Ann. 39; *Richardson v. Lacey*, 27 La. Ann. 62.

When A brought suit against B, and summoned himself, in the capacity of administrator of the estate of C, as trustee, it was held that he could not be charged as such trustee: *Hoag v. Hoag*, 55 N. H. 172.

<sup>4</sup> *Wade on Attachment*, sec. 349; *Fowler v. R. R. Co.*, 35 Pa. St. 22; *McGraw v. R. R. Co.*, 5 Cold. 434; *Wilder v. Shea*, 13 Bush, 128; *Pettin-gill v. R. R. Co.*, 51 Me. 370; *Sprague v. Steam Nav. Co.*, 52 Me. 592; *Bowker v. Hill*, 60 Me. 172; *Edmonson v. De Kalb Co.*, 51 Ala. 103; *Neuer v. O'Fallon*, 18 Mo. 277; 59 Am. Dec. 313; *Casey v. Davis*, 100 Mass. 124; *Varnell v. Speer*, 55 Ga. 132. *Contra*, *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490; *Everdell v. R. R. Co.*, 41 Wis. 395; *First Nat. Bank v. R. R. Co.*, 45 Iowa, 120; *Littleton Nat. Bank v. R. R. Co.*, 58 N. H. 104; *Central Plank Co. v. Sammons*, 27 Ala. 380; *Center v. McQueston*, 13 Kan. 476.

<sup>5</sup> *McIlvaine v. Lancaster*, 42 Mo. 96.

<sup>6</sup> *Sprague v. Steam etc. Co.*, 52 Me. 592; *Lewis v. Smith*, 2 Cranch C. C. 571.

corporation cannot be charged as its trustee, either for funds held by him officially, or funds pledged to him to secure an indebtedness of the corporation to him.<sup>1</sup> An auctioneer having in his possession a consignment for sale cannot be garnished by the plaintiff in suit against the owner of the goods.<sup>2</sup> The contents of a safe rented from a safe-deposit company are not liable to attachment for the depositor's debts in the hands of the company.<sup>3</sup> In an action against one of a firm, a debtor to the firm cannot be made a garnishee.<sup>4</sup> A judgment creditor of one partner cannot take out an execution upon his judgment and levy upon property in the hands of an assignee of another partner by summoning an agent of the latter as garnishee.<sup>5</sup> One having possession of mortgaged chattels as the mortgagee's agent cannot be charged as garnishee of the mortgagor.<sup>6</sup>

§ 3603. Other Cases.—A trespasser in possession of another's goods cannot be charged as his garnishee.<sup>7</sup> A common carrier is not subject to garnishment for goods in actual transit at the time of service of process.<sup>8</sup> Property outside the state cannot be garnished.<sup>9</sup> The holder of a gratuitous gift of money cannot be held a trustee by the donor's creditor, although the debt existed prior to the gift, if the donor's insolvency or large indebtedness does not appear.<sup>10</sup> If money comes into the hands of a person wrongfully, as the consideration of real estate supposed to be conveyed to him by another, where no title passed, he cannot for that cause be chargeable as the trustee of one who had deeded the same estate to him, without consideration and without passing the title. Nor

<sup>1</sup> Bowker v. Hill, 60 Me. 172; Mueth v. Schardin, 4 Mo. App. 403.  
<sup>2</sup> Pratte v. Scott, 19 Mo. 625.  
<sup>3</sup> Gregg v. Nilson, 1 Leg. Gaz. Rep. 128.  
<sup>4</sup> Trickett v. Moore, 34 Kan. 755.  
<sup>5</sup> Fenton v. Block, 10 Mo. App. 536.  
<sup>6</sup> Atwood v. Hale, 17 Mo. App. 81.  
<sup>7</sup> Despatch Line Co. v. Bellamy Mfg. Co., 12 N. H. 205; 37 Am. Dec. 203.  
<sup>8</sup> Bates v. R. R. Co., 60 Wis. 296; 50 Am. Rep. 369.  
<sup>9</sup> Bates v. R. R. Co., 60 Wis. 296; 50 Am. Rep. 369.  
<sup>10</sup> Whittier v. Prescott, 48 Me. 367.

would a person be charged as trustee who had received a deed of real estate without consideration, and who, with the assent of his grantor, had so conveyed it that the title passed to a third person, but, being sold upon a credit, no part of the proceeds of the sale had been realized by him at the time of the service upon him.<sup>1</sup> A creditor of a fraudulent mortgagor, instead of proceeding in equity, may reach the property included in such mortgage by garnishing the mortgagee.<sup>2</sup> Even after conditions broken, the mortgagor has an equity of redemption in mortgaged chattels, and the mortgagee in possession is liable to garnishment by the mortgagor's creditor for the surplus after the payment of the mortgage debt.<sup>3</sup> A wife may be charged as trustee of her husband.<sup>4</sup> Where the law precludes an action for the price of an article unlawfully sold, as intoxicating liquors, a trustee is not chargeable for moneys due under such illegal sale.<sup>5</sup> Where a woman was compelled to institute proceedings in the names of her husband and herself to have the title of property which belonged to her in her own right vested in her, and she was successful in her suit, and the court allowed her bill of costs, it was held that such costs were not liable to attachment by a creditor of her husband in a suit by foreign attachment.<sup>6</sup>

**§ 3604. Garnishee must have Personal Property of Defendant Subject to Execution.** — To charge a garnishee, he must have personal property of the defendant in his possession capable of being seized and sold on execution;<sup>7</sup> and he must know that the property in his hands belonged to defendant.<sup>8</sup> Property exempt from execution

<sup>1</sup> *Foster v. Libby*, 24 Me. 448.

<sup>2</sup> *Brainard v. Van Kuran*, 22 Iowa, 261.

<sup>3</sup> *Doane v. Garretson*, 24 Iowa, 351.

<sup>4</sup> *Jones v. Roberts*, 60 N. H. 216.

<sup>5</sup> *McGlinchy v. Winchell*, 63 Me. 31.

<sup>6</sup> *Barnard v. Mix*, 35 Conn. 223.

<sup>7</sup> *Maine Ins. Co. v. Weeks*, 7 Mass. 438; *White v. Jenkins*, 16 Mass. 62;

*Runlet v. Jordan*, 3 Me. 47; *Getchell v. Chase*, 37 N. H. 106; *Hoyt v. Swift*, 13 Vt. 129; 37 Am. Dec. 586; *Wilson v. Bartholomew*, 45 Mich. 41; *Anderson v. Odell*, 51 Mich. 492; *De Gruff v. Thompson*, 24 Minn. 452.

<sup>8</sup> *Bingham v. Lamping*, 26 Pa. St. 340; 67 Am. Dec. 418.

is also exempt, at the election of the debtor, from process of garnishment.<sup>1</sup> A garnishee cannot be held liable because of an indebtedness on a written lease to another than the defendant, though it is shown that the leased property is owned by the defendant.<sup>2</sup> An admission by the garnishee defendant of an indebtedness to the principal defendant is not within the scope of the claim that he holds or controls property, money, etc., belonging to the principal defendant, nor will it authorize a judgment on such claims.<sup>3</sup> A special depositary of coin is not such a debtor to the depositor as to subject him to garnishment on execution against the depositor.<sup>4</sup>

**§ 3605. Or Defendant must have a Cause of Action against Him.**—Or the defendant must have a cause of action against him.<sup>5</sup> If one agree to pay the debt of another for a good consideration received at the time from the precedent debtor, and the creditor, in consideration of such undertaking, discharge such precedent debtor, and accept such undertaking in place of the old debt, the party so agreeing will become the debtor, and will be chargeable as the trustee of the original creditor.<sup>6</sup> A, after collecting money for B, and paying it to B's creditor against B's direction, may be held liable therefor in garnishment by other creditors of B.<sup>7</sup> In garnishment proceedings in a court of one state against a resident thereof, where such court has obtained jurisdiction of the principal debtor, the fact that the garnishee's indebtedness

<sup>1</sup> *Wilson v. Bartholomew*, 45 Mich. 41. An insurance company is liable as garnishee of the insured after a loss, though the property insured was exempt: *Wooster v. Page*, 54 N. H. 125; 20 Am. Dec. 128.

<sup>2</sup> *Hueskamp v. Van Leuven*, 56 Iowa, 653.

<sup>3</sup> *Botsford v. Simmons*, 32 Mich. 352.

<sup>4</sup> *Wood v. Edgar*, 13 Mo. 451.

<sup>5</sup> Cases cited in last section, and

*Whitney v. Munroe*, 19 Me. 42; 36 Am. Dec. 732. A person making the statutory affidavit denying that he has any estate or property of the defendant in his hands cannot be charged by garnishment unless the principal debtor has a cause of action against him: *Carpenter v. Gay*, 12 R. I. 306.

<sup>6</sup> *Head v. Richardson*, 16 N. H. 454.

<sup>7</sup> *Felch v. Eau Pleine Lumber Co.*, 58 Wis. 431.

to the latter is by its terms payable at a particular place in another state where the principal debtor resides is no defense.<sup>1</sup>

If the claim is not a legal cause of action, on account of the illegality of the matter, the amount is not garnishable.<sup>2</sup> A garnishee cannot be charged except for a debt which the defendant in the attachment might have recovered of him in an action at law.<sup>3</sup> The choses in action or credits in the hands of the garnishee belonging to the debtor must be due and owing to him, and must be of a legal, and not a merely equitable, character. The statute only authorizes the creditor to recover such indebtedness as can be recovered by an action of debt or in *indebitatus assumpsit* in the name of the attachment or judgment debtor against the garnishee.<sup>4</sup> Where, under an entire contract, a portion of the work has been completed, the contractor has the right to have the work wholly finished, and cannot, by means of a garnishee process, be compelled by a creditor of the workman to pay a *quantum meruit*.<sup>5</sup> Money due from an employer to a contractor who has broken his contract cannot be attached in a suit against the contractor, if the amount of damages to the employer from the breach of the contract exceeds such sum.<sup>6</sup> A corporation cannot be garnished merely on evidence that the debtor has been doing work for it, and that its books indicate that a balance on the contract with him remains unpaid. It should also appear whether the balance has yet become an actual debt against the corporation, and if so, whether the claim still belongs to the principal debtor, or has been assigned to some other person.<sup>7</sup> A consignee of a cargo of coal cannot

<sup>1</sup> Commercial Bank v. R. R. Co., 45 Wis. 172.

<sup>2</sup> Thompson v. Trans. Co., 24 La. Ann. 384.

<sup>3</sup> Patton v. Smith, 7 Ired. 438.

<sup>4</sup> Webster v. Steele, 75 Ill. 544.

<sup>5</sup> Smith v. Davis, 1 Wis. 447; 60 Am. Dec. 590.

<sup>6</sup> Doyle v. Gray, 110 Mass. 206.

<sup>7</sup> Hewitt v. Wagar Lumber Co., 38 Mich. 701.

be held as trustee of the master of the vessel upon a writ served before the entire cargo has been delivered, although by the terms of the bill of lading the consignee is to pay freight at a certain rate per ton.<sup>1</sup> Where defendant is in the employ of the garnishee as clerk, under a compensation paid weekly in advance, the contract determinable by either party at any time without cause, there is no liability which can be reached by garnishment.<sup>2</sup> A son, supporting his indigent father, is not chargeable as trustee for the value of the father's labor on the son's farm.<sup>3</sup> Where a husband simply represents his wife in the firm business, the firm owes him nothing for services which can be reached by garnishment.<sup>4</sup> If an innkeeper requires the guest to pay or pledge payment in advance of his keeping, no indebtedness arises that is the subject of garnishment by the innkeeper's creditors.<sup>5</sup> A purchaser of mortgaged premises does not by his purchase become indebted to the mortgagee, nor does he become such debtor by virtue of an agreement with his vendor to pay the mortgage debt. He therefore cannot be garnished by a creditor of the mortgagee.<sup>6</sup>

ILLUSTRATIONS. — A, being indebted to B, at his request promises to pay the amount to C, in payment of indebtedness of B to C. *Held*, that A cannot be garnished as the debtor of B: *Lovely v. Caldwell*, 4 Ala. 684. A conveyed certain property to B, in consideration of which B promised to pay A's debts, among which was plaintiff's. *Held*, that B was chargeable as trustee in an action against A: *Chapman v. Mears*, 56 Vt. 389. A bought land of B, on which was a mortgage to secure a note of B on demand, which had run for two years. A, in his contract with B, assumed and agreed to pay this debt. *Held*, that he was not liable to a creditor of B, no demand having been made nor anything paid since the debt was assumed: *Elmer v. Welch*, 47 Conn. 56. B. conveyed land to W. by a deed absolute on its face, but in fact a mortgage. *Held*, that W.

<sup>1</sup> *Peterson v. Loring*, 135 Mass. 397.

<sup>4</sup> *Dupuy v. Sheak*, 57 Iowa, 361.

<sup>5</sup> *Caldwell v. Stewart*, 30 Iowa, 379.

<sup>2</sup> *Alexander v. Pollock*, 72 Ala. 137.

<sup>3</sup> *Cobb v. Bishop*, 27 Vt. 624.

<sup>6</sup> *Hartman v. Olvera*, 54 Cal. 61.

could not be garnished in a suit against B.: *Farwell v. Wilmarth*, 65 Wis. 160. A and B having a lawsuit about a tract of land, C, wanting to rent it, applied to both for that purpose, but each declined to exercise ownership over it. C then told them he should cultivate it, and would pay rent to whichever of the two was ascertained to be the owner. *Held*, that this promise inured to the owner of the land, and that the tenant could be garnished by a creditor of the owner when the ownership was ascertained: *Smith v. Taylor*, 9 Ala. 633. A deposited money in a bank, payable to the order of B, to whom a certificate of deposit was issued. The bank was garnished as a debtor of B, and subsequently refused to pay the certificate to B. *Held*, that the debt evidenced by the certificate was subject to garnishment, and that the garnishee process bound the bank from the time payment was refused: *Exchange Bank v. Gulick*, 24 Kan. 359. A delivered to B a steer, with directions to have it killed and disposed of to the best advantage. B thereupon killed it, and delivered the carcass to a butcher to dress and sell, who did so, and credited the proceeds to B. Meanwhile B had been summoned as trustee of A. *Held*, that the butcher was the servant of B, and the receipt by him of such proceeds, and the crediting the same to B, prior to the service of the writ, rendered B chargeable as trustee: *McDonald v. Gillett*, 69 Me. 271. A father conveyed to his son all his property, as a consideration for future support; and as a part of the contract, the son promised to pay a debt due from the father to A. *Held*, in a suit brought by A against the father, on that debt, that the son was chargeable: *Corey v. Powers*, 18 Vt. 587. An attorney collected money on a judgment belonging in part to S., and set apart from the net proceeds a sum not greater than S.'s part of the judgment, and equal in amount to the bill of A. for services as the counsel for S. in that case, and retained the same, that it might be appropriated to the payment of A. *Held*, that he is chargeable as trustee of S. for the sum so set apart and retained, on a suit brought by A. against S.: *Abbott v. Stinchfield*, 71 Me. 213. Pending the foreclosure of a railway mortgage, a contract was proposed whereby certain bonds were to be distributed among the stockholders of the corporation, in return for their certificates of stock, which contract was never executed, but a declaration of trust was afterwards made referring to the contract, and proposing to distribute the bonds as contemplated in the contract, and reciting the receipt of the certificates of stock which were to constitute the consideration for said bonds. *Held*, that the bonds were held by the trustee subject to the debts of the company, and were liable to garnishment in his hands: *Warren v. Booth*, 51 Iowa, 215.

**§ 3606. Real Estate not Garnishable.**— Unless specially authorized by statute, real estate cannot be garnished.<sup>1</sup>

**§ 3607. Property must be in Possession of Garnishee.**— The property must be in the actual possession of the garnishee, or so within his power and control that he can turn it over to the court.<sup>2</sup> A constructive possession will not do.<sup>3</sup> The owners of a private boom, who have exclusive possession and control of the same, may properly be charged as garnishees of a defendant who has placed logs, of which he is owner, in such boom for safe-keeping, under an agreement with the boom-owners, who are to receive an agreed price for keeping the same.<sup>4</sup> Where money was offered to a person appointed by the court to receive it, he protesting at the time that he had no right to receive it, and had nothing to do with it, and the money was left upon his table, and he, after being summoned as the trustee of the person for whose use the money was tendered, took care of the same, he was held chargeable as trustee.<sup>5</sup>

**§ 3608. Property must be That of Defendant Absolutely — Trust Funds.**— The money or property which the garnishment can reach must be that which is the property of the defendant absolutely. Trust funds in his hands, or money held by him in a fiduciary capacity, cannot be reached.<sup>6</sup> A mere custodian of choses in action is not liable

<sup>1</sup> *Stedman v. Vickery*, 42 Me. 132; *How v. Field*, 5 Mass. 390; *Bissell v. Strong*, 9 Mass. 562; *Risley v. Welles*, 5 Conn. 431; *Baxter v. Carrier*, 13 Vt. 615; *Wright v. Bosworth*, 7 N. H. 590; *Hunter v. Case*, 20 Vt. 195.

<sup>2</sup> *Andrews v. Ludlow*, 5 Pick. 28; *Lane v. Nowell*, 15 Me. 86; *Morse v. Holt*, 22 Me. 180; *Burrell v. Letson*, 1 Strob. 239.

<sup>3</sup> See *Wilde, J.*, in *Andrews v. Ludlow*, 5 Pick. 28.

<sup>4</sup> *Farmers' etc. Bank v. Wells*, 23 Minn. 475.

<sup>5</sup> *Morse v. Holt*, 22 Me. 180.

<sup>6</sup> *White v. White*, 30 Vt. 338; *Keyser v. Mitchell*, 67 Pa. St. 473; *White v. Jenkins*, 16 Mass. 62; *Hinckley v. Williams*, 1 Cush. 490; 48 Am. Dec. 642; *Rogers Locomotive Works v. Kelly*, 19 Hun. 399; 88 N. Y. 234; *Clement v. Clement*, 19 N. H. 460; *Truitt v. Griffin*, 61 Ill. 26; *Shumway v. Clark*, 114 Mass. 103; *Morrill v. Raymond*, 28 Kan. 415; 42 Am. Rep. 167. *Aliter* as to the trustee of an express trust in Texas: *McDonald v. Moore*, 34 Tex. 384. And



to an attachment in execution.<sup>1</sup> So property held by an assignee, under a valid assignment for the benefit of creditors, is not subject to attachment or garnishment for the assignor's debts,<sup>2</sup> unless the assignment is first impeached;<sup>3</sup> or property, notes, and accounts assigned to one to be collected and the proceeds applied to meet specified debts of the assignor.<sup>4</sup> A trustee in a deed of trust for the benefit of creditors is not liable to a judgment against him as garnishee, where it appears that the purposes for which the trust was created have not been accomplished, and that after the execution of the trust there will be no surplus in the hands of the trustee.<sup>5</sup> Money in the hands of an assignee in bankruptcy cannot be garnished in a suit against a creditor of the estate.<sup>6</sup>

ILLUSTRATIONS. — A trustee for certain purposes came absolutely in possession of A's land. Although the purposes were for the benefit of A's creditors, they had not a right of action against the trustee, and for certain moneys realized by the trustee he was accountable to A alone. *Held*, that he could be made a garnishee in a suit against A: *Plattsburgh Bank v. Gardner*, 28 Fed. Rep. 917. A deposit was made by a city comptroller with a trust company to meet interest next day due on the city bonds, the deposit being accepted by the company for that specific purpose. *Held*, not attachable at suit of a general creditor of the city: *Hurd v. Trust Co.*, 63 How. Pr. 314. A testator gave his executors a power to sell any or all of his lands, and to pay over the rents from the time of his death

in Kentucky as to rents of real estate, devised to a trustee with directions that they be paid over to the *cestui* as they fall due: *Kuefler v. Shreve*, 78 Ky. 297.

<sup>1</sup> *Gilmore v. Carnahan*, 81\* Pa. St. 217.

<sup>2</sup> *Schlueter v. Raymond*, 7 Neb. 281; *Avery v. Lockhard*, 75 Ala. 530; *Dehuer v. Helmbacher etc.* *Mills Co.*, 7 Ill. App. 47; *Mass. Nat. Bank v. Bullock*, 120 Mass. 86.

<sup>3</sup> *Hecht v. Green*, 61 Cal. 269. Where the garnishee claims that the moneys of the judgment debtor, which he admits are in his hands, are affected by a trust, the *onus* is on him to show the trust; and this cannot be shown by a

deed of assignment made in another state, and not shown to have been valid anywhere: *Frank v. Frank*, 6 Mo. App. 588.

<sup>4</sup> *Van Winkle v. Iowa Iron etc. Fence Co.*, 56 Iowa, 245; *Mansfield v. Rutland Mfg. Co.*, 52 Vt. 444; *Dusser v. McCord*, 96 Ill. 387.

<sup>5</sup> *Lightfoot v. Rupert*, 38 Ala. 666.

<sup>6</sup> *Oliver v. Smith*, 5 Mass. 183; *Farmers' Bank v. Beaton*, 7 Gill & J. 421; 28 Am. Dec. 226. See also *Lewis v. Latner*, 72 Me. 487, and *Heust v. Bingers*, 4 Hughes, 560, as to trustees for benefit of creditors. *Aliter*, where the assignment is invalid: *Boutwell v. Bartlett*, 11 N. H. 418; 35 Am. Dec. 503.

until the time of such sale, after deducting the charges thereon, to the persons designated by him. The executors had in hand a considerable sum belonging to B, one of such persons. *Held*, an active trust, which could not be reached to satisfy a judgment creditor of B: *Force v. Brown*, 32 N. J. Eq. 118. A assigned a judgment to B, who was to deduct therefrom, when collected, the amount of a claim held by him against A, and then pay the balance to C. B, having collected the money, was garnished by a creditor of A. *Held*, that garnishment would not lie, A having parted with all his interest in the judgment, and that B held the balance of the money collected, after deducting his own portion in trust for C: *Hughes v. Sprague*, 4 Ill. App. 301.

§ 3609. **Privity of Interest and Contract between Defendant and Garnishee Necessary.**—Also, there must be between the garnishee and the defendant such a privity of interest and contract that the latter would have a right of action against the former to recover the property for his own use at some time.<sup>1</sup> There must be a privity of contract, express or implied, between the principal debtor and the supposed trustee, or the former must have intrusted and deposited goods and effects with the latter.<sup>2</sup> It is irregular to make up and try an issue between a garnishee and the attaching creditor. The issue should be between the defendant in attachment and the garnishee.<sup>3</sup>

§ 3610. **Plaintiff Acquires only Rights of Defendant against Garnishee.**—The plaintiff stands, as against the garnishee, in the defendant's shoes.<sup>4</sup> An attaching creditor cannot acquire, through his attachment, any higher or better right to the property or assets attached than the defendant had when the attachment was made, unless he can show some fraud or collusion by which his rights were impaired.<sup>5</sup> The defenses the garnishee had against

<sup>1</sup> *Skowhegan Bank v. Farrar*, 46 Me. 293; *Huot v. Ely*, 17 Fla. 775; *Drake on Attachment*, secs. 485 et seq.

<sup>2</sup> *Skowhegan Bank v. Farrar*, 46 Me. 293.

<sup>3</sup> *Warne v. Kendall*, 78 Ill. 598.

<sup>4</sup> *Myer v. Liverpool Ins. Co.*, 40 Md. 595; *Harris v. Phoenix Ins. Co.*, 35 Conn. 310; *Coble v. Nonemaker*, 78 Pa. St. 501; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354; 21 Am. Rep. 66.

<sup>5</sup> *Samuel v. Agnew*, 80 Ill. 553.

the defendant he has against the plaintiff.<sup>1</sup> But where the garnishee is in possession of property of the defendant under a fraudulent transfer, a creditor of the defendant can garnish the property, though the defendant himself would have no standing to attack the garnishee's title.<sup>2</sup> The garnishee's exemption of any demand to which he may be entitled as against the principal defendant does not apply where the property was wrongfully obtained, as under a chattel mortgage, which, by reason of being kept from record, was fraudulent as against other creditors.<sup>3</sup>

**§ 3611. Defenses by Garnishee.**—The garnishee may, and must to protect himself, set up in defense that the property is exempt from execution;<sup>4</sup> that the plaintiff's judgment has been satisfied;<sup>5</sup> the statute of limitations.<sup>6</sup> He may—and it is his duty to do so, otherwise he will not be protected against the defendant's claim—take advantage of the fact, if it so is, that the judgment against the defendant on which he is garnished is void.<sup>7</sup> If the defendant in attachment is personally present in court, the garnishee is not required to question the jurisdictional legality of the proceedings, or their regularity as to the

<sup>1</sup> Drake on Attachment, sec. 458; *Iowa*, 385; *Leiber v. R. R. Co.*, 49 *Iowa*, 688.

<sup>2</sup> *Mathis v. Clark*, 2 Mill Const. 456; 12 Am. Dec. 688; *Russel v. Hinton*, 1 Murph. 468; *Sheldon v. Simonds*, Wright, 724; *McCause v. McClure*, 38 Mo. 410; *Myers v. Baltzell*, 37 Pa. St. 491; *McDermott v. Donegan*, 44 Mo. 85; *Sheedy v. Bank*, 62 Mo. 17; 21 Am. Rep. 407.

<sup>3</sup> *Lamb v. Stone*, 11 Pick. 527; *Eyerman v. Kneekhaus*, 7 Mo. App. 455.

<sup>4</sup> *Cummings v. Fearey*, 44 Mich. 39.

<sup>5</sup> *Winterfield v. R. R. Co.*, 29 Wis. 589; *Butler v. Clark*, 46 Ga. 466; *Claghorn v. Sausy*, 51 Ga. 576; *Davenport v. Swan*, 9 Humph. 186; *Clark v. Averill*, 31 Vt. 512; 76 Am. Dec. 131; *Staniels v. Raymond*, 4 Cush. 314; *Mull v. Jones*, 33 Kan. 112; *Pierce v. R. R. Co.*, 84 Ill. 375. *Aliter* as to an exemption allowed by the law of another state: *Moore v. R. R. Co.*, 43

*Iowa*, 385; *Leiber v. R. R. Co.*, 49 *Iowa*, 688.

<sup>6</sup> *Gleason v. Gage*, 2 Allen. 410; *Spring v. Ayer*, 23 Vt. 516; *Howard v. Crawford*, 21 Tex. 399; *Baldwin v. Morrill*, 8 Humph. 132.

<sup>7</sup> *Hazen v. Emerson*, 9 Pick. 144; *Benton v. Lindell*, 10 Mo. 557; *Gee v. Warwick*, 2 Hayw. (N. C.) 354; *Hinkle v. Currin*, 2 Humph. 137.

<sup>8</sup> *Berry v. Anderson*, 2 How. (Miss.) 649; *Ford v. Hurd*, 4 Smedes & M. 683; *Pierce v. Carlton*, 12 Ill. 358; 54 Am. Dec. 405; *Stone v. Magruder*, 10 Gill & J. 383; 32 Am. Dec. 177; *Cota v. Ross*, 66 Me. 161; *Erwin v. Heath*, 50 Miss. 795; *Laidlaw v. Morrow*, 44 Mich. 547; *Woodfolk v. Whitworth*, 5 Cold. 561; *Pratt v. Cunliff*, 9 Allen, 90; *Thayer v. Tyler*, 10 Gray, 164; *Sun Mut. Ins. Co. v. Seligson*, 59 Tex. 3.

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defendant, nor is he in a condition to do so. But where the defendant in attachment is not personally before the court, the garnishee is required to examine and know that the court has jurisdiction of the subject of the action.<sup>1</sup> The garnishee cannot oppose the plaintiff's claim by setting up defenses which the defendant might have resorted to, but has waived.<sup>2</sup> He cannot take advantage of technical errors in the proceedings which the defendant might have taken advantage of, but has not.<sup>3</sup> Nor can he object to irregularities in the proceeding against the principal debtor, unless they are such as render the judgment void.<sup>4</sup>

**§ 3612. Plaintiff's Rights Subject to Pre-existing Contracts of Garnishee.**—As to property of the defend-

<sup>1</sup> Ohio etc. R. R. Co. v. Alvey, 43 Ind. 180.

<sup>2</sup> Hanna v. Lauring, 10 Mart. (La.) 568; 13 Am. Dec. 339; Baltimore etc. R. R. Co. v. Taylor, 81 Ind. 24.

<sup>3</sup> St. Louis Co. v. Cohen, 9 Mo. 421; Whitehead v. Henderson, 4 Smedes & M. 704; Matheney v. Galloway, 12 Smedes & M. 475; Foster v. Jones, 1 McCord, 116; Camberford v. Hall, 3 McCord, 345; Douglass v. Brown, 37 Tex. 528; Cort v. Haven, 30 Conn. 190; 79 Am. Dec. 244; Gunn v. Howell, 35 Ala. 144; 73 Am. Dec. 485; Hollingsworth v. Hammond, 30 Ala. 668; Erwin v. Heath, 50 Miss. 795; Security Loan Ass'n v. Weems, 69 Ala. 584; Earl v. Matheney, 60 Ind. 202; the court saying: "When the jurisdiction has been established over both the defendant and the garnishee, the latter has no further right to interfere with or inquire into the proceedings in the main action between the plaintiff and defendant; for all that he is interested in is, that the attachment proceedings shall protect him against a second payment of the same debt; and this will be the case, although there may be errors and irregularities in the main proceedings for which the defendant might obtain a reversal of the judgment. It has therefore been uniformly held that a garnishee cannot reverse or avoid a judgment on account of mere errors or irregularities in the pro-

ceedings in the principal action. They affect only the defendant, who alone can take advantage of them, and then only by appeal: Drake on Attachment, secs. 658, 659, 691-698; Schoppenhast v. Bollman, 21 Ind. 280; Cassel v. Scott, 17 Ind. 514; Whitaker v. Coleman, 25 Ind. 374; Richardson v. Hickman, 22 Ind. 244; Baragree v. Cronkhite, 33 Ind. 192; McKee v. Anderson, 35 Ind. 17; Ohio and Miss. R. R. Co. v. Alvey, 43 Ind. 180; Schwab v. City of Madison, 49 Ind. 329; Stebbins v. Fitch, 1 Stew. 180; Thompson v. Allen, 4 Stew. & P. 184; Lomerson v. Hoffman, 24 N. J. L. 674; O'Connor v. O'Connor, 2 Grant, 245; Houston v. Walcott, 1 Iowa, 86; Fifield v. Wood, 9 Iowa, 249; Parmenter v. Childs, 12 Iowa, 22; Atcheson v. Smith, 3 B. Mon. 502; Hair v. Lowe, 19 Ala. 224; Matthews v. Sands, 29 Ala. 136; Gunn v. Howell, 35 Ala. 144; 73 Am. Dec. 484; Gould v. Meyer, 36 Ala. 565; Featherstonhaugh v. Compton, 3 La. Ann. 330; United States Ex. Co. v. Bulbury, 31 Ill. 459; Lawrence v. Smith, 45 N. H. 533; 86 Am. Dec. 183; Willet v. Price, 32 Ga. 115; Peters v. League, 13 Md. 58; 71 Am. Dec. 622; Freidenrich v. Moore, 24 Md. 295; Danaher v. Prentiss, 22 Wis. 311; Atlantic etc. F. Ins. Co. v. Wilson, 5 R. I. 479."

<sup>4</sup> Benson v. Holloway, 59 Miss. 358.

ant in the garnishee's hands, the plaintiff's rights are subject to any pre-existing contract between the defendant and the garnishee.<sup>1</sup> So the garnishment of a person as to his indebtedness to the defendant cannot interfere with previous contracts entered into between the garnishee and third persons with reference to such indebtedness.<sup>2</sup> Money which has passed from the hands of the garnishee before service of the writ cannot be reached thereby, no fraud being shown.<sup>3</sup> A bank check given and accepted as payment of an account entitles the drawer to a discharge as trustee of the payee, although not presented at the bank until the day after service of the process.<sup>4</sup> A prior settlement between the defendant in the main action and the garnishee, by which the indebtedness of the latter to the former is extinguished, avoids any liability of the garnishee upon a judgment against the defendant.<sup>5</sup>

ILLUSTRATIONS. — A gave money to B, to be paid to C. Before C knew of it, B was garnished by A's creditor. *Held*, that the money could be held by A's creditor, as against C: *Ridge v. Olmstead*, 73 Mo. 578. C. gave his note, secured by a mortgage on cattle, to a bank, and then sold the cattle to W., who agreed to pay the note. W. went to the bank with the requisite amount of money, which the assistant cashier agreed to receive, but the mortgage being in the possession of a third party, W. started out to obtain it, and had scarcely left the bank when he was garnished by a creditor of C. *Held*, that, as W. had become the principal debtor to the bank, the sum in his possession was not subject to garnishment: *Center v. McQuesten*, 24 Kan. 480. On suit of R. against T. and T.'s sureties, who held a chattel mortgage from T., they consented to a sale of the chattels on condition that the proceeds be deposited with K., to be applied to R.'s judgment when obtained. After this agreement, and before R. got judgment, P. obtained a judgment against T. *Held*, that the money in K.'s hands was not subject to garnishment for appropriation to P.'s judgment: *Prescott v.*

<sup>1</sup> *Baltimore etc. R. R. Co. v. Black v. Paul*, 10 Mo. 103; 45 Am. Wheeler, 18 Md. 372; *Grant v. Shaw*, Dec. 353.  
<sup>2</sup> 16 Mass. 341; 8 Am. Dec. 142; *Curtis v. Norris*, 8 Pick. 280; *Davis v. Wilson*, 52 Iowa, 187.

<sup>3</sup> *Drake on Attachment*, sec. 594;

<sup>4</sup> *Lieberman v. Hoffman*, 102 Fa. St. 590.

<sup>5</sup> *Getchell v. Chase*, 124 Mass. 306.

<sup>6</sup> *Huntington v. Risdon*, 43 Iowa, 517.

*King*, 52 Ga. 50. C. received from D. a letter inclosing an order on C. from D.'s brother to pay to D. the balance coming to the brother from an estate whereof C. was administrator. C. answered that he would do so as soon as he could raise the money. *Held*, that C. was not liable as garnishee of the brother: *Crownover v. Bamburg*, 2 Ill. App. 162. Two persons owned a promissory note jointly, and one of them sold and transferred his interest therein to the other, and suit thereon was, through inadvertence, commenced in the name of both, and judgment was rendered in their favor jointly. *Held*, that a creditor of the one who had transferred his interest acquired no interest by attaching the judgment: *Manny v. Adams*, 32 Iowa, 165. A purchased of B his interest as heir in his mother's estate, and notes for the price were made and delivered to B's wife, who joined in the conveyance. The wife then, in pursuance of a previous agreement, to which B was a party, transferred the notes to C in payment for necessities furnished to her and her husband. *Held*, that trustee process would not lie against A by a creditor of B: *Way v. Pierce*, 51 Vt. 326. A savings bank, holding a note against the principal defendant secured by a mortgage, purchased the equity of redemption at a sheriff's sale, and released to the mortgagor a portion of the real estate covered by the mortgage, in consideration of \$274 paid by the mortgagor, and indorsed that sum upon the note. *Held*, that the bank was not chargeable as trustee for the money thus received: *Flagg v. Bates*, 65 Me. 364. A school-teacher, being indebted, drew an order on the treasurer of the school district for the sum he was entitled to receive, in favor of his creditor, which was accepted by the board of directors on condition he completed his contract; the creditor, on the back of the order, authorized the secretary to draw the money for him, which he did, as agent for the creditor, on orders drawn in favor of the teacher before the time limited in the order for payment, and before he was garnished by another creditor of the teacher. *Held*, that such agent was not liable to the garnishee process: *Johnson v. Pace*, 78 Ill. 143.

§ 3613. Effect of Previous Assignment of Property. —

Where the garnishee has property of the defendant which, before the garnishment, has been transferred to the garnishee or a third person, the writ cannot reach it.<sup>1</sup> An

<sup>1</sup> *Sandridge v. Graves*, 1 Pat. & H. 101; *Smyth v. Ripley*, 33 Conn. 306; *Oldham v. Ledbetter*, 1 How. (Miss.) 43; 26 Am. Dec. 690; *NeSmith v. Drum*, 196; *Henderson v. Insurance Co.*, 72 Ala. 32; *Spear v. Rood*, 51 Mich. 140; *v. Thompson Oil Co.*, 79 Pa. St. 35; 21 Am. Rep. 66; *O'Connor v. Cavan*, 126 Mass. 117; *Simpson v. Bibber*, 59 Me. 196; *Henderson v. Insurance Co.*, 72 Ala. 32; *Spear v. Rood*, 51 Mich. 140;

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assignment of a debt to become due on the completion of a contract, or at the expiration of a term of service, is valid against a subsequent garnishment of it.<sup>1</sup> But when the garnishee at the time of service of the garnishment process has no notice of a previous assignment of the debt, the garnishment will prevail over the assignment.<sup>2</sup> A statement of account for board, with the words appended, "You will please pay the above amount to D.," was held to be an order to pay money, and not an assignment of a cause of action. A garnishment of such debt, before acceptance of the order, takes priority of the order.<sup>3</sup> It is the duty of the garnishee, knowing of a previous assignment of the defendant's claim against him, to so notify the court, that the assignee's rights may be protected.<sup>4</sup> Commencement of a suit against him by the assignee is notice to the garnishee of the assignment.<sup>5</sup>

But the plaintiff may impeach the transferee's title by showing that the transfer was fraudulent.<sup>6</sup> A debtor's fraudulent assignment of his interest in a contract may be treated by the creditor as a nullity; and parties may be garnished for his debt who, by the terms of the assignment, would be indebted to the assignee.<sup>7</sup> But the burden of proving that the assignment is invalid rested on the creditor.<sup>8</sup> Evidence that the claimant knew of the plaintiff's demand, and of his seeking to hold the fund in the

*Herot v. Ely*, 17 Fla. 775; *Missouri Bank v. Staley*, 9 Mo. App. 146; *Clafflin v. Kimball*, 52 Vt. 6; *Early v. Redwood City*, 57 Cal. 193; *Stinson v. Caswell*, 71 Me. 510. Where a negotiable note is transferred by indorsement after maturity, the legal title is thereby vested in the indorsee; and, after such indorsement, the amount due on the note cannot be garnished in the hands of the maker, whether he has notice of the transfer or not, as a debt due to the original holder: *Knisely v. Evans*, 34 Ohio St. 158.

<sup>1</sup> *Payne v. Mayor*, 4 Ala. 333; 37 Am. Dec. 744; *Kane v. Clough*, 36 Mich. 436; 24 Am. Rep. 599. See,

*contra*, *Egan v. Luby*, 133 Mass. 543.

<sup>2</sup> *Robertson v. Baker*, 10 Lea, 300; *Penniman v. Smith*, 5 Lea, 130.

<sup>3</sup> *De Liquero v. Munson*, 11 Heisk. 15.

<sup>4</sup> *Larrabee v. Knight*, 69 Me. 320; *Bunker v. Gilmore*, 40 Me. 83; *Dawson v. Jones*, 2 Houst. 412; *Smoot v. Es-lava*, 23 Ala. 659; 58 Am. Dec. 310; *Casey v. Davis*, 100 Mass. 124; *Greentree v. Rosenstock*, 61 N. Y. 583.

<sup>5</sup> *Smith v. Blatchford*, 2 Ind. 184; 52 Am. Dec. 504.

<sup>6</sup> *Cowles v. Coe*, 21 Conn. 220; *Saller v. Insurance Co.*, 62 Ala. 221.

<sup>7</sup> *Prentiss v. Danaher*, 20 Wis. 311.

<sup>8</sup> *Sheldon v. Hinton*, 6 Ill. App. 216.

hands of the trustee, is admissible on the issue whether the assignment was made to the claimant in good faith for a good consideration.<sup>1</sup>

If the garnishee has a lien on the property, the plaintiff can only take the property subject to that lien.<sup>2</sup>

**§ 3614. Pledged or Mortgaged Property.**—The pledgee or mortgagee of personalty cannot be held as garnishee of the pledgor or mortgagor while the property is the subject of the pledge or mortgage.<sup>3</sup> Collateral securities placed in the hands of a creditor are not garnishable.<sup>4</sup> The equity of redemption in mortgaged personalty, even after condition broken, may be reached by garnishment.<sup>5</sup>

**§ 3615. Plaintiff's Right against Garnishee Exists only as Long as his Right against Defendant.**—The plaintiff's right against the garnishee exists no more after his right against the defendant is gone.<sup>6</sup>

**§ 3616. Judgment against Defendant Necessary before Judgment against Garnishee.**—There can be no judgment against the garnishee until there is a valid judgment against the defendant,<sup>7</sup> and a final one.<sup>8</sup> Prior to that

<sup>1</sup> *Sullivan v. Langley*, 124 Mass. 264; *Johnson v. Husey*, 70 Me. 74.

<sup>2</sup> *Kirkham v. Hamilton*, 9 Mart. (La.) 297; *Smith v. Clarke*, 9 Iowa, 241; *Nolen v. Cook*, 5 Humph. 312; *Grant v. Shaw*, 16 Mass. 341; 8 Am. Dec. 142; *Curtis v. Norris*, 8 Pick. 280; *Roby v. Labuzan*, 21 Ala. 60; 56 Am. Dec. 237.

<sup>3</sup> *Badlam v. Tucker*, 1 Pick. 389; 11 Am. Dec. 202; *Central Bank v. Prentice*, 18 Pick. 396; *Howard v. Card*, 6 Me. 353; *Callender v. Furbish*, 46 Me. 226; *Patterson v. Harland*, 12 Ark. 158; *Curtis v. Raymond*, 29 Iowa, 52; *Mace v. Heald*, 36 Me. 136; *Reggio v. Day*, 37 Me. 314. *Contra*, *Carty v. Feustemaker*, 14 Ohio St. 247; *Burnham v. Doolittle*, 14 Neb. 214. See *Edwards v. Bergnot*, 7 Cal. 162. The amount in an insurance policy made payable in case of loss to the mortgagee is not garnishable by the creditors of the mortgagor: *Mansfield v. Stevens*, 31 Minn. 40.

<sup>4</sup> *Hall v. Page*, 4 Ga. 428; 48 Am.

Dec. 235; *Lochrane v. Solomon*, 38 Ga. 290.

<sup>5</sup> *Burnham v. Doolittle*, 14 Neb. 214; *Becker v. Dunham*, 27 Minn. 32.

<sup>6</sup> *Thompson v. Wallace*, 3 Ala. 132; *McEachin v. Reid*, 40 Ala. 410; *Price v. Higgins*, 1 Litt. 274; *Hammet v. Morris*, 55 Ga. 644.

<sup>7</sup> *Gaines v. Beirne*, 3 Ala. 114; *Leigh v. Smith*, 5 Ala. 583; *Lowry v. Clements*, 9 Ala. 442; *Bostwick v. Beach*, 13 Ala. 80; *Case v. Moore*, 21 Ala. 758; *Housemans v. Heilbron*, 23 Ga. 186; *Roberts v. Barry*, 42 Miss. 260; *Kellogg v. Freeman*, 50 Miss. 127; *Railroad v. Todd*, 11 Heisk. 549; *Woodfolk v. Whitworth*, 5 Cold. 561; *Withers v. Fuller*, 30 Gratt. 547; *Sun Mut. Ins. Co. v. Seelgson*, 59 Tex. 3; *Washburn v. R. R. Co.*, 41 Vt. 50; *Metcalf v. Steele*, 42 Miss. 511; *Bryan v. Dean*, 63 Ga. 317; *Walton v. Sharp*, 11 Lea, 578; *Collins v. Friend*, 21 La. Ann. 7; *Arnold v. Gullatt*, 68 Ga. 810.

<sup>8</sup> *Emanuel v. Smith*, 38 Ga. 602.



time, an officer holding an execution against the debtor defendant in the original action has no authority to seize such property on the execution, by virtue of any inchoate lien created under the garnishee proceedings. A mere order for judgment is insufficient to give such authority.<sup>1</sup> Should the judgment upon which a process of garnishment has been issued in aid of execution be reversed, the garnishment proceedings necessarily fall with it.<sup>2</sup> A judgment against a garnishee should be entered in the name of the debtor in attachment, as the plaintiff, and against his debtor, the garnishee, as defendant.<sup>3</sup> The judgment against the principal debtor may be shown by the judgment entry, and the garnishee's liability is limited by the amount of said judgment.<sup>4</sup> When the latter is paid off and satisfied, the former is *functus officio*; the purpose for which it was entered up has been accomplished in another way, and it ceases to be a valid process for any purpose, except, perhaps, for costs.<sup>5</sup> A garnishee cannot be held if the original attachment served on him is void, notwithstanding judgment has been obtained against the debtor defendant.<sup>6</sup> Where the attachment defendant has consented to judgment, the garnishee cannot insist on a recovery of judgment as protection to himself.<sup>7</sup>

**§ 3617. Garnishment not Retroactive — Nor can It Reach Subsequent Liabilities.** — A garnishment dates from its service.<sup>8</sup> It can have no retroactive effect so as to affect prior transactions between the defendant and the garnishee.<sup>9</sup> The validity of an attachment must be determined by the state of facts existing at the time thereof.<sup>10</sup> And it cannot reach any liability of the garnishee to the defendant accruing after the service of the

<sup>1</sup> Langdon v. Thompson, 25 Minn. 509.

<sup>2</sup> Clough v. Buck, 6 Neb. 343.

<sup>3</sup> Townner v. George, 53 Ill. 168.

<sup>4</sup> Strong v. Hollon, 39 Mich. 411.

<sup>5</sup> Hammett v. Morris, 55 Ga. 644.

<sup>6</sup> Greene v. Tripp, 11 R. I. 424.

<sup>7</sup> Daniel v. Daniels, 62 Miss. 352.

<sup>8</sup> Martz v. Detroit Ins. Co., 28 Mich. 201.

<sup>9</sup> Bailey v. Ross, 20 N. H. 302; Whittier v. Prescott, 48 Me. 367;

English v. King, 10 Heisk. 666.

<sup>10</sup> O'Brien v. Collins, 124 Mass. 98.

writ.<sup>1</sup> It is error to render judgment against him for refusing to answer whether he had received any property after the service of the summons.<sup>2</sup> So the garnishee, after service of the writ on him, cannot retain effects to discharge credits subsequently given by him to the debtor.<sup>3</sup>

**§ 3618. Successive or Several Garnishments—Priority.**

—In the case of several garnishments, they have, like other attachments, precedence in the order of their service.<sup>4</sup> A writ of garnishment issued and served under an original attachment proceeding holds all money or property belonging to the attachment defendant in the hands of the garnishee at the time the writ is served, not only for the original plaintiff, but for all creditors who file claims under the original proceeding before the final adjustment thereof.<sup>5</sup>

**§ 3619. Several Defendants and Several Garnishees.—**

Where several persons are jointly and severally liable for a debt, any one of them may be garnished and subjected to a judgment for the whole amount of the debt in the same manner that he might be sued by the defendant without his co-debtor being joined in the action.<sup>6</sup> A garnishee cannot be held in a suit against joint defendants, if their disclosure shows an indebtedness to only a part of

<sup>1</sup> Drake on Attachment, sec. 667; Roby v. Labuzan, 21 Ala. 60; 56 Am. Dec. 237; Williams v. R. R. Co., 36 Me. 201; 58 Am. Dec. 742; Hitchcock v. Miller, 48 Mich. 603; Hopson v. Dinan, 48 Mich. 612; Burlington etc. R. R. Co. v. Thompson, 31 Kan. 180; 47 Am. Rep. 497; Ormsby v. Anson, 21 Me. 23. Wages earned after the service of garnishment cannot be held thereby: Thomas v. Gibbons, 61 Iowa, 50.

<sup>2</sup> Wood v. Wall, 24 Wis. 647; Norris v. Burgoyne, 4 Cal. 409.

<sup>3</sup> Edwards v. Baldwin, 2 Root, 23; Farmers' Bank v. Gettinger, 4 W. Va. 305; Seamon v. Bank of Berkeley, 4 W. Va. 339; Leslie v. Merrill, 58 Ala. 322.

<sup>4</sup> See ante, § 5371; Williams v. R. R. Co., 36 Me. 201; 58 Am. Dec. 742; Baldwin's Appeal, 86 Pa. St. 483; Carr v. Benedict, 48 Ga. 431.

<sup>5</sup> Ryan v. Burkham, 42 Ind. 507.

<sup>6</sup> Drake on Attachment, sec. 560; Ladd v. Baker, 26 N. H. 76; 57 Am. Dec. 355; Lawson v. Bradley, 42 Vt. 165; Parker v. Gullow, 10 N. H. 103. But see Rix v. Elliot, 1 N. H. 184; Hudson v. Hunt, 5 N. H. 538; Ladd v. Baker, 26 N. H. 76; 57 Am. Dec. 355; French v. Rogers, 16 N. H. 177. If the answer shows that a third person claims the debt, or some interest therein, he should be summoned: Payne v. Mayor, 4 Ala. 333; 37 Am. Dec. 744.

the defendants.<sup>1</sup> Two persons, not jointly liable, cannot be joined as garnishees in one garnishment.<sup>2</sup> Where there are several defendants, the property of each is liable for the whole debt. In such case, if it appears that the garnishee is indebted to one or more of the defendants, though not to all, he will be charged.<sup>3</sup> A copartnership credit cannot be attached for the individual debt of one of the copartners.<sup>4</sup> A person summoned as trustee in his individual capacity will not be held chargeable where he discloses a liability merely as a member of a firm to the principal debtor.<sup>5</sup>

**§ 3620. Garnishee's Liability to Defendant must be Affirmatively Shown.**—The garnishee's liability to the defendant must be affirmatively shown.<sup>6</sup> Where it is

<sup>1</sup> Ford v. Detroit Dry Dock Co., 50 Mich. 358.

<sup>2</sup> Thorn v. Woodruff, 5 Ark. 55; Bender v. Bridge, 18 Ark. 291; Atkinson v. Minor, 1 Tyler, 122; Ball v. Young, 52 Mich. 476.

<sup>3</sup> Drake on Attachment, sec. 566.

<sup>4</sup> Sweet v. Reed, 12 R. I. 121.

<sup>5</sup> Atkins v. Prescott, 10 N. H. 120; Sheedy v. Second Nat. Bank, 62 Mo. 17; 21 Am. Dec. 407.

<sup>6</sup> Caldwell v. Coates, 78 Pa. St. 312; Farwell v. Howard, 26 Iowa, 381; Karnes v. Pritchard, 36 Mo. 135; Hunt v. Coon, 9 Ind. 537; East Line R. R. Co. v. Terry, 50 Tex. 129; Shafer v. Vizena, 20 Minn. 387; Rippen v. Schaen, 92 Ill. 229; Spears v. Chapman, 43 Mich. 541. In Porter v. Stevens, 9 Cush. 530, the court say: "So far as regards the question of presumption either of law or fact, the alleged trustee is not to be assumed to be trustee, either by reason of its being alleged by the plaintiff, or by force of the statute, or of any legal inferences derivable therefrom. On the contrary, it is for the plaintiff to prove his allegation, not for the defendant trustee to disprove it. Neither the nature of the process, nor the relation of the parties, raises such a general intendment of the alleged trustee having effects in his hands or possession

belonging to the alleged *cestui que trust* as to throw the general burden of proof on the alleged trustee so that the thing to be proved shall be the negative fact of whether the party is not trustee instead of the affirmative one of whether he is trustee. On the contrary, the primary general question on such a state of the record is, Shall the trustee be charged? If it cannot affirmatively be proved by the answers of the alleged trustee or by the collateral proofs that he is chargeable, then he is to be discharged. The court will not, in disregard of the true legal relation of the parties, assume that a supposed trustee is a prejudiced witness, and act on the rule of treating his testimony accordingly. On the contrary, the law assumes him to be, if he have assets in his hands, a mere stake-holder between the creditor and his debtor; and the law is very far from assuming against him that he has in fact such credits of the debtor intrusted to him, and then charging him inferentially, in the absence of conclusive negative proofs. He is to be charged or not, according as, on a just view of all the facts, the weight of evidence and of conviction shall fairly preponderate. The consideration that he is, in one point of view, a witness in his own case does

doubtful whether the garnishee owes the debtor, the question must be solved in the garnishee's favor.<sup>1</sup> The answer of a garnishee must stand, whether it be a denial or an affirmation of new matter, until evidence is produced to overthrow it.<sup>2</sup> But a statutory requirement that "the answers and statements sworn to by a trustee shall be deemed true, in deciding how far he is chargeable, until the contrary is proved," does not exclude the application of the ordinary rule as to the preponderance of evidence.<sup>3</sup> The burden is on the garnishee or defendant to establish that earnings due from the garnishee are exempt from liability.<sup>4</sup> And where, by his answer, it appears that, at one time, prior to the service of the writ upon him, he held funds of the principal defendant which would be attachable in that suit, the burden is upon the trustee to show that prior to the service he had expended such funds for the defendant's benefit, and this cannot be done by doubtful, indefinite, and sweeping statements, with an omission of details and particulars.<sup>5</sup>

**§ 3621. Debt must be Payable in Money.**—The debt must be payable in money, and not in goods or chattels.<sup>6</sup>

not change the established rules of reasoning and of mental conclusion as applied to proofs. He testifies under the ordinary obligations of an oath, in course of law, and his testimony is to be weighed and its effects determined by the general principles on which conclusions are to be drawn from any other lawful evidence. If the alleged trustee swear falsely, and the plaintiff be thus aggrieved, the latter has ample remedy, not only by means of a criminal prosecution, but also by his right of action on the case against the trustee, and of recovering from him the full amount of the debt out of his own goods and effects."

<sup>1</sup> Nashville v. Potomac Ins. Co., 58 Tenn. 296.

<sup>2</sup> Holton v. R. R. Co., 50 Mo. 151.

<sup>3</sup> Kelley v. Weymouth, 68 Me. 197.

<sup>4</sup> Oakes v. Marquardt, 49 Iowa, 643.

<sup>5</sup> Barker v. Orborne, 71 Me. 69.

<sup>6</sup> Mims v. Parker, 1 Ala. 421; Jones v. Crews, 64 Ala. 368; Wrigley v. Geyer, 4 Mass. 102; Willard v. Butler, 14 Pick. 560; McMinn v. Hall, 2 Tenn. 328; Peebles v. Meeds, 96 Pa. St. 150; Weil v. Tyler, 38 Mo. 545; 90 Am. Dec. 441; 43 Mo. 581; Fuller v. O'Brien, 121 Mass. 422; Smith v. Davis, 1 Wis. 447; 60 Am. Dec. 390. *Contra*, Louderman v. Wilson, 2 Har. & J. 379; Comstock v. Farnum, 2 Mass. 96; Clark v. King, 2 Mass. 524; Stadler v. Parmlee, 14 Iowa, 175. A maker of a note cannot be held liable as garnishee on a note as follows: "Due H., one thousand dollars, in brandy, at five dollars per gallon. We will let him have one or two barrels of fine whiskey on the above amount; this is for commissions": Weil v. Tyler, 43 Mo. 581.

One summoned as trustee, and answering that he was owing the principal defendant on a contract, by the terms of which payment was to be made in negotiable promissory notes of the trustee, but which did not specify when they should be payable, is not chargeable as trustee.<sup>1</sup> So the maker of a note for a specified sum "in board" is not chargeable as trustee in respect to the amount due, until after a demand and refusal to pay the note according to its terms, whereby it becomes a cash note.<sup>2</sup> An insurance company which has the right to rebuild instead of paying the loss is not chargeable as trustee of the assured; and the fact that after service of process an arrangement is made under which it pays the money to a creditor of the assured, who erects a building on his own land, is immaterial.<sup>3</sup>

§ 3622. **Must not Depend upon Contingency.**—The debt must be absolute, either now or in the future, and not dependent on any contingency;<sup>4</sup> as a debt contingent

<sup>1</sup> Fuller v. O'Brien, 121 Mass. 422.

<sup>2</sup> Aldrich v. Brooks, 25 N. H. 241.

<sup>3</sup> Godfrey v. Macomber, 128 Mass. 188.

<sup>4</sup> Roberts v. Drinkard, 3 Met. (Ky.) 309; Russell v. Clingan, 33 Miss. 535; Bishop v. Young, 17 Wis. 46; Wentworth v. Whittemore, 1 Mass. 471; Grant v. Shaw, 16 Mass. 341; 8 Am. Dec. 142; Potter v. Cain, 117 Mass. 238; Williams v. R. R. Co., 36 Me. 201; 58 Am. Dec. 742; Maduel v. Mousseaux, 29 La. Ann. 228; Curtis v. Alvord, 45 Conn. 539; Webber v. Doran, 70 Me. 140; Larrabee v. Walker, 71 Me. 441; Renhart v. Hardesty, 17 Nev. 141; Fellows v. Smith, 131 Mass. 363; Williams v. Young, 46 Iowa, 140; Norton v. Soule, 75 Me. 385. In Thorndike v. De Wolf, 6 Pick. 122, the court said: "Property or debts not actually due, but depending on a contingency, cannot be attached on the trustee process. This was one of the earliest constructions of our trustee process, and it has been steadfastly adhered to. The proposition itself is sufficiently simple, but

the application of it to particular cases which raise the question of contingent or not is not always of easy solution. This much, however, may be considered as clear, that the contingency must affect the property itself, or the debt which is supposed to exist, and not merely the title to the property in the possession of the trustee, or his liability on a contract which he has actually made, but the force or effect of which is in litigation. Examples showing the distinction may be taken from the cases decided. Thus the wages of a sailor on board a vessel which has not arrived are not liable to the process, because whether due or not depends on the arrival of the vessel: Wentworth v. Whittemore, 1 Mass. 471. So shippers of a cargo, under contract with the owner of the ship that he shall have a share of the net profits arising on the cargo, are not liable as trustees until the termination of the voyage, as it is altogether contingent whether anything will ever be due: 3 Mass. 33. There are many other cases of a similar character, but these two

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upon the satisfaction of a mortgage;<sup>1</sup> or a claim for unliquidated damages;<sup>2</sup> or where one has received money from one person which, upon the fulfillment of certain conditions, is to become the property of a third;<sup>3</sup> or the wages of a school-teacher employed for a definite time, until the expiration of which he is not by the contract entitled to receive any part of his pay;<sup>4</sup> or where the trustee will be liable to the defendant for commissions upon sales only in the event of payment by the buyers of goods sold by defendant for the trustee.<sup>5</sup> But a debt not really contingent, but only apparently so, may be garnished.<sup>6</sup> When labor contracted for is performed, and there remains only to fix its amount and value, the fact that, by the contract, the payment is to be made on an estimate and certificate of a third person does not constitute a contingency.<sup>7</sup> Money deposited with the clerk of court in lieu of an undertaking on appeal is attachable in an action by another party against the depositor. The depositor's interest in such a deposit is not contingent.

are sufficiently distinct to show what is intended in the decisions by the term 'contingent,' that is, an uncertainty whether anything will ever come into the hands of the trustee, or whether he will ever be indebted, the uncertainty arising from the contract, express or implied, between the debtor and the trustee: See Rev. Stats., c. 109, sec. 30; *Williams v. Marston*, 3 Pick. (2d ed.) 66, note 1; *Faulkner v. Waters*, 11 Pick. 473; *Guild v. Holbrook*, 11 Pick. 104. This principle has never been applied to a case where property is actually in the possession of the trustee, claimed by the debtor, his right to it being in controversy, nor to demands against the trustee himself in the nature of a debt due to the principal, which, however, may be in dispute between them. In such cases the process is considered as attaching, and is postponed until a liability to the debtor is ascertained. This, however, is subject to the restriction that the trustee process shall

be served before the party summoned shall be concluded, by the state of the pleadings, against showing in defense that the debt or property is attached in his hands." Even a statute authorizing an attachment on debts not yet due do not include contingent debts. There must be an absolute indebtedness which will become due by mere efflux of time: *Hearne v. Keath*, 63 Mo. 84. Although A may have a right of action against B for deceit, B is not therefore subject to garnishment at the instance of C, a creditor of A: *Bates v. Forsyth*, 69 Ga. 365.

<sup>1</sup> *Hoyt v. Swift*, 13 Vt. 129; 37 Am. Dec. 587.

<sup>2</sup> *Eastman v. Thayer*, 60 N. H. 575; *Gove v. Varrell*, 58 N. H. 78.

<sup>3</sup> *Williams v. Young*, 46 Iowa, 140.

<sup>4</sup> *Norton v. Soule*, 75 Me. 385.

<sup>5</sup> *Jordan v. Jordan*, 75 Me. 100.

<sup>6</sup> *Webster Wagon Co. v. Peterson*, 27 W. Va. 314.

<sup>7</sup> *Ware v. Gowen*, 65 Me. 534.

It remains his property, subject to answer the claim of the other party in the original suit.<sup>1</sup>

ILLUSTRATIONS. — B. sold certain property to a company composed of himself, W., and another person, intrusting the proceeds to W. to pay certain debts of B., and let the residue entitle B. to a proportionate interest in the capital stock of the company. *Held*, that B.'s interest in the property and its avails was contingent, and not garnishable: *Libby v. Brainard*, 63 Me. 65. A loaned a railroad a certain quantity of iron, having bought and paid for it with a note of the company, secured as to half its amount by the personal guaranty of A, the defendants, and five others. The loan was to become a sale if the company paid for the iron as stipulated, and A reserved to himself the power, on default of such payment, to repossess himself of the iron for the purpose of indemnifying the guarantors. *Held*, that A was not chargeable on garnishee process, in a suit against two of his co-guarantors: *Clarke v. Farnum*, 7 R. I. 174. S. made an oral agreement with M., whereby S. was to purchase of M. a lot of land and pay therefor by installments of his wages, M. giving S. steady employment under a firm of which M. was a member. In an action by a creditor of S., brought before the land was paid for, *held*, that the members of the firm were not liable as trustees: *Wart v. Mann*, 124 Mass. 586.

§ 3623. **Debt not Due or Payable in Futuro.** — A debt due from a garnishee to a defendant, but not payable at the time of garnishment, may be attached, and judgment will be rendered at once, but execution delayed till the time of payment arrives;<sup>2</sup> as an unadjusted loss on a policy

<sup>1</sup> *Dunlop v. Ins. Co.*, 74 N. Y. 145; 30 Am. Rep. 283.

<sup>2</sup> *Willard v. Sheafe*, 4 Mass. 235; *Fulweiler v. Hughes*, 17 Pa. St. 440; *Steuart v. West*, 1 Har. & J. 536; *Peace v. Jones*, 3 Murph. 256; *Sayward v. Drew*, 6 Me. 263; *Cottrell v. Varnum*, 5 Ala. 229; 39 Am. Dec. 323; *Dunnegan v. Byers*, 17 Ark. 492. But see *contra*, *Ordway v. Remington*, 12 R. I. 319; 34 Am. Rep. 646; *Knight v. Bowley*, 117 Mass. 551; *Potter v. Cain*, 117 Mass. 238; *Thorp v. Preston*, 42 Mich. 511. In *Teeter v. Williams*, 3 B. Mon. 562, 39 Am. Dec. 485, the court said: "Since the abolition of imprisonment for debt, a creditor cannot lay hold of his debtor and prevent him from gaining a support for him-

self and family by his daily labor. He may, by the aid of the chancellor, attach whatever may be due to his debtor for labor already performed, and he may attach whatever may become due upon an existing contract for his future labor; but neither the creditor nor the chancellor can compel the debtor to work out his part of such a contract, or to earn the promised reward for the exclusive use of the creditor. If the chancellor could exercise such power of compulsion at all, he certainly would not fail to allow to the debtor, out of the proceeds of his labor, so much as was necessary for the support of himself and family, and would give the net balance only to the creditor; and when

of insurance.<sup>1</sup> A tenant absolutely, not contingently, liable for future rent may be held as a trustee.<sup>2</sup> Where one's monthly salary has been earned it may be attached, although not yet payable.<sup>3</sup>

§ 3624. **Negotiable Paper.**—Negotiable paper, before maturity, cannot be garnished.<sup>4</sup> But it is otherwise if such note or bill is transferred before maturing, voluntarily or fraudulently, for the purpose of protecting the

a debtor, who is dependent upon his labor for the support of himself and family, has partially performed a contract for work, and the same is attached by his creditor, the chancellor would not be disposed to animadvert severely upon the conduct of the parties, much less to subject either of them to penalties, if upon the debtor's refusal to go on and complete his part of the contract which has been attached, some new arrangement should be made by which he might appropriate his personal faculties and daily labor to those objects which have the highest claim upon him; and though the chancellor might deem it his duty to scrutinize such new arrangement with some jealousy, when it resulted in the debtor's going on in fact, though under the employment of another contractor, to complete the same work which he had originally undertaken by the attached contract, yet even if the new arrangement should be deemed colorable only, it would seem that he ought not to do more in behalf of the creditor than would have been done if the debtor had gone on, either by constraint of the chancellor or by his own will, to complete the original contract."

<sup>1</sup> *Knox v. Protection Ins. Co.*, 9 Conn. 430; 25 Am. Dec. 33. *Contra*, *Bucklin v. Powell*, 60 N. H. 119. A policy of life insurance, payable to the legal representatives of the assured, is not the subject of an attachment execution during his life: *Day v. New England Life Ins. Co.*, 111 Pa. St. 507; 56 Am. Rep. 297.

<sup>2</sup> *Rowell v. Felker*, 54 Vt. 526.

<sup>3</sup> *Seymour v. Over River School District*, 53 Conn. 502.

<sup>4</sup> *Hubbard v. Williams*, 1 Minn. 54;

55 Am. Dec. 66; *Gregory v. Higgins*, 10 Cal. 339; *Wilson v. Albright*, 2 G. Greene, 125; *Fittell v. Wood*, 9 Iowa, 249; *Littlefield v. Hodge*, 6 Mich. 326; *Howe v. Ould*, 28 Gratt. 1; *Iglehart v. Moore*, 21 Tex. 501; *Kapp v. Teel*, 33 Tex. 811; *Gaffney v. Bradford*, 2 Bail. 441; *Ludlow v. Bingham*, 4 Dall. 47; *Hinsdill v. Safford*, 11 Vt. 309; *Little v. Hale*, 11 Vt. 482; *Foster v. Mix*, 20 Conn. 395; *Amoskeag Mfg. Co. v. Gibbs*, 28 N. H. 316; *Davis v. Pawlette*, 3 Wis. 300; 62 Am. Dec. 690; *Linschon v. Wagner*, 76 Ala. 412; *Diefendorf v. Olive*, 8 Kan. 365; *Wilhelm v. Heffner*, 52 Ill. 222; *Hughes v. Monty*, 24 Iowa, 499. *Contra*, *Scott v. Hill*, 3 Mo. 88; 22 Am. Dec. 462; and subsequent Missouri cases. In *McNiell v. Roache*, 49 Miss. 436, the court say: "While the notes were current as negotiable paper, it is usually very difficult for the maker to say whether, at the time of the garnishment, they were still the property or in the possession of the payee. If he answers that he does not know whether they were so or not, certainly he should not be charged, because it does not appear affirmatively that he was, when garnished, indebted to the defendant, and unless that fact so appear, no court can rightfully render judgment against him. The most that can be claimed is, that he may be so indebted, which is manifestly insufficient. The great fact necessary to charge him is not shown, but only conjectured. The whole matter is in doubt, and while in doubt, the court cannot, with truth, record that the garnishee is found to be indebted to the defendant, and unless that be found by the judgment of the court, there is no ground for charging the garnishee."



debt from the creditors of the payee. It may be attached or garnished while the same remains in the hands of such indorsee.<sup>1</sup> And a party indebted to an attachment defendant, by a note not negotiable, may be garnished, although his note may not be due, and judgment may be rendered against him in favor of the attaching creditor.<sup>2</sup> Mr. Drake says: "As a general rule, the maker of a negotiable note should not be charged as garnishee of the payee under an attachment served before the maturity of the note, unless it be affirmatively shown that, before the rendition of the judgment, the note had become due, and was then still the property of the payee."<sup>3</sup> A debtor, by a promissory note, may be garnished, and if served with the summons before he has paid the note, he will pay it at his peril; nor is he protected in paying to a third party who acquired title after the service of the summons, if the note was taken overdue. A holder takes an overdue note subject to all the equities between the original parties, and among these equities is the right which a vigilant creditor acquires by his attaching the note by serving the summons of garnishment on the maker.<sup>4</sup>

§ 3625. **Interrogatories to Garnishee.**—The garnishee having been summoned, the attaching creditor files in

<sup>1</sup> Clough v. Buck, 6 Neb. 343.

<sup>2</sup> King v. Vance, 46 Ind. 246. But see Cairo etc. R. R. v. Killenberg, 82 Ill. 295.

<sup>3</sup> Drake on Attachment, sec. 587; Scott v. Hill, 3 Mo. 88; 22 Am. Dec. 462; Carson v. Allen, 2 Pinn. 457; 54 Am. Dec. 148; King v. Vance, 46 Ind. 246; Shuler v. Bryson, 65 N. C. 116; Clough v. Buck, 6 Neb. 343; Burton v. Wynne, 55 Ga. 615; Huff v. Mills, 7 Yerg. 42; Bassett v. Garthwaite, 22 Tex. 280; 73 Am. Dec. 257; Cruett v. Jenkins, 53 Md. 217. In Sheets v. Culver, 14 La. 449, 33 Am. Dec. 593, the court say: "As to notes indorsed in blank, which circulate and pass from hand to hand by mere delivery, it has never been, nor can it be, pretended that any notice of transfer is necessary: La. Code, 3128. If, then,

no such notice is ever given, how is a garnishee, who has issued his promissory note, indorsed in blank, to know in whose hands it happens to be at the precise moment when he is called upon to answer interrogatories? And if, perchance, he were to know that his note was still the property of the defendant, and were so to declare it, could such a proceeding restrain its negotiability? Could it affect the rights of a *bona fide* holder? Surely not. The ownership of negotiable paper is incessantly varying before its maturity, and the obligation of the maker of such instruments is not to pay to any particular person, but to the holder, at maturity, whoever he may be."

<sup>4</sup> Burton v. Wynne, 55 Ga. 615.

court interrogatories to be served on the garnishee.<sup>1</sup> Although the statute requires the plaintiff to file interrogatories within a certain time, the court may, in its discretion, allow them to be filed afterwards.<sup>2</sup> Additional interrogatories may be propounded to the garnishee after the first interrogatories have been answered, without going through the formalities of traversing the answers to the first interrogatories.<sup>3</sup> A garnishee who is required to answer interrogatories in open court, on a day fixed, is entitled to personal notice, which must be given him a reasonable time before the day for answering.<sup>4</sup>

When the garnishee failed to answer through a mistake

<sup>1</sup> Waples on Attachment, 348, says: "The interrogatories should be confined to the ascertaining of one or both of the facts,—indebtedness and possession of property. They should be further confined to such indebtedness as would render the person addressed liable to garnishment in case of affirmative answers, and to such possession as would render him liable. They must not be impertinent, nor unnecessarily harassing, nor calculated to expose such business relations between the person addressed and his creditor as the exigencies of the occasion do not require to be exposed. They must not be such as to entrap the garnishee into admissions which he would not be required to make were questions plain and readily apprehensible; they must not tend to criminate himself; they must not be such as to deprive him of any just ground of defense against his own creditor, in case of a subsequent suit. They should not be unnecessarily prolix or repetitious. They should contain all that the attaching creditor wishes to ask, so as to leave no occasion for supplemental interrogatories; but there may be supplemental ones under leave of court. If the first set have not been served, they may, by leave, be withdrawn and amended; or if served, supplemental questions may be propounded. There is good ground for application to file supplemental interrogatories, if new facts have come to the knowledge of the interrogator after the filing of the first. To effect their object; to ascertain whether the

person addressed is really liable as a garnishee to the amount of the debt claimed of the defendant, or less; to avoid the necessity of applying for permission to file amended or supplemental questions,—the interrogatories should be full, frank, searching, pointed, respectful, pertinent, and not susceptible of being evaded. They should be such as to draw, if possible, even from a double-dealing man, the truth respecting his indebtedness to the defendant, or his relation to the defendant as the custodian of property liable to garnishment. They should be sufficiently incisive, so as to lay bare all the facts within the bounds circumscribing the garnishee as a mere stakeholder disinterested as to whom he may be called upon to pay or to deliver; but, as before remarked, they should not go beyond those bounds to render the garnishee worse off than he was before. They may within those bounds cut into transactions, facts, and various matters tending to bring out the one essential fact of legal responsibility as garnishee; for, as the garnishee is not supposed to know the exact boundary of his rights and exemptions when the circumstances are complicated, the bringing out of all the particulars may be of great importance to enable the court to understand and decide whether or not he is chargeable."

<sup>2</sup> Lawrence v. Sturdivant, 10 Ark. 130.

<sup>3</sup> Ober v. Matthews, 24 La. Ann. 90; Miller v. R. R. Co., 131 Mass. 231.

<sup>4</sup> Cockfield v. Tourres, 24 La. Ann. 168.

as to his legal duty, and judgment was rendered against him for a much larger sum than he had in hand, the discretion of the court in setting aside the same, on motion made during the term, will not be controlled.<sup>1</sup> To entitle a garnishee, against whom judgment has been rendered, to an injunction, he must show a good defense, that the collection of the judgment would be unjust, and that he was unable to avail himself of his defense in season, or was prevented by fraud or accident, to which his negligence in no way contributed.<sup>2</sup>

§ 3626. **Judgment by Default against Garnishee.**—If the garnishee does not appear and answer the interrogatories, judgment by default may be taken against him.<sup>3</sup> So if he have answered, but has been required to make his answers more specific, and he does not do so.<sup>4</sup> A judgment by default against a trustee only makes out a *prima facie* case of indebtedness.<sup>5</sup> It should be in the name of the defendant, and not of the plaintiff.<sup>6</sup> After judgment confessed by a defendant, the question of indebtedness by the defendant to the plaintiff is not open to the garnishee, under his plea of *nulla bona*.<sup>7</sup>

It is error to render judgment by default against a garnishee without proof, or an examination of him;<sup>8</sup> or when the writ fails to designate the cause in which the garnishee

<sup>1</sup> Russell v. Freedman's Savings Bank of Mason, 50 Ga. 575. And see Evans v. Mohr, 55 Iowa, 302; Machaw v. Noyes, 33 La. Ann. 882.

<sup>2</sup> Freeman v. Miller, 53 Tex. 372. A garnishee's failure to answer within ten days was held not to be excused by his having been misled by an erroneous statement of the justice as to the time allowed: Farley v. Bloodworth, 66 Ga. 349.

<sup>3</sup> Drake on Attachment, sec. 636; Abell v. Simson, 49 Md. 318. Where a garnishee, without sufficient excuse, fails to appear for personal examination, but files an answer, the answer should be stricken from the files, and judgment entered as for default:

Penn. v. Pelan, 52 Iowa, 535. In Illinois, upon default of the garnishee, it is error to render final judgment against him at the return term of the writ. A conditional judgment only should be entered, and a *scire facias* issued against the garnishee, returnable to the next term of the court, to show cause why the judgment should not be made final: Horat v. Jackel, 59 Ill. 139.

<sup>4</sup> Scamahorn v. Scott, 42 Iowa, 529.

<sup>5</sup> Townsend v. Libbey, 70 Me. 162.

<sup>6</sup> Chicago etc. R. R. Co. v. Mason, 11 Ill. App. 525.

<sup>7</sup> Bartlett v. Wilbur, 53 Md. 485.

<sup>8</sup> Lewis v. Faul, 29 Ark. 470.

is called upon to answer; or when the affidavit for the writ omits to state that the garnishee resides in the county in which the original suit is brought;<sup>1</sup> or the return does not show a valid service,<sup>2</sup> or where a garnishee appears in court ready to answer, and by an arrangement with the attorneys for the plaintiff his answer is deferred, and in his absence he is defaulted.<sup>3</sup>

§ 3627. **Garnishee may Except to Interrogatories.**—The garnishee may except to the interrogatories.<sup>4</sup> He may in this way plead to the jurisdiction.<sup>5</sup>

§ 3628. **Or He may Answer—Requisites of Answer.** If the defendant does not except, he must answer. His answer must disclose every fact within his knowledge which may go to show that he ought not to be charged.<sup>6</sup> If

<sup>1</sup> Johnson v. McCutchings, 43 Tex. 553.

<sup>2</sup> Sun Mut. Ins. Co. v. Seeligson, 59 Tex. 3.

<sup>3</sup> Hueskamp v. Van Leuben, 56 Iowa, 653; Laffin Rand Powder Co. v. R. R. Co., 63 Md. 76.

<sup>4</sup> "Exceptions to interrogatories," says Mr. Waples (Waples on Attachment, 355), "may be taken when they are of such character that the law does not require that they should be answered. Persons interrogated respecting funds officially held which are not subject to garnishment; persons questioned about business relations of such character that neither an affirmative nor a negative reply would avail the interrogator, — may except, and may withhold response till the court pass upon the exception. All impertinent, disrespectful, and illegal interrogatories may be resisted by exception. If some are right and others wrong, the former may be answered and the latter resisted. If answers have been filed, and then further interrogatories propounded without leave of court, the garnishee may except that he has already answered, and is not obliged to respond a second time; and then, till the court decide, he may safely be silent. If the court has already granted

leave for the second propounding, it has not passed at all upon the character of the questions; and if they are a mere repetition (either in the same or different verbiage) of those already answered, or if they are objectionable for any other reason, the garnishee may yet except, not now to the right of propounding, but to the questions propounded. It is often of the highest importance, involving the garnishee's future protection, that he should resist improper and illegal inquisition. It is always the safer course to proceed under judicial orders, and not to do unnecessary things, which might afterwards be charged to have been voluntary disclosures: Gould v. Meyer, 36 Ala. 565; Gunn v. Howell, 35 Ala. 144; 73 Am. Dec. 484. He is not bound to answer irrelevant interrogatories: Rhine v. R. R. Co., 10 Phila. 336. But his right way to avoid them is by excepting to them, and submitting the question of relevancy to the court."

<sup>5</sup> Waples on Attachment, 354.

<sup>6</sup> Drake on Attachment, sec. 630. An appearance and filing an answer is a waiver of any defect in the garnishee summons: Nat. Bank of Commerce v. Titsworth, 73 Ill. 591; Lup-ton v. Moore, 101 Pa. St. 318. He is

he has no property of the defendant, or is not indebted to him, he must simply so declare. If he is in doubt as to his liability, he should state the facts, and leave the question to the court.<sup>1</sup> An evasive answer will be a nullity. He must answer every pertinent question.<sup>2</sup> His answer is not voluntary; for he is bound by law to answer.<sup>3</sup> The answer of a garnishee, verified by affidavit, and referred to in the judgment entry, is a part of the record. It is his pleading in the case.<sup>4</sup> When the answer of a garnishee is not satisfactory to the plaintiff, the latter may examine him orally in the presence of the court, or he may make affidavit that he believes the answer to be untrue, and have an issue made up for trial.<sup>5</sup>

**§ 3629. Need not Conform to Technical Rules of Pleading.**—The answer need not conform to the technical rules of pleading.<sup>6</sup> It is not to be construed with the same strictness as a defendant's affidavit of defense. The garnishee is not bound to set forth specifically and at length the nature and character of his defense to the attachment. He is only required to answer the interrogatories submitted to him. And judgment will not be entered against him on his answer, unless he expressly or impliedly admits his indebtedness to or his possession of assets belonging to the judgment debtor; and the admission ought to be of such a character as to leave no doubt in regard to its nature and extent.<sup>7</sup> But an answer need

not compelled to appear and answer, unless he is tendered the fees and mileage to which an ordinary witness would be entitled; *Westphal v. Clark*, 42 Iowa, 371. Under the Oregon statute, the plaintiff's allegations are not demurrable by the garnishee. To raise the question of jurisdiction or of the legality of the proceedings, the defect should be alleged in the answer, without more; upon an exception to such answer for insufficiency, the question thus pre-

sents itself: *Faull v. Mining Co.*, 8 Saw. 420; 14 Fed. Rep. 657.

<sup>1</sup> *Drake on Attachment*, sec. 632.

<sup>2</sup> *Scales v. Swan*, 9 Port. 163; *Parker v. Page*, 38 Cal. 522.

<sup>3</sup> *Dodd v. Brott*, 1 Minn. 270; 66 Am. Dec. 540.

<sup>4</sup> *Corbitt v. Pynes*, 45 Ala. 258.

<sup>5</sup> *Wright v. Swanson*, 46 Ala. 708.

<sup>6</sup> *Ashby v. Watson*, 9 Mo. 235; *Klauber v. Wright*, 52 Wis. 303.

<sup>7</sup> *Allegheny Savings Bank v. Meyer*, 59 Pa. St. 361.

not expressly admit the debt, to justify a judgment; it is sufficient if it states facts showing the indebtedness.<sup>1</sup>

He need not confine himself to facts within his own knowledge, but may set out extrinsic facts which he may suppose relevant to his liability.<sup>2</sup> His disclosure is to be taken altogether, and no part of it can be excluded merely for being made upon information and belief.<sup>3</sup> The rule that when an answer in chancery is given in evidence in a court of law the party is entitled to have the whole of his answer read should be applied when the answer of a garnishee is offered in evidence by the plaintiff on a contest of such answer.<sup>4</sup>

**§ 3630. What Garnishee not Required to Answer.—**

The garnishee need not answer vexatious, impertinent, or irrelevant questions;<sup>5</sup> nor new questions, after he has once fully answered;<sup>6</sup> nor questions which would show a violation of law on his part;<sup>7</sup> nor, it seems, in some states, questions which might tend to impeach his title to real estate derived from the defendant.<sup>8</sup>

**§ 3631. Amendment of Answer.—** The garnishee may be allowed to amend his answer or to put in a new one.<sup>9</sup>

**§ 3632. Conclusiveness of Answer.—** In some states the garnishee's answer is conclusive;<sup>10</sup> but in most jurisdictions it is considered true *prima facie*, but may be controverted.<sup>11</sup> If, however, his answer denying his in-

<sup>1</sup> Mann v. Buford, 3 Ala. 312; 37 Am. Dec. 691.

<sup>2</sup> Crossman v. Crossman, 21 Pick. 21; Willard v. Sturtevant, 7 Pick. 194.

<sup>3</sup> Sexton v. Amos, 39 Mich. 695.

<sup>4</sup> Godden v. Pierson, 42 Ala. 370.

<sup>5</sup> Crossman v. Crossman, 21 Pick. 21; Rhine v. R. R. Co., 10 Phila. 336.

<sup>6</sup> Warner v. Perkins, 8 Cush. 518.

<sup>7</sup> Boardman v. Roe, 13 Mass. 104. But he may be required to answer questions tending to show that he was a party to a fraudulent assignment by the defendant in the suit: Oberteuffer v. Harwood, 2 McCrary, 415.

<sup>8</sup> Boardman v. Roe, 13 Mass. 104; Russell v. Lewis, 15 Mass. 127; Moor v. Towle, 38 Me. 133. *Contra*, Bell v. Kendrick, 8 N. H. 520.

<sup>9</sup> Drake on Attachment, sec. 650; Terry v. Sisson, 125 Mass. 560; Tracy v. McGarty, 12 R. I. 168.

<sup>10</sup> Drake on Attachment, sec. 651; Barker v. Taber, 4 Mass. 81; Sexton v. Amos, 39 Mich. 695; Childress v. Dickens, 8 Yerg. 113.

<sup>11</sup> Davis v. Knapp, 8 Mo. 657; Holton v. R. R. Co., 50 Mo. 151; Rippen v. Schoen, 92 Ill. 229; Britt v. Bradshaw, 18 Ark. 530; Williams v. Jones,

debtedness, etc., is not disproved, he should be discharged.<sup>1</sup>

To charge a garnishee on his answer, he must admit an indebtedness in money;<sup>2</sup> but if he admits by his disclosure that money or property of the principal defendant has come into his possession, he will be charged, unless he clearly states in his disclosure matters of discharge.<sup>3</sup> The disclosure of a garnishee is the answer of a party, and analogous in its functions to an answer in chancery. It does not stand upon the same footing as the testimony of a witness, but whatever is admitted by it may be treated as established.<sup>4</sup> When it is evident that a garnishee is acting in bad faith in denying his indebtedness or asserting his claim, his answer may be disregarded as fraudulent.<sup>5</sup> If one summoned as trustee answers that he believes the fund in his hand to belong to a third person, the latter may appear and disclaim, and the trustee may be charged.<sup>6</sup> An order discharging garnishees may be reviewed on error before final judgment.<sup>7</sup>

42 Miss. 270; *Kergin v. Dawson*, 6 Ill. 86; *Pierce v. Carleton*, 12 Ill. 358; 54 Am. Dec. 405; *Gordon v. Moore*, 62 Miss. 493. In *Walters v. Washington Ins. Co.*, 1 Iowa, 404, 63 Am. Dec. 451, the court say: "Primarily, the garnishee is taken to be an innocent person, who is called into court as owing money to another, or as having property of that other in his hands, and in either case without fault or blame. It is true that this process may be, and sometimes is, used as a powerful instrument for ferreting out fraud, or the concealment of property. But the proceeding is based upon the idea of innocence in the party summoned. He is supposed to stand indifferent as to who shall have the money or property. His answer is generally the only evidence of his indebtedness or liability. By the statute of this state an issue may be taken on his answer, but if such issue is not taken, the answer remains the sole test of his being indebted or holding

property. His rights are to be carefully protected; he is to be charged only upon his contract or relation with his creditor precisely as it exists between them; he is in no case to be placed in a situation where he will be compelled to pay the debt twice: *Drake on Attachment*, sec. 626. And it is apprehended that he is not to be unnecessarily exposed to litigation and expense."

<sup>1</sup> *Laschear v. White*, 88 Ill. 43; *Burrows v. Moore*, 63 Ga. 405; *Pierce v. Carleton*, 12 Ill. 358; 54 Am. Dec. 405; *Hackley v. Keuritz*, 39 Mich. 398; *Cairo etc. R. R. Co. v. Killenberg*, 82 Ill. 295; *Wilder v. Shea*, 13 Bush, 128; Ill. Cent. R. R. Co. v. Cobb, 48 Ill. 402.

<sup>2</sup> *Mims v. Parker*, 1 Ala. 421.

<sup>3</sup> *Fogg v. Worster*, 49 N. H. 503.

<sup>4</sup> *Allen v. Hazen*, 26 Mich. 142.

<sup>5</sup> *Parker v. Page*, 38 Cal. 522.

<sup>6</sup> *Mortland v. Little*, 137 Mass. 339.

<sup>7</sup> *Turpin v. Coates*, 12 Neb. 321.

§ 3633. **Declarations of Garnishee to Disprove Answer.**

—The declarations of the garnishee, either before or after the answer, are in some states admissible to disprove the statements in the answer.<sup>1</sup> But the declarations of the defendant are not admissible against the garnishee.<sup>2</sup>

§ 3634. **Garnishee's Liability for Costs—Interest.**—

The garnishee will not, as a rule, be ordered to pay the costs of the proceeding,<sup>3</sup> unless he contests the suit,<sup>4</sup> or refuses to answer when ordered to do so.<sup>5</sup> So the garnishee is entitled to his own costs, and to an attorney's fee as part of his costs.<sup>6</sup> But an allowance to a garnishee

<sup>1</sup> *Stevens v. Gwathmey*, 9 Mo. 636; *Warder v. Baker*, 54 Wis. 43; *Keel v. Ogden*, 5 T. B. Mon. 362; *Odlum v. Yard*, 1 Rawle, 163; 18 Am. Dec. 608. *Contra*, *Crossman v. Crossman*, 21 Pick. 21.

<sup>2</sup> *Enos v. Tuttle*, 3 Conn. 27; *Cahoon v. Ellis*, 18 Vt. 500.

<sup>3</sup> *Gracy v. Coates*, 2 McCord, 224; *Breading v. Siegworth*, 29 Pa. St. 396; *Baltimore etc. R. R. Co. v. Taylor*, 81 Ind. 24; *Johnson v. Delbridge*, 35 Mich. 436; *Prout v. Grout*, 72 Ill. 456; *Tupper v. Cassell*, 45 Miss. 352. A claimant in garnishment proceedings who succeeds on the merits is entitled to the same costs as a defendant: *Mahoney v. McLean*, 28 Minn. 63.

<sup>4</sup> *Newlin v. Scott*, 26 Pa. St. 102; *Lucas v. Campbell*, 88 Ill. 447; *Thompson v. Allen*, 4 Stew. & P. 184; *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581; *Strong v. Holton*, 39 Mich. 411.

<sup>5</sup> *Randolph v. Heaslip*, 11 Iowa, 37. In *State v. Linawever*, 3 Head, 51, 75 Am. Dec. 757, the court said: "By the code, section 3102, 'the garnishee shall have the pay and be entitled to the privileges of a witness, and shall recover costs against the plaintiff, if the garnishment is not successfully prosecuted.' This would seem to imply that if the plaintiff was successful in rendering him liable, that he should pay costs. This section is, in substance, or was, doubtless, intended to adopt the act of 1826, Car. & Nich., c. 17, p. 364. Under that act this court

held, in *Huff v. Mills*, 7 Yerg. 42, 46, the garnishee was not subject to costs, although the judgment was against him, but that the plaintiff in the execution should pay them. We think there was no intention to change that rule by the code. The justice and reason of the case accord with that construction. The garnishee is in no fault. He could not pay the debt he owed the execution debtor to his creditor, without the judgment of a court. He fairly discloses the facts which establish his liability, and submits to the judgment of the court. It is nothing to him to whom he pays the debt, provided he does it according to law, so as to get a legal discharge. The whole proceeding and the result is for the benefit of the execution creditor, and it is right that he should pay the costs, rather than the garnishee, who is in no wrong. The execution debtor cannot be taxed, because he is not a party to the proceeding. We think it right to adhere to the rule established in the case of *Huff v. Mills*, 7 Yerg. 42, under the act of 1826, as we think it just, and the code does not change it. How it would be if the garnishee had resisted and appealed from a judgment against him, or if the fund in his hands was more than sufficient to pay the execution and costs, we need not now say, as that is not the case in judgment."

<sup>6</sup> *Griffiths v. Stockmuller*, 14 Phila. 236.



is a part of the costs in the case, and cannot be granted after the term at which final judgment is rendered, either in the lower or appellate court.<sup>1</sup> On an appeal improperly taken from a judgment of the superior court, charging a trustee in foreign attachment, the trustee is not entitled to costs.<sup>2</sup>

The garnishee is sometimes held liable for interest.<sup>3</sup>

§ 3635. **Agreements and Payments between Garnishee and Defendant after Service.**—No agreements between the garnishee and the defendant subsequent to the writ can affect the plaintiff's rights.<sup>4</sup> A garnishee cannot escape liability under the garnishment by rescinding a contract by which he became indebted to the defendant.<sup>5</sup> So a voluntary payment of his debt by the garnishee after the service will be no defense against the plaintiff's claim.<sup>6</sup> Where the balance due a depositor in a bank is levied on, by virtue of an attachment against the depositor, the bank is not authorized to deduct an outstanding check given by the depositor to a third person, which had not, prior to the levy of the attachment, been presented and accepted. And this is so, although a clerk in the bank has, prior to the levy, stated to the holder that the check was in order, and would be paid.<sup>7</sup>

<sup>1</sup> Ladd v. Couzens, 52 Mo. 451.

<sup>2</sup> Kellogg v. Waite, 99 Mass. 501; O'Donnell v. McIntire, 99 Mass. 551.

<sup>3</sup> See *ante*, Title Contract—Interest. As when the demand is on interest at the time the process is served: Baker v. R. R. Co., 56 Vt. 302; or he is the cause of the delay: Rushton v. Rowe, 64 Pa. St. 63; or has mingled the money with his own: Woodruff v. Bacon, 35 Conn. 97; or whenever he receives interest, or when he has expressly promised to pay interest, but not when it is recoverable simply as damages: Abbott v. Stinchfield, 71 Me. 213. See Smith v. Flanders, 129 Mass. 322; Candee v. Skinner, 40 Conn. 464.

<sup>4</sup> Leslie v. Merrill, 58 Ala. 322; Ellis v. Goodnow, 40 Vt. 237.

<sup>5</sup> Fowler v. Williamson, 52 Ala. 16.

<sup>6</sup> Home Mut. Ins. Co. v. Gamble, 14 Mo. 407; Mason v. Crabtree, 71 Ala. 479; Johann v. Rufener, 32 Wis. 195; Hughes v. Monty, 24 Iowa, 499; Toledo etc. R. R. Co. v. McNulty, 34 Ind. 531; Pulliam v. Aler, 15 Gratt. 54; Sargent v. Wood, 51 Vt. 597; Locke v. Tippets, 7 Mass. 149; West v. Platt, 116 Mass. 308; Stevens v. Dillman, 86 Ill. 233; Wilcox v. Kling, 87 Ill. 107. Whether or not a garnishee had the legal control of the funds of the debtor, he is liable to the creditor if in point of fact he did control such funds, and disposed of them after notice of the garnishment: Buddig v. Simpson, 33 La. Ann. 375.

<sup>7</sup> Duncan v. Berlin, 60 N. Y. 151.

A payment made in ignorance of the garnishment will be valid.<sup>1</sup> So, also, if it is made under compulsion of the law.<sup>2</sup> Where a corporation is summoned as trustee, and the service of the writ is made on an officer of the corporation away from its office and place of business, and the debt due the principal defendant from the trustee is paid by another officer of the corporation, acting in his ordinary line of duty, without actual notice of the service of the trustee writ, or reasonable cause to believe that such service had been made, and the corporation, or its officer upon whom service was made, was guilty of no neglect in giving notice to the officer making the payment, the trustee will be discharged.<sup>3</sup> One who has paid a debt and delivered up a certificate of stock held as collateral security therefor is not liable as trustee of the creditor, although summoned as such before the stock has been transferred on the books.<sup>4</sup>

ILLUSTRATIONS. — After a loss by fire, the assured assigned the policy to A to secure a debt, and had the assignment recorded, but before A was notified and signified his assent, the insurance company was garnished in a suit against the assured. *Held*, that the garnishment took precedence of the assignment: *Hart v. Forbes*, 60 Miss. 745. D. & Co., when garnished in aid of an execution, had in their hands an unaccepted sight draft, drawn by a bank of one state on a bank in another state, payable to the order of the judgment debtor, which D. & Co. had purchased with money which they had collected for him. *Held*, that the draft was subject to garnishment, and that defendants, who sent it to the debtor after service of garnishee process, are liable to the judgment creditor for the amount thereof: *Storm v. Cotzhausen*, 38 Wis. 139. Service was made upon A, as trustee, at eight o'clock, P. M., after business hours,

<sup>1</sup> *Robinson v. Hall*, 3 Met. 301; *Spooner v. Rowland*, 4 Allen, 485; *Williams v. Marston*, 3 Pick. 65; *Thorne v. Matthews*, 5 Cush. 544; *Jordan v. Jordan*, 75 Me. 100; *Landry v. Chayret*, 58 N. H. 89; *Kauffman v. Jacobs*, 49 Iowa, 432. But where it appears that process was served on a garnishee on the same day that the debt was assigned, and it does not appear which

occurred first, the debt will be held by the garnishment process, as the burden is on the assignee to prove title: *Bergman v. Sells*, 39 Ark. 97.

<sup>2</sup> *Drake on Attachment*, sec. 674 a; *Hall v. Daniel*, 62 Ga. 620. And see *Evans v. Adams*, 81\* Pa. St. 443.

<sup>3</sup> *Lyon v. Russell*, 72 Me. 519.

<sup>4</sup> *Cooke v. Hallett*, 119 Mass. 148.

and after he had ordered his book-keeper to remit by mail to defendant the amount due him. The book-keeper mailed the letter at seven, A. M., of the next day. *Held*, that A was not required, after being served, to look up his book-keeper at so unreasonable an hour, and countermand the order, and that he should not be charged as trustee: *Jordan v. Jordan*, 75 Me. 100.

§ 3636. **Set-off by Garnishee.** — The defense of set-off is open to the garnishee. Whatever claim he has against the defendant, and of which he could avail himself by set-off in an action against him by the defendant, he can avail himself of in the garnishment proceeding.<sup>1</sup> But not a debt barred by the statute of limitations.<sup>2</sup> A garnishee who was indebted to the defendant at the time of the service of the writ, but who has since been obliged to pay a note of the defendant's on which he was an indorser, may set off the amount of the note.<sup>3</sup> So one summoned as trustee may retain from money due the defendant enough to pay defendant's note, not yet due, held by him.<sup>4</sup> If a garnishee, by his answer, pleads a set-off against all the plaintiffs, and admits at the trial, without amending his answer, that his set-off is against some of the plaintiffs only, the set-off will not be allowed.<sup>5</sup>

ILLUSTRATIONS. — At the time of service of garnishee process upon S. by creditors of D. and B., he had paid all amounts which D. and B. had earned under their contract, except a certain sum for which he was legally liable to said laborers for their wages. *Held*, that he was not liable as garnishee: *Balliet v. Scott*, 32 Wis. 174.

<sup>1</sup> *Picquet v. Swan*, 4 Mason, 443; *Beach v. Viles*, 2 Pet. 675; *Mattingly v. Boyd*, 20 How. 123; *Wheeler v. Emerson*, 45 N. H. 526; *St. Louis v. Rogers*, 29 Wis. 144; *Allen v. Morgan*, 1 Stew. 9; *Ball v. Citizens' Nat. Bank*, 39 Ind. 364; *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 442; *Roger v. Fleming*, 58 Mo. 438; *Nutter v. R. R. Co.*, 132 Mass. 427; *Mowry v. Davenport*, 6 Lea, 80.

<sup>2</sup> *Wadleigh v. Jordan*, 74 Me. 483.

<sup>3</sup> *Boston Type Foundry v. Mortimer*, 7 Pick. 166; 19 Am. Rep. 266.

<sup>4</sup> *Lynde v. Watson*, 52 Vt. 648. So as to a debt not yet due: *Farmers' etc. Bank v. Franklin Bank*, 31 Md. 404. *Aliter* as to an accommodation notice, in *Roig v. Tim*, 103 Pa. St. 115.

<sup>5</sup> *Story v. Kemp*, 55 Ga. 276.

§ 3637. **Pendency of Suit by Defendant against Garnishee.**—The pendency in the same court of an action by the defendant against the garnishee will not prevent the garnishee being charged.<sup>1</sup> But where the action is pending in one jurisdiction, and the garnishment in another, that proceeding which was first instituted will have precedence.<sup>2</sup> And where the action is in such a situation that the garnishee, if charged, cannot avail himself of the judgment in attachment as a bar to a recovery in the action, he cannot be held as garnishee.<sup>3</sup> Where, during the garnishment proceedings, but before judgment, the defendant sues the garnishee for the debt, the practice in some states is for the garnishee to plead the garnishment in abatement;<sup>4</sup> in others, the suit is suspended, pending the garnishment.<sup>5</sup> The plea in abatement must aver that the court issuing the garnishment had jurisdiction, that the writ was issued on the proper affidavit, and that the entire debt or a portion named was attached.<sup>6</sup> The plea should not be that the writ be quashed, but that the defendant be not required to further answer.<sup>7</sup> If the plaintiff recover judgment against him, after he has pleaded in his creditor's action, the garnishee may have execution on the other judgment enjoined in equity.<sup>8</sup>

§ 3638. **Judgment against Garnishee a Bar to Suit by Defendant.**—A judgment against the garnishee, and pay-

<sup>1</sup> Drake on Attachment, secs. 617 et seq.; Wallace v. McConnell, 13 Pet. 136; Hitt v. Lacey, 3 Ala. 104; 36 Am. Dec. 440.

<sup>2</sup> Id. A defendant sued in a state court, who has been previously proceeded against as garnishee in a federal court, for the same indebtedness, cannot plead such former suit in bar: McRee v. Brown, 45 Tex. 503.

<sup>3</sup> Thorndike v. De Wolf, 6 Pick. 130.

<sup>4</sup> Embree v. Hanna, 5 Johns. 101; Wallace v. McConnell, 13 Pet. 136; Mattingly v. Boyd, 20 How. 128; Near v. Mitchell, 23 Mich. 382; Clise v. Freeborne, 27 Iowa, 280; Brown v. Somerville, 8 Md. 444; Ladd v. Jacobs,

64 Me. 347; Haselton v. Monroe, 18 N. H. 598; Crawford v. Slade, 9 Ala. 887; 44 Am. Dec. 463; Crawford v. Clute, 7 Ala. 157; 41 Am. Dec. 92. It is not a good plea in bar: Shealy v. Toole, 56 Ga. 210.

<sup>5</sup> Winthrop v. Carleton, 8 Mass. 453; Crawford v. Slade, 9 Ala. 887; 44 Am. Dec. 463; Smith v. Blatchford, 2 Ind. 184; 52 Am. Dec. 504; McFadden v. O'Donnell, 18 Cal. 160; McKeon v. McDermott, 22 Cal. 667; 83 Am. Dec. 86.

<sup>6</sup> Crawford v. Clute, 7 Ala. 157; 41 Am. Dec. 92.

<sup>7</sup> Crawford v. Slade, 9 Ala. 887; 44 Am. Dec. 463.

<sup>8</sup> Allen v. Watt, 79 Ill. 284.

ment by him of the debt to the plaintiff, is a bar to an action against him for the debt by his original creditor,<sup>1</sup> even though the judgment were erroneous.<sup>2</sup> It is held in some states that the judgment itself is no bar when the garnishee is sued by his original creditor, unless the judgment has been satisfied;<sup>3</sup> in others, the subsisting judgment is a good defense, without proof of satisfaction.<sup>4</sup> Parol evidence is admissible to identify the debt sued on with that on which judgment was recovered against the garnishee.<sup>5</sup>

But if the court had no jurisdiction, the payment will not protect him.<sup>6</sup> And if he is notified before making his disclosure that the funds in his hands have been assigned,

<sup>1</sup> Drake on Attachment, secs. 693 et seq.; *Cole v. Fletcher*, 47 Md. 312; *Adams v. Filer*, 7 Wis. 306; 73 Am. Dec. 410; *Chearis v. Slaten*, 3 Humph. 101; *Barrow v. West*, 23 Pick. 270; *Canady v. Detrick*, 63 Ind. 485; *Greenman v. Fox*, 54 Ind. 267; *Ohio etc. R. R. Co. v. Alvey*, 43 Ind. 180; *Ladd v. Jacobs*, 64 Me. 347; *Baltimore etc. R. R. Co. v. May*, 25 Ohio St. 347; *Wigwall v. Union Co.*, 37 Iowa, 129; *Brown v. Dudley*, 33 N. H. 511; *Allen v. Watt*, 79 Ill. 284; *Hirth v. Pfeifle*, 42 Mich. 32; *Anderson v. Young*, 21 Pa. St. 443; *Morgan v. Neville*, 74 Pa. St. 52; *Hitt v. Lacy*, 3 Ala. 104; 36 Am. Dec. 440; *Rose v. Pitts*, 39 Ala. 606; *Sessions v. Stevens*, 1 Fla. 233; 46 Am. Dec. 339; *Smoot v. Eslava*, 23 Ala. 659; 48 Am. Dec. 210; *McGuire v. Pitts*, 42 Iowa, 535. But where the garnishee has been served with garnishee process, and before judgment is rendered in that suit the creditor of the garnishee prosecutes the debt to judgment, and afterwards judgment is rendered against the garnishee as such, for the same debt, and he pays it, his only remedy against the judgment in favor of the original creditor is in equity, where the collection thereof will be enjoined: *Allen v. Watt*, 79 Ill. 284. Levy of an attachment upon indebtedness of a third person to the debtor in attachment operates as an assignment of the demand to the attaching creditor; and

the third person is protected, in any payment he may make to the attaching creditor in due course of the attachment proceedings, from any further demand by the attachment debtor: *Campbell v. Nesbitt*, 7 Neb. 300.

<sup>2</sup> *Oppenheim v. R. R. Co.*, 85 Ind. 471; *Smith v. Dickson*, 58 Iowa, 444; *Cottle v. American Screw Co.*, 13 R. I. 627. And see *Woods v. Milford Savings Inst.*, 58 N. H. 184.

<sup>3</sup> *Cook v. Field*, 3 Ala. 53; 36 Am. Dec. 437; *Merriam v. Rundlett*, 13 Pick. 511; *Farmer v. Simpson*, 6 Tex. 303; *Brannon v. Noble*, 8 Ga. 549; *Hammett v. Morris*, 55 Ga. 644; *Brown v. Somerville*, 8 Md. 444; *Lowry v. Lumberman's Bank*, 2 Watts & S. 210.

<sup>4</sup> *McAllister v. Brooks*, 22 Me. 80; 38 Am. Dec. 282; *King v. Vance*, 46 Ind. 246; *Coburn v. Currens*, 1 Bush, 242.

<sup>5</sup> *Cook v. Field*, 3 Ala. 53; 36 Am. Dec. 437.

<sup>6</sup> Drake on Attachment, sec. 691; *Loring v. Folger*, 7 Gray, 505; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354; 21 Am. Rep. 66; *Pierce v. Carleton*, 12 Ill. 358; 54 Am. Dec. 405; *Laidlaw v. Morrow*, 44 Mich. 547. Where a person summoned as trustee, in a trustee process, does not reside in the state, the court has no jurisdiction, and a judgment against him is void: *Columbus Ins. Co. v. Eaton*, 35 Me. 391.

and he neglects to disclose the assignment, his being charged will not bar a suit against him for the benefit of the assignee.<sup>1</sup> So where a garnishee answers that he is indebted to the defendant on certain negotiable notes, and then, having notice that said notes were assigned before the garnishment, fails to amend his answer, and is compelled to satisfy judgment against him, he is not protected in a subsequent proceeding by the assignee from paying the notes a second time.<sup>2</sup> Where he fails to set up an exemption that covers the money in his hands, he is liable to his creditor for the amount thus lost to him.<sup>3</sup>

A judgment discharging the garnishee, on the ground of non-liability to the defendant in the suit, will not be conclusive on such defendant in a suit by him against such garnishee.<sup>4</sup>

**ILLUSTRATIONS.**—An auctioneer having certain chattels in his possession to sell for the benefit of the holder of a mortgage thereon was served with process of garnishment, and not disclosing in his answer the facts of the case as they were, was obliged to pay the proceeds of the sale into court, taking a bond of indemnity. *Held*, no defense to an action by the holder of the mortgage to recover the proceeds from the auctioneer: *Smith v. Ainscow*, 11 Neb. 476. A deposited money belonging to his employee B with C, as security for bail. The money was garnished in C's hands as A's. C knew that it was B's, but nevertheless paid it over to plaintiffs in the garnishment suits, without disclosing the fact that it was B's. *Held*, that B might maintain an action against C for recovery: *Kimball v. Macomber*, 50 Mich. 362.

<sup>1</sup> *Larrabee v. Knight*, 69 Me. 320; *Tabor v. Vrankin*, 39 Mich. 793; *Field v. McKinney*, 60 Miss. 763.

<sup>2</sup> *Lewis v. Dunlop*, 57 Miss. 130.

<sup>3</sup> *Welker v. Hintze*, 16 Ill. App. 326. A trustee against whom judgment has been duly rendered in trustee process brought in another state is not liable

to the principal debtor in this state on the debt trusted, although the debt was for wages, and exempt in this state from such process: *Gray v. Del. etc. Canal Co.*, 5 Abb. N. C. 131.

<sup>4</sup> *Ruff v. Ruff*, 85 Pa. St. 333; *Puffer v. Graves*, 26 N. H. 256.

## PART V.—REPLEVIN.

## CHAPTER CLXXXI.

## REPLEVIN.

- § 3639. Replevin — In general.
- § 3640. Distinguished from detinue and trover — Trespass.
- § 3641. By statute — Under the codes.
- § 3642. When action lies.
- § 3643. When action does not lie.
- § 3644. Right to possession necessary.
- § 3645. Who may and may not bring action.
- § 3646. What property may and may not be replevied.
- § 3647. Demand when necessary.
- § 3648. Defenses.
- § 3649. Pleading and practice — By plaintiff.
- § 3650. By defendant.
- § 3651. Verdict — Judgment.
- § 3652. Damages.
- § 3653. Return of property.
- § 3654. The bond.

§ 3639. **Replevin — In General.** — Replevin at common law lies to regain possession of personal chattels which have been wrongfully taken from the possession of plaintiff, or which he claims as the rightful owner.<sup>1</sup> Formerly it was held that replevin would lie only in case of an unlawful distress,<sup>2</sup> but this doctrine is now overruled,<sup>3</sup> and the writ may be used wherever one claims property in another's possession.<sup>4</sup> The defendant must, at the time

<sup>1</sup> *In re Wilson*, 1 Schoales & L. 320, note. The taking need not be unlawful, if it is against the plaintiff's right: *Murphy v. Tindal*, Hemp. 10.

<sup>2</sup> *Watson v. Watson*, 9 Conn. 140; 23 Am. Dec. 324; *Hewitson v. Hunt*, 8 Rich. 106.

<sup>3</sup> *Pangburn v. Partridge*, 7 Johns. 140; 5 Am. Dec. 250; *Daggett v. Robins*, 2 Blackf. 752; 21 Am. Dec. 752; *Crocker v. Mann*, 3 Mo. 472; 26 Am. Dec. 684; *Dearman v. Blackburn*, 1 Sneed, 390; 60 Am. Dec. 160.

<sup>4</sup> *Clark v. Adair*, 3 Harr. (Del.) 113; *Daggett v. Robins*, 2 Blackf. 415; 21 Am. Dec. 752; *Cullum v. Bevans*, 6 Har. & J. 469; *Bruen v. Ogden*, 11 N. J. L. 370; 20 Am. Dec. 593; *Pangburn v. Partridge*, 7 Johns. 140; 5 Am. Dec. 250; *Weaver v. Lawrence*, 1 Dall. 156; *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612; *Boyle v. Rankin*, 22 Fa. St. 168; *Herdie v. Young*, 55 Pa. St. 176; 93 Am. Dec. 739.

the action is brought, be in the actual or constructive possession of the property.<sup>1</sup> Replevin is a possessory action, and does not necessarily determine title. It may fail, either because the plaintiff shows no right of possession, or because the defendant is shown not to have wrongfully withheld; and it may fail for lack of demand in some cases, as well as for lack of substantial right.<sup>2</sup> By the English law, if the defendant in replevin claim property in the goods or chattels described in the writ, the officer cannot lawfully deliver them to the plaintiff until the question of property has been determined in his favor on a writ of *de proprietate probanda*, sued out by him. In Massachusetts, the question of property is to be tried in the replevin suit.<sup>3</sup> Where a portion of the chattels cannot be replevied because defendants have destroyed, concealed, or sold such portion, the plaintiff may replevy that part of the property that can be found, and maintain a separate action to recover the value of that which had been thus severed.<sup>4</sup> A judgment in replevin, where there is no assessment of damages, merely determines the right of possession at the time, and is not inconsistent with the right of the party defeated to recover it back afterwards under a change of circumstances.<sup>5</sup>

**§ 3640. Distinguished from Detinue and Trover—Trespass.**—Replevin at common law lies only for a wrongful taking or seizing, and not for the wrongful withholding of them by a person who, in the first instance, came into possession of them lawfully.<sup>6</sup> And in

<sup>1</sup> Clark v. Skinner, 20 Johns. 465; 11 Am. Dec. 302.

<sup>2</sup> Pearl v. Garlock, 61 Mich. 419; 1 Am. St. Rep. 603. See *post*, § 3647.

<sup>3</sup> Willard v. Kimball, 10 Allen, 211; 87 Am. Dec. 632.

<sup>4</sup> Bennett v. Hood, 1 Allen, 47; 79 Am. Dec. 705.

<sup>5</sup> Deyve v. Jameson, 33 Mich. 94; Lisher v. Pierson, 2 Wend. 345; 20

Am. Dec. 612; Daggett v. Robins, 2 Blackf. 415; 21 Am. Dec. 752; Pearl v. Garlock, 61 Mich. 419; 1 Am. St. Rep. 603.

<sup>6</sup> Meany v. Head, 1 Mason, 319; Galloway v. Bird, 4 Bing. 299; Dickenson v. Mathers, Hemp. 65; Marshall v. Davis, 1 Wend. 109; 19 Am. Dec. 463; Harwood v. Smethurst, 29 N. J. L. 195; 80 Am. Dec. 207; Trap-



order that replevin will lie, an action of trespass must also lie, for to uphold the action the taking of the goods must have been under such circumstances that trespass would lie for them.<sup>1</sup> But in Massachusetts it was early held that the action of detinue having become obsolete, replevin would lie for an unlawful detainer.<sup>2</sup> And this rule is now adopted by the statutes of nearly all the states.<sup>3</sup>

§ 3641. **By Statute — Under the Codes.** — In many of the states the common-law action of replevin has been abolished by statute, and the whole ground for both replevin and detinue is now covered by the code provision for the recovery of personal property.<sup>4</sup> But under these statutes, and also under the codes which abolish particular forms of action, the principles of the common-law action of replevin are not changed. The statutory proceeding by possessory warrant may be resorted to only in cases strictly within the statute.<sup>5</sup> And to entitle a party to maintain an action for claim and delivery of personal property, there must be a compliance with all the requisites specified in the statute authorizing it.<sup>6</sup> The plaintiff need not ask for the immediate possession of the property, but may leave the possession to be determined by the final judgment, in which case the bond and affidavit required where an immediate delivery is claimed need not be filed.<sup>7</sup>

*nall v. Hattier*, 6 Ark. 18; *Wright v. Armstrong*, 1 Ill. 130; *Rector v. Chevalier*, 1 Mo. 345; *Dame v. Dame*, 43 N. H. 37; *Ely v. Ehle*, 3 N. Y. 506; *Vaiden v. Bell*, 3 Rand. 448.

<sup>1</sup> See next chapter; *Rogers v. Arnold*, 12 Wend. 30; *Pangburn v. Partidge*, 7 Johns. 140; *Roberts v. Randel*, 3 Sand. 707; *Bruen v. Ogden*, 11 N. J. L. 670; 20 Am. Dec. 593.

<sup>2</sup> *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Grimes v. Briggs*, 110 Mass. 449. See *Rouge v. Dawson*, 9 Wis. 251, where this ruling is questioned.

<sup>3</sup> *Oleson v. Merrill*, 20 Wis. 462; 91 Am. Dec. 428; *Eveleth v. Blossom*, 54 Me. 447; 92 Am. Dec. 555; *Stone v. Wilson*, *Wright*, 159; *Whitman v. Merrill*, 125 Mass. 127. If A takes a thing, and A and B detain it, B is liable in replevin: *Rowe v. Hicks*, 58 Vt. 18.

<sup>4</sup> *Wilson v. Rybolt*, 17 Ind. 391; 79 Am. Dec. 486.

<sup>5</sup> *Trotti v. Wyly*, 77 Ga. 684.

<sup>6</sup> *Hirsh v. Whitehead*, 65 N. C. 516.

<sup>7</sup> *Catterlin v. Mitchell*, 27 Ind. 298; 89 Am. Dec. 501.

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§ 3642. **When Action Lies.**—At common law, the action lies only where the property has been wrongfully taken, but under most of the statutes it will also lie when it is unlawfully detained,<sup>1</sup> and any person having the unlawful possession of personal property belonging to another is the proper party from whom to replevy the same, whether he claims it as owner, agent, administrator, trustee, custodian, or in any other capacity.<sup>2</sup> Thus the action will lie for goods wrongfully detained by a fraudulent purchaser;<sup>3</sup> or to recover from a *bona fide* purchaser property which had been taken by his vendor without the owner's authority or consent;<sup>4</sup> or against the assignee of property, even though he allow it to remain in the assignor's hands;<sup>5</sup> or against any person in whose possession personal property unlawfully taken is found;<sup>6</sup> or to recover a parcel of money sealed up in a leather bag, which was deposited with the defendant, and wrongfully detained by him after demand therefor;<sup>7</sup> or against one who has wrongfully taken the property of the plaintiff, and for a time detained it, but who has, before the commencement of the suit, sold and delivered it to another.<sup>8</sup>

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§ 3643. **When Action does not Lie.**—The common-law action does not lie when the defendant came into possession of the property rightfully or under a contract express or implied;<sup>9</sup> nor against a person who has no possession or control of the goods;<sup>10</sup> nor against one who

<sup>1</sup> Crocker v. Maun, 3 Mo. 472; 26 Am. Dec. 684; McBrien v. Morrison, 55 Mich. 351.

<sup>2</sup> Rose v. Cash, 58 Ind. 278.

<sup>3</sup> Root v. French, 13 Wend. 570; 28 Am. Dec. 482; Hoffman v. Noble, 6 Met. 68; 39 Am. Dec. 711. Or by a purchaser from him with notice: Manning v. Albee, 14 Allen, 7; 92 Am. Dec. 736. Or his general assignee: Farley v. Lincoln, 51 N. H. 577; 12 Am. Rep. 182.

<sup>4</sup> Parish v. Morey, 40 Mich. 417.

<sup>5</sup> Coomer v. Gale Mfg. Co., 40 Mich. 691.

<sup>6</sup> Murphy v. Tindall, Hemp. 10.

<sup>7</sup> Skidmore v. Taylor, 29 Cal. 619.

<sup>8</sup> Sayward v. Warren, 27 Me. 453; Badger v. Phinney, 15 Mass. 359; 8 Am. Dec. 105; Baker v. Fales, 16 Mass. 147; Marston v. Baldwin, 17 Mass. 606.

<sup>9</sup> Witherby v. Sleeper, 101 Mass. 138.

<sup>10</sup> Richardson v. Reed, 4 Gray, 441; 64 Am. Dec. 77; Feder v. Abrahams,

has parted with the possession and control of the goods;<sup>1</sup> nor for property received by warehousemen, which has been destroyed through their negligence, and is not in existence at the commencement of the action;<sup>2</sup> nor for levying an execution against a mortgagor and mortgagee upon the mortgaged chattels, by direction of the mortgagee;<sup>3</sup> nor for taking property held adversely to the plaintiff;<sup>4</sup> nor for an injury to the mere possession of property;<sup>5</sup> nor for goods deposited with the plaintiff for safe-keeping by a stranger who has no interest in them;<sup>6</sup> nor against the actual *bona fide* owner of land for taking slates out of it;<sup>7</sup> nor by husband and wife to recover chattels, the property of the wife before marriage;<sup>8</sup> nor to try the right of property;<sup>9</sup> nor by a trespasser who sows grain on another's land, and the owner enters and cuts it;<sup>10</sup> nor for property taken or sold for taxes, even though illegal;<sup>11</sup>

28 Mo. App. 454. The plaintiff must show that at the time the writ was issued the property was in the defendant's possession: *Rogers v. Davis*, 21 Mo. App. 150. If A, having B's horse, which B may replevy, trades it with a third person for another horse, B cannot replevy the latter horse instead of his own: *Power v. Telford*, 60 Miss. 195.

<sup>1</sup> *Hall v. White*, 106 Mass. 599.

<sup>2</sup> *Burr v. Daugherty*, 21 Ark. 559.

<sup>3</sup> *Talbot v. De Forest*, 3 G. Greene, 586.

<sup>4</sup> *Dillon v. Wright*, 7 J. J. Marsh. 10.

<sup>5</sup> *Broadwater v. Darne*, 10 Mo. 277.

<sup>6</sup> *Harrison v. McIntosh*, 1 Johns. 380.

<sup>7</sup> *Brown v. Caldwell*, 10 Serg. & R. 114; 13 Am. Dec. 660.

<sup>8</sup> *Seibert v. McHenry*, 6 Watts, 301.

<sup>9</sup> *Taggart v. Hart*, Brayt. 215.

<sup>10</sup> *Elliott v. Powell*, 10 Watts, 453; 36 Am. Dec. 200; *Hooser v. Hays*, 10 B. Mon. 72; 50 Am. Dec. 540.

<sup>11</sup> *Baisall v. Cornly*, 44 Pa. St. 442; *Emerick v. Sloan*, 18 Iowa, 139; *Adams v. Davis*, 109 Ind. 10; *Vocht v. Reed*, 70 Ill. 491. But *aliter* where there was no jurisdiction to levy the tax: *Le Roy v. R. R. Co.*, 18 Mich. 233; 100 Am. Dec. 162; *McCoy v.*

*Anderson*, 47 Mich. 502. A party cannot bring replevin for the seizure of personal property by the treasurer to pay taxes, if a portion of the tax is legally assessed, although another portion is illegal: *Emerick v. Sloan*, 18 Iowa, 139. The common-law rule that a person could not maintain replevin for the possession of goods taken from him by virtue of legal process does not apply to property held under process based upon an unconstitutional law. Property seized under an unconstitutional law cannot be said to be seized under legal process any more than if the process issued without law: *Cooley v. Davis*, 34 Iowa, 128; *Westenberger v. Wheaton*, 8 Kan. 169. A tax warrant, regular on its face, although the tax is void, protects the officer in replevin, but not the purchaser of the property seized and sold: *Power v. Kindschi*, 58 Wis. 539; 46 Am. Rep. 652. The fact that an officer seizing property under a tax warrant violated an *ex parte* injunctive order which had been improvidently issued does not deprive him of his right to defend in an action for the recovery of the property seized: *Kachler v. Dobberphul*, 60 Wis. 256.

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nor for property in the custody of an officer under a valid writ.<sup>1</sup>

<sup>1</sup> Smith v. Huntington, 3 N. H. 76; 14 Am. Dec. 331; Gardner v. Campbell, 15 Johns. 401; Griffith v. Smith, 22 Wis. 646; 99 Am. Dec. 90; Freeman v. Howe, 24 How. 450; Rayford v. Hyde, 36 Ga. 93; Kellogg v. Churchill, 2 N. H. 412; 9 Am. Dec. 105; Kittridge v. Holt, 55 N. H. 621; Ginsberg v. Pohl, 35 Md. 505; Gist v. Cole, 2 Nott & McC. 456; 10 Am. Dec. 616; Spring v. Bourland, 11 Ark. 658; 54 Am. Dec. 243; Dearmon v. Blackburn, 1 Sneed, 390; 60 Am. Dec. 160; Hagan v. Duell, 24 Ark. 216; 88 Am. Dec. 769; McDonald v. Holmes, 45 Conn. 157; Pollard v. Stoval, 60 Miss. 266; Goodrich v. Fritz, 4 Ark. 525; Lathrop v. Cook, 14 Me. 414; 31 Am. Dec. 62; Perry v. Richardson, 9 Gray, 216; Melcher v. Lamprey, 20 N. H. 403; Sharp v. Whittenhall, 3 Hill, 576; Hartlep v. Cole, 101 Ind. 458. There is a conflict of authorities on this point, the courts of New York holding that where goods are taken on execution, the true owner, other than the defendant, may bring replevin for them: Dunham v. Wyckoff, 3 Wend. 280; 20 Am. Dec. 695; Rogers v. Weir, 34 N. Y. 463; Clark v. Skinner, 20 Johns. 465; 11 Am. Dec. 302; Allen v. Crary, 10 Wend. 349; 25 Am. Dec. 566; Johnson v. Carnley, 10 N. Y. 570; 61 Am. Dec. 762. See also Bouldin v. Alexander, 7 T. B. Mon. 425; Philips v. Harris, 3 J. J. Marsh. 123; 19 Am. Dec. 166; Brown v. Bassett, 21 N. J. L. 267; Bruen v. Ogden, 11 N. J. L. 370; 20 Am. Dec. 593; Yarrow v. Harper, 25 Miss. 112; Anchor Milling Co. v. Walsh, 20 Mo. App. 107. And by statute in most of the states a stranger to the writ may bring replevin for them: See note to Kellogg v. Churchill, in 9 Am. Dec. 105-107; Tandler v. Saunders, 56 Mich. 142. Where property has been replevied, it cannot, while in the sheriff's possession, be levied on under an execution against the defendant in the replevin suit: Oswego Bank v. Dunn, 97 N. Y. 149; 49 Am. Rep. 517. Replevin may be maintained against a sheriff who holds property by virtue of a writ in another action of replevin then pending and undetermined, and

also against the plaintiff in such suit, where the plaintiff in the latter suit is not a party to the first: Reiley v. Hayes, 38 Kan. 259; 5 Am. St. Rep. 737. Under the Michigan statute replevin can be maintained by a mortgagee against an officer attaching the goods as the property of the mortgagor, while in the latter's possession, after a demand upon the officer and a refusal by him to surrender the goods to the mortgagee: Wood v. Weimar, 104 U. S. 786. Replevin lies against an officer in favor of an execution creditor whose exempt property has been levied on: Wallingsford v. Bennett, 1 Mackey, 303. Replevin is authorized by the Iowa code to recover possession of personal property taken by legal process by the owner when such property is exempt from seizure by such process; and the action may be brought at any time before the property is finally sold by virtue of the process, unless the same issue has been *res judicata* on motion: Wilson v. Stripe, 4 G. Greene, 551; 61 Am. Dec. 138. One court cannot take property from the custody of another by replevin or any other process: Lewis v. Buck, 7 Minn. 164; 82 Am. Dec. 73. That property is in possession of a United States marshal by virtue of process of a United States court is an impregnable defense to an action of replevin of the same property in a state court: Booth v. Ableman, 16 Wis. 460; 84 Am. Dec. 711. Replevin lies in a state court against a marshal of the United States for property attached by him on mesne process from a United States court against a third person: Howe v. Freeman, 14 Gray, 566. Replevying property from sheriff does not release it from the levy, but upon judgment of restitution being rendered it is his duty to sell it by virtue of such levy, and apply the proceeds to the satisfaction of executions in the order of their priority. No new authority is necessary to enable him to do this: Ferguson v. Williams, 3 B. Mon. 302; 39 Am. Dec. 466. The owner may maintain replevin against a sheriff's vendee, although such action would not lie

**ILLUSTRATIONS.**—A sheriff demanded possession of stolen property held by the property clerk of the New York City police department pending the trial of the thief. The sheriff's demand was based upon a requisition demanding him to replevy the property in behalf of its owner. *Held*, that the property was properly retained; that it was in the custody of the law, and was held pending the prosecution, subject to the order of the criminal court: *Simpson v. St. John*, 93 N. Y. 333.

§ 3644. **Right to Possession Necessary.**—The plaintiff must have a right to immediate possession of the property,<sup>1</sup> and a general or special property in the goods.<sup>2</sup> It will lie in all cases where the plaintiff has a present right to the possession of any personal property in the possession of the defendant.<sup>3</sup> It may be maintained by one having a right of possession, whether he has ever had possession or not, and whether his property in the goods be absolute or qualified.<sup>4</sup> But it is not sufficient for the

against the sheriff: *Dodd v. McCraw*, 8 Ark. 83; 46 Am. Dec. 301. Property replevied by the sheriff, and delivered to the plaintiff, who had thereupon given the usual bond required in such case, is not *in custodia legis*, and may be replevied from such possession: *Hagan v. Deuell*, 24 Ark. 216; 88 Am. Dec. 769. One whose property has been replevied by a writ against his agent or his bailee can replevin the same from the plaintiff in the first action, even during the pendency thereof. After the sheriff had completed the transfer, the property is not *in custodia legis*: *White v. Dolliver*, 113 Mass. 400; 18 Am. Rep. 502.

<sup>1</sup> *Britt v. Aylett*, 11 Ark. 475; 52 Am. Dec. 282; *Alden v. Carver*, 13 Iowa, 253; 81 Am. Dec. 430; *Stockwell v. Phelps*, 34 N. Y. 363; 90 Am. Dec. 710; *Berthold v. Fox*, 13 Minn. 501; 97 Am. Dec. 243; *Weller v. Ely*, 45 Conn. 567; *Birks v. French*, 21 Kan. 238; *Wheeler eto. Machine Co. v. Teetzlaff*, 53 Wis. 211; *Teepie v. Dickey*, 94 Ind. 124; *Filley v. Norton*, 17 Neb. 472; *Sandler v. Bresnahan*, 58 Mich. 567; *Brainard v. Hart*, 12 Heisk. 366. A constructive possession for this purpose only follows a legal

title; it cannot arise upon a void conveyance: *Johnson v. Elwood*, 53 N. Y. 431. One who admits himself to be in possession of the property at the time he begins a replevin suit cannot maintain it: *Aber v. Bratton*, 60 Mich. 357; *McHugh v. Robinson*, 71 Wis. 565.

<sup>2</sup> *Sanford Mfg. Co. v. Wiggins*, 14 N. H. 441; 40 Am. Dec. 198; *Pattison v. Adams*, 7 Hill, 126; 42 Am. Dec. 59; *Peters v. Stewart*, 45 Conn. 103; 29 Am. Rep. 663; *McMahill v. Walter*, 22 Mo. App. 170.

<sup>3</sup> *Shaddon v. Knott*, 2 Swan, 358; 58 Am. Dec. 63.

<sup>4</sup> *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612; *Wilson v. Royston*, 2 Ark. 315; *Walpole v. Smith*, 4 Blackf. 304; *Cox v. Morrow*, 14 Ark. 603; *Holaday v. Lewis*, 15 Mo. 403; *Frost v. Mott*, 34 N. Y. 253; *Brockway v. Burnap*, 12 Barb. 347; *Mead v. Kilday*, 2 Watts, 110; *Kirby v. Miller*, 4 Cold. 3; *Gillett v. Treguaza*, 6 Wis. 343. One in the sole and peaceable possession of goods, not as an intruder, trespasser, or wrong-doer, but as owner, either of the whole or some special property in them, has a valid title as against all mere strangers, and can maintain replevin

plaintiff in replevin to have a clear legal title to the property in controversy; he must also be entitled to the immediate possession.<sup>1</sup> It will not lie for grain sown by the plaintiff on land of which he has been disseised, and which has been cut and removed by the disseisor;<sup>2</sup> nor for hay taken from premises of which the plaintiff was not in possession;<sup>3</sup> nor for trees cut on land, where the defendant was in possession under claim of title;<sup>4</sup> nor for slates taken out of a quarry by one not in possession of the real estate, against one in possession under a claim of right.<sup>5</sup> Where plaintiff claims as sole owner, he cannot, if his alleged title proves to be invalid as against the true owner, fall back upon an alleged lien.<sup>6</sup> One who has no title to personal property, except by virtue of a contract with the owner to own it on the performance of certain conditions, cannot maintain an action to recover possession of it.<sup>7</sup> In an action by a mortgagee to obtain possession of mortgaged personalty, an allegation that the

against the latter for taking them from him, which they cannot defeat by showing an outstanding title in some third party: *Van Baalen v. Dean*, 27 Mich. 104.

<sup>1</sup> *Britt v. Aylett*, 11 Ark. 475; 52 Am. Dec. 282; *Hill v. Robinson*, 16 Ark. 90; *Walpole v. Smith*, 4 Blackf. 304; *Ingraham v. Martin*, 15 Me. 373; *Noble v. Epperly*, 6 Ind. 414; *Moorman v. Quick*, 20 Ind. 67; *Marienthal v. Shafer*, 6 Iowa, 223; *Alden v. Carver*, 13 Iowa, 253; 81 Am. Dec. 430; *Smith v. Williamson*, 1 Har. & J. 147; *Gates v. Gates*, 15 Mass. 310; *Collins v. Evans*, 15 Pick. 63; *Wheeler v. Train*, 3 Pick. 255; *Baker v. Fales*, 16 Mass. 147; *Berthold v. Fox*, 13 Minn. 501; 97 Am. Dec. 243; *Frizel v. White*, 27 Miss. 198; *Pilkinton v. Trigg*, 28 Mo. 95; *Gartside v. Nixon*, 43 Mo. 138; *Bockwell v. Saunders*, 19 Barb. 473; *McCurdy v. Brown*, 1 Duer, 101; *Delworth v. Jones*, 4 Duer, 201; *Bogard v. Jones*, 9 Humph. 739; *Shaddon v. Knott*, 2 Swan, 358; 58 Am. Dec. 63; *Sprague v. Clark*, 41

Vt. 6. A railroad company, after delivering to a party goods consigned to him subject to the order of another, cannot replevy them from such consignee, the lien being released: *Lake Shore etc. R. R. Co. v. Ellsey*, 85 Pa. St. 283.

<sup>2</sup> *De Mott v. Hagerman*, 8 Cow. 220; 18 Am. Dec. 443.

<sup>3</sup> *Stockwell v. Phelps*, 34 N. Y. 364; 90 Am. Dec. 710; *Pennybecker v. McDougall*, 46 Cal. 661.

<sup>4</sup> *Snyder v. Vaux*, 2 Rawle, 423; 21 Am. Dec. 466; *Moser v. Vehue*, 77 Ma. 169. Replevin will not lie for crops severed by the person in possession of the land under claim of title, either at common law or under a statute enabling the owner of the land to maintain replevin for timber, lumber, coal, or "other property" severed therefrom: *Renick v. Boyd*, 99 Pa. St. 555; 44 Am. Rep. 124.

<sup>5</sup> *Brown v. Caldwell*, 10 Serg. & R. 114; 13 Am. Dec. 660.

<sup>6</sup> *Hudson v. Swan*, 83 N. Y. 552.

<sup>7</sup> *Cardinell v. Bennett*, 52 Cal. 476.

goods were mortgaged to him was held insufficient, as not showing who was entitled to possession.<sup>1</sup>

It may be maintained by the assignee of the buyer of a chattel who has never had possession.<sup>2</sup> An owner's delivery of a common carrier's receipt for goods, not negotiable, as security for an advance of money, with intent to transfer the property in the goods, is a good symbolical delivery, and vests in the transferee a special property therein sufficient to maintain replevin against an officer who afterwards attaches them upon a writ against the general owner.<sup>3</sup> In case of the neglect of persons in possession of personal property to comply with the terms and conditions of the delivery to them of such property, as shown by the receipt held by those holding the same interest, such trustees are entitled to the immediate possession of such property, and may maintain replevin therefor.<sup>4</sup> One who has a right to use property at will can replevy it from any wrong-doer.<sup>5</sup>

**§ 3645. Who may and may not Bring Action.**— Replevin may be maintained by a trustee to recover trust property which has been attached as his own in an action against him as an individual;<sup>6</sup> or by the assignee of a chattel mortgage, upon condition broken, for the recovery of the mortgaged property;<sup>7</sup> or by an administrator to recover chattels fraudulently mortgaged by his intestate, and taken by the mortgagee from the administrator's lawful possession;<sup>8</sup> or by the owner of goods carried by an ex-

<sup>1</sup> *Johnson v. Simpson*, 77 Ind. 412.

<sup>2</sup> *Woods v. Nixon*, Addis. 131; 1 Am. Dec. 364.

<sup>3</sup> *National Bank of Green Bay v. Dearborn*, 115 Mass. 219.

<sup>4</sup> *Bartlett v. Goodwin*, 71 Me. 350.

<sup>5</sup> *Tandler v. Saunders*, 56 Mich. 142.

<sup>6</sup> *Jackson v. Hubbard*, 36 Conn. 10.  
Or where personal property is conveyed in trust, the trustee may maintain replevin, but not the beneficiaries: *Gates v. Bennett*, 33 Ark. 475.

<sup>7</sup> *Barbour v. White*, 37 Ill. 164.

Where personal property is wrongfully detained, the owner may assign his title thereto, and his assignee can maintain an action of replevin therefor, whether he ever had possession of the property or not, and whether his property in the goods be absolute or qualified, he having the right to possession: *Lazard v. Wheeler*, 22 Cal. 139.

<sup>8</sup> *Bennett v. Schuster*, 24 Minn. 383.

press company, after tendering the sum legally due for transportation, and demand and refusal, against the agent of the company who has them in custody;<sup>1</sup> or by a member of a firm for his interest and right of possession as partner in the goods replevied;<sup>2</sup> or by a factor who has advanced money on goods;<sup>3</sup> or by a shipper for a cargo, where the master wrongfully refuses to proceed on the voyage;<sup>4</sup> or by one acting as a general agent under a power of attorney, and in possession of chattels secured to his principal by mortgage, against one interfering therewith under claim of title from the mortgagor;<sup>5</sup> or by one from whose possession the assignee of a bankrupt has taken goods, claiming them *bona fide* as part of the bankrupt estate, from the assignee on a writ issuing from the state court, notwithstanding that the bankrupt act provides that no one shall maintain an action against an assignee for anything done by him as such assignee, without giving him twenty days' notice.<sup>6</sup> An assignment of a lease by the lessor, who had no possession nor right of possession of the crops, is nevertheless sufficient, if made in good faith, to enable the assignee to maintain replevin against all those showing no paramount title.<sup>7</sup> Where a bailee of goods for a particular purpose transfers them to another in contravention of that purpose, the general owner may maintain trover or replevin against that person, even though he is a *bona fide* vendee.<sup>8</sup> One who takes a mortgage of chattels in his own name, but in fact for the benefit of another, may maintain replevin for such chattels in his own name, without joining such other person.<sup>9</sup> The owner of a locomotive-engine may maintain replevin for it against the agent of a railroad corporation,

<sup>1</sup> *Eveleth v. Blossom*, 54 Me. 447; 92 Am. Dec. 555.

<sup>2</sup> *Bostick v. Brittain*, 25 Ark. 482; *Smith v. Wood*, 31 Md. 293.

<sup>3</sup> *Williams v. Bugg*, 10 Mo. App. 585.

<sup>4</sup> *Portland Bank v. Stubbs*, 6 Mass. 422; 4 Am. Dec. 151.

<sup>5</sup> *Bartels v. Arms*, 3 Col. 72.

<sup>6</sup> *Leighton v. Harwood*, 111 Mass. 67; 15 Am. Rep. 4.

<sup>7</sup> *Lufkin v. Preston*, 57 Iowa, 28.

<sup>8</sup> *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350.

<sup>9</sup> *Allen v. Kennedy*, 49 Wis. 549.



whose property is in the hands of receivers, without obtaining leave of the court appointing the receivers, if the corporation has no interest in the engine, although it is used on the railroad.<sup>1</sup>

A part owner of a chattel cannot maintain replevin for his undivided part.<sup>2</sup> The title to personal property does not vest in the purchaser until the purchase is complete, and nothing remains to be done under the agreement of sale; until then, the purchaser cannot maintain replevin to obtain possession of the property.<sup>3</sup> Where personal property has been leased, the right to replevin during the lease is with the lessee, and not the lessor; the action of replevin is possessory, and no one not entitled to the possession can maintain it.<sup>4</sup> Where a mortgagee of personal property has obtained possession thereof for a breach of the conditions, the mortgagor cannot maintain replevin on the ground that the consideration was illegal.<sup>5</sup> One who parts with the possession of a chattel under a contract void as against public policy and good morals will not be aided by the courts to recover the possession.<sup>6</sup> A mortgagee of chattels cannot maintain replevin against the sheriff seizing the same on *feri facias* against the mortgagor while in the latter's possession, and threatening to sell in disregard of the mortgagee's title. Some tortious act is necessary to constitute the sheriff a trespasser *ab initio* in such case, and a mere threat to sell the property absolutely is not sufficient.<sup>7</sup>

The defendant in replevin cannot maintain a second action of replevin for the same property against the plain-

<sup>1</sup> *Hills v. Parker*, 111 Mass. 508; 15 Am. Rep. 63.

<sup>2</sup> *Hart v. Fitzgerald*, 2 Mass. 509; 3 Am. Dec. 75. See *ante*, Title Real Property—Tenants in Common. Where several own grain, of the same kind and value, mingled together by their consent, or by reason of circumstances reasonably to be foreseen, each may maintain replevin for his just propor-

tion: *Piazzek v. White*, 23 Kan. 621; 33 Am. Rep. 211.

<sup>3</sup> *Stanley v. Robinson*, 14 Ill. App. 480.

<sup>4</sup> *Hunt v. Strew*, 33 Mich. 85.

<sup>5</sup> *Dougherty v. Bonavia*, 124 Mass. 210.

<sup>6</sup> *Hutchins v. Weldin*, 114 Ind. 80.

<sup>7</sup> *Fugate v. Clarkson*, 2 B. Mon. 41; 36 Am. Dec. 589.

tiff in possession during the pendency of the first suit, nor can one deriving title from the defendant after the service of the writ maintain such action.<sup>1</sup> After judgment in replevin against defendant, he cannot sue out another writ of replevin to prevent execution against himself and to procure a restoration of the property to himself; and if such second writ is issued, the court will, on application, supersede the writ if it be not returned, or will set it aside as irregularly issued if it is returned.<sup>2</sup>

ILLUSTRATIONS. — Plaintiff sold goods to C. and delivered them to a carrier. Defendant, a constable holding an execution against C., levied on and seized the goods while in the carrier's possession, and paid the freight charges thereon. Plaintiff demanded the goods from defendant, without paying or tendering the amount of the freight charges, and being refused, brought replevin. *Held*, 1. That plaintiff's right of stoppage *in transitu* was not terminated by the levy and seizure; but 2. That the lien for freight charges, to which defendant had rightfully succeeded, was prior to plaintiff's right, and that plaintiff could only bring replevin after discharging that lien: *Rucker v. Donovan*, 13 Kan. 251; 19 Am. Rep. 84.

§ 3646. What Property may and may not be Replevied.

—In replevin the owner may take the property described in the writ from the possession of a stranger to whom it belongs, and he is justified by his writ; but the party in whose behalf the writ issued is answerable for the wrong done.<sup>3</sup> The owner of property wrongfully taken may pursue it, so long as it can be identified, whatever alteration in form it may assume, unless it is annexed to or made part of some other thing, which is the principal.<sup>4</sup> A purchaser from the defendant in replevin of property

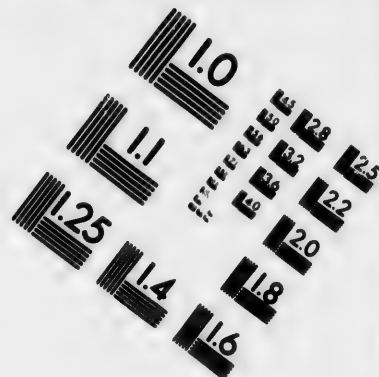
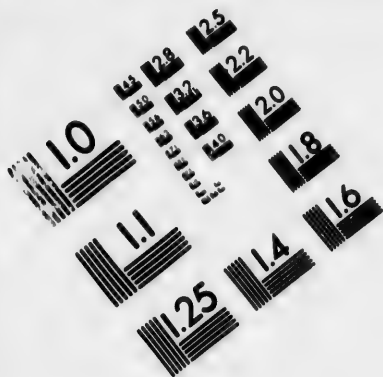
<sup>1</sup> *Hines v. Allen*, 55 Me. 114; 92 Am. Dec. 1.

<sup>2</sup> *Tison v. Bowden*, 8 Fla. 61; 71 Am. Dec. 101.

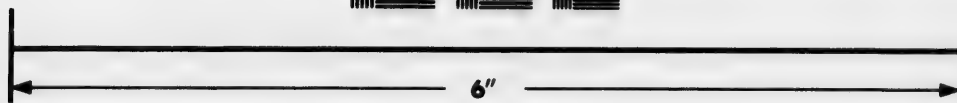
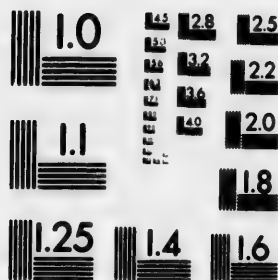
<sup>3</sup> *Shipman v. Clark*, 4 Denio, 446; 47 Am. Dec. 264.

<sup>4</sup> *Davis v. Easley*, 13 Ill. 192; *Richardson v. York*, 14 Me. 216; *Snyder v. Vaux*, 2 Rawle, 423; 21 Am. Dec. 466. But replevin does not lie, where one per-

son, acting in good faith and under color of title, has made use of materials belonging to another in manufacturing a new article, to recover the manufactured product. The remedy of the owner of the materials is by action for the conversion, in which he may recover the value of his property. *Taken: Potter v. Mardre*, 76 N. C. . .



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in suit, with actual notice of the litigation, buys at his peril, and must abide the result of the action, the same as the party from whom he got his title. And if judgment be afterwards rendered against the defendant, and an execution thereon issued, it will be the duty of the sheriff under it to take the property from such purchaser, notwithstanding he may have paid full value for it.<sup>1</sup>

Replevin will lie for choses in action, as notes, checks, bank-bills, bonds, etc.;<sup>2</sup> or for deeds which are the muniments of title to real estate;<sup>3</sup> or for parish records;<sup>4</sup> or for animals;<sup>5</sup> or for chattels severed from freehold, where there is no adverse possession;<sup>6</sup> or to recover a building wrongfully removed;<sup>7</sup> or a chattel—as a parlor organ—removed by the buyer from the place where, by the terms of the conditional sale, it was to remain until paid for.<sup>8</sup> It lies against an executor for a specific legacy.<sup>9</sup> Corn in the stalk may be replevied without regard to whether it is growing, or, having matured, has ceased to derive any nutriment from the soil.<sup>10</sup> The owner of intoxicating liquors kept in violation of law can maintain an action of replevin for the liquors and the vessels containing the same against an officer seizing them upon an execution as the property of another.<sup>11</sup>

<sup>1</sup> *Swantz v. Pillow*, 50 Ark. 300; 7 Am. St. Rep. 98.

<sup>2</sup> *Graves v. Dudley*, 20 N. Y. 76; *Birdsall v. Russell*, 29 N. Y. 220; *Comparet v. Burr*, 5 Blackf. 419; *Moody v. Keener*, 7 Port. 218; *Kingman v. Pierce*, 17 Mass. 247; *Booth v. Powers*, 56 N. Y. 22; *Decker v. Matthews*, 12 N. Y. 313; *Wookey v. Pole*, 4 Barn. & Ald. 1; *Graff v. Shannon*, 7 Iowa, 508. Or a promissory note which has been paid: *Savery v. Hays*, 20 Iowa, 25; 89 Am. Dec. 511. After a check has been paid and returned canceled to the drawer, being held by him only as a voucher, the drawer cannot resort to the action of replevin for the check, to enforce a claim he may have to be repaid the amount of it by the payee: *Barnett v. Selling*, 70 N. Y. 492.

<sup>3</sup> *Towle v. Lovet*, 6 Mass. 394; *Weiser v. Zeisinger*, 2 Yeates, 537; *Kingman v. Paine*, 17 Mass. 247; *Sawyer v. Baldwin*, 11 Pick. 492; *Sudbury v. Stearns*, 21 Pick. 148; *Wilson v. Rybolt*, 17 Ind. 391; 79 Am. Dec. 486; 34 Ill. 523; 13 Ill. 192.

<sup>4</sup> *Sawyer v. Baldwin*, 11 Pick. 492.

<sup>5</sup> *Eddy v. Drew*, 35 Vt. 247; *Keifer v. Carrier*, 53 Wis. 404.

<sup>6</sup> *Anderson v. Hapler*, 34 Ill. 436; 85 Am. Dec. 318.

<sup>7</sup> *Huebschmann v. McHenry*, 29 Wis. 655.

<sup>8</sup> *Hall v. Draper*, 20 Kan. 137.

<sup>9</sup> *Eberstein v. Camp*, Mich. 1887.

<sup>10</sup> *Garth v. Caldwell*, 72 Mo. 622.

<sup>11</sup> *Monty v. Arneson*, 25 Iowa, 383.

But the archives of the government in the possession of a public officer are not repleviable;<sup>1</sup> nor will replevin lie for an undivided share of property;<sup>2</sup> nor for an article manufactured to order, until it is completed and delivered;<sup>3</sup> nor to oust a tenant from the occupancy of a building;<sup>4</sup> nor for real estate;<sup>5</sup> nor property fixed to the freehold;<sup>6</sup> nor for ungathered corn standing in the field;<sup>7</sup> nor for the recovery of money, unless specifically described, and the plaintiff shows himself entitled to possession of the specific money as described.<sup>8</sup> Articles of dress or personal adornment cannot be taken on a writ of replevin from the person of the defendant without his consent, even though he wears them for the sole purpose of keeping them beyond the reach of legal process.<sup>9</sup> A purchaser at a foreclosure sale cannot, before the sale is confirmed, maintain replevin for crops growing thereon at the time of sale, but afterwards severed therefrom by the person in possession of the land.<sup>10</sup>

ILLUSTRATIONS. — Plaintiff leased wheat-land to defendant, defendant agreeing to pay as rent one half the wheat crop at the thrashing-time. When the wheat was thrashed defendant

<sup>1</sup> *Brent v. Hagner*, 5 Cranch C. C. 71.

<sup>2</sup> *Low v. Martin*, 18 Ill. 286; *Ward v. Worthington*, 33 Ark. 830; *Hackett v. Potter*, 131 Mass. 50; *Read v. Middleton*, 62 Iowa, 317; *Hart v. Morton*, 44 Ark. 447; *Spooner v. Ross*, 24 Mo. App. 599; *Phipps v. Taylor*, 15 Or. 414. Replevin cannot be maintained to recover three fourths of three bales of cotton: *Jackson v. Stockard*, 9 Baxt. 260. Nor for an undivided interest in a chattel where the execution of the writ will operate to deprive a co-tenant whose title is not disputed of his right of possession: *Kindy v. Green*, 32 Mich. 310. Nor for cotton mixed in the same bale with the defendant's: *McKennon v. May*, 39 Ark. 442.

<sup>3</sup> *Pettengill v. Merrill*, 47 Me. 109.

<sup>4</sup> *McCormick v. Riewe*, 14 Neb. 509.

<sup>5</sup> *Roberts v. Dauphin Bank*, 19 Pa. St. 71; *Eddy v. Hall*, 5 Col. 576. But

*aliter* as to property tortiously severed from the freehold: *Cong. Soc. v. Fleming*, 11 Iowa, 533; 79 Am. Dec. 511; *Dorr v. Duddear*, 88 Ill. 107; *Leonard v. Stickney*, 131 Mass. 541. Replevin for a specific quantity of mineral ore cannot be commenced until such mineral has been converted from real into personal property by being severed from the earth: *Knowlton v. Culver*, 2 Pinn. 243; 1 Chand. 214; 52 Am. Dec. 156.

<sup>6</sup> *Cresson v. Stout*, 17 Johns. 116; 8 Am. Dec. 373; *Johnson v. Hunt*, 11 Wend. 137; *Riewe v. McCormick*, 11 Neb. 261; *Harlan v. Harlan*, 15 Pa. St. 507; 53 Am. Dec. 612.

<sup>7</sup> *Jones v. Dodge*, 61 Mo. 368. *Contra*, *Salmon v. Fewell*, 17 Mo. App. 118; *Garch v. Caldwell*, 72 Mo. 622.

<sup>8</sup> *Sager v. Blain*, 44 N. Y. 445.

<sup>9</sup> *Maxham v. Day*, 16 Gray, 213; 77 Am. Dec. 409.

<sup>10</sup> *Woehler v. Endter*, 46 Wis. 301.

delivered only one third, retaining the remainder. *Held*, that plaintiff could not replevy the balance of wheat due him under the lease: *Lacy v. Weaver*, 49 Ind. 373; 19 Am. Rep. 683. A trades a horse, known by him to have been stolen, with B for B's horse, and then trades B's horse with C for C's horse. *Held*, that B, on having to give up the stolen horse to its owner, cannot recover the horse originally his from C, C having acted in good faith: *Benedict v. Williams*, 48 Hun, 123. A, by falsely representing himself to be of age, he being in fact an infant, obtained personal property by purchase from the owner, and then turned it over to B. *Held*, that the owner could maintain replevin against B, and this without proving collusion between A and B; and that evidence of similar frauds perpetrated by A might be shown: *Neff v. Landis*, 110 Pa. St. 204.

§ 3647. **Demand when Necessary.** — Where the property came into the defendant's possession without any wrong on his part (the statutes, as we have seen, allowing the action in such cases), a demand is essential.<sup>1</sup> The action will not lie against a purchaser in good faith from a wrongful taker until after demand made for the delivery.<sup>2</sup> A consignee of goods sent C. O. D. cannot maintain replevin against the carrier before payment and delivery.<sup>3</sup> A bailor who has left machinery for repairs cannot maintain replevin therefor without first tendering the amount due for the repairs.<sup>4</sup> A tender of the purchase-money and demand are essential to replevying chattels bargained but not paid for, where no time nor place is fixed for the delivery.<sup>5</sup>

But a demand is not necessary where the taking was wrongful;<sup>6</sup> or where the defendant purchased the goods

<sup>1</sup> *Millsbaugh v. Mitchell*, 8 Barb. 333; *Gillet v. Roberts*, 57 N. Y. 28; *Dearing v. Ford*, 21 Miss. 269; *Ingalls v. Bulkley*, 13 Ill. 315; *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 258; *Adams v. Wood*, 51 Mich. 411; *Becker v. Vandercock*, 54 Mich. 114.

<sup>2</sup> *Conner v. Comstock*, 17 Ind. 90; *Wood v. Cohen*, 6 Ind. 455; 63 Am. Dec. 389; *Stauchfield v. Palmer*, 4 G. Greene, 23; *Stratton v. Allen*, 7 Minn. 502; *Gilchrist v. Moore*, 7 Iowa, 9;

*Newman v. Jones*, 47 Me. 520; *Millsbaugh v. Mitchell*, 8 Barb. 333. But see *contra*, *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795.

<sup>3</sup> *Lane v. Chadwick*, 146 Mass. 68.

<sup>4</sup> *Brown v. Dempsey*, 95 Pa. St. 243.

<sup>5</sup> *Hart v. Livingston*, 29 Iowa, 217.

<sup>6</sup> *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 258; *Clark v. Lewis*, 35 Ill. 417; *Tuttle v. Robinson*, 78 Ill. 332; *Farwell v. Hanchett*, 19 Ill. App. 620.

with knowledge that his vendor obtained them by fraud;<sup>1</sup> or against one holding the property under a trespasser;<sup>2</sup>

<sup>1</sup> *Goldschmidt v. Berry*, 13 Ill. App. 276; *Butters v. Haughwout*, 42 Ill. 18; 89 Am. Dec. 401. Where the buyer of goods obtains them by fraud, the seller may maintain replevin against the buyer; and a demand is not necessary. And if the seller proves that the buyer bought with the intention of not paying, he need not also prove that means to deceive, and which did deceive, were used: *Farwell v. Hanchett*, 120 Ill. 573. In *Shoemaker v. Simpson*, 16 Kan. 43, the court says: "A demand of the property before commencing an action of replevin is necessary only where the possession of the property by the defendant is rightful, or at least not wrongful, and where a demand is required to terminate such rightful possession, or to convert what was previously an innocent possession into a wrongful one. A demand never was necessary in a replevin action where the possession of the property by the defendant was already wrongful without a demand. And all that is necessary to make the possession of the property of another wrongful in law is, that the possession be without the authority of the owner and inconsistent with his rights. We think it may be laid down as a rule that whenever one person obtains the possession of the personal property of another without the consent of the owner, and then, without any right which the law will recognize, asserts a claim to the property inconsistent with the owner's right of property and right of possession, then the possession of such person will immediately become illegal and wrongful, and no demand for the property will be required to be made by the owner before he commences an action of replevin for its recovery, although the possessor may ever so honestly entertain the belief that his claim to the property is both legal and just. An innocent owner of property is not to be subject to additional inconvenience and burdens merely because some other person may be innocent and ignorant. The innocence and ignorance of the person in possession of another's property cannot in any man-

ner abridge the legal rights of the owner. The owner of property who has the present and existing right of possession is not to be postponed on account of the ignorance or innocence of some other person who claims adversely to him. Nor is such owner, if he commences an action of replevin for his property, bound to tender an issue, or to litigate a question, founded merely upon the ignorance and innocence of the party who claims adversely to him. These views, we think, are sustained by the great weight of authority: *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795; *Ballou v. O'Brien*, 20 Mich. 304; *Clark v. Lewis*, 35 Ill. 417; *McNeil v. Arnold*, 17 Ark. 155; *McDonald v. Smith*, 21 Ark. 422; *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 258; *Newell v. Newell*, 34 Miss. 386; *Smith v. McLean*, 24 Iowa, 322. The last two cases decide that a defendant, by pleading title in himself, waives any right that he might otherwise have to claim that a previous demand should have been made for the property. Of course replevin could not be maintained against a person who came innocently into the possession of the property, who never claimed any interest in it, and who never disputed the owner's right thereto. But if sued, he should disclaim and not set up title and right of possession in himself, as the defendants did in this case. With respect to the question of a necessity for a demand, where the defendant has come into the possession of the property with the consent of the owner, and then wrongfully claims the property as his own, we have not expressed any opinion, and shall not do so in this case. In the present case the defendants did not come into the possession of the property with the consent of the owners, and after they got possession of it they claimed it as their own, and after this suit was commenced, they set up in their answer an affirmative claim of title and right of possession in themselves, and they obtained a judgment to that effect in the court below. We think no demand was necessary."

<sup>2</sup> *Ballou v. O'Brien*, 20 Mich. 304.



or against an officer for goods seized by him in abuse of his authority;<sup>1</sup> or where plaintiff and defendant claim under the same right;<sup>2</sup> or where the parties had stipulated that the goods should be sold and the proceeds paid over to the one entitled.<sup>3</sup> A demand by the owner of property seized by an officer, on a writ against a third person, is not a necessary prerequisite to an action against the officer.<sup>4</sup> If a person, acting as the agent of another, buys at a sale property which has been attached as the property of a person other than the owner, and takes possession of and claims to hold it for his principal, no demand upon him by the owner is necessary before commencing an action of replevin therefor.<sup>5</sup> Where goods are delivered by mistake to one who has no right to the possession, and he, instead of endeavoring to correct the mistake, lends himself to favor it, and without authority performs services respecting them, and claims thereby a lien, he may be regarded as a wrong-doer from the beginning, and an action will lie against him without demand.<sup>6</sup> In some states the omission to make a demand prevents the recovery of costs by the plaintiff.<sup>7</sup>

It is not essential to a sufficient demand, in a replevin of numerous and widely scattered articles of personal property, after a peremptory refusal to surrender, that the plaintiff should try to compel the defendant to hear a list thereof read, or to go with him from place to place to have them pointed out.<sup>8</sup> A plaintiff after demand need not delay serving his writ in order that the defendant may satisfy himself that the demand is rightfully made.<sup>9</sup> A demand on one having no control of the property nor authority to deliver it effects nothing.<sup>10</sup>

<sup>1</sup> *Vanderhorst v. Bacon*, 38 Mich. 669; 31 Am. Rep. 328.

<sup>2</sup> *Lamping v. Keenan*, 9 Col. 390; *Redding v. Page*, 52 Iowa, 406; *Smith v. McLean*, 24 Iowa, 322.

<sup>3</sup> *Butters v. Haughwout*, 42 Ill. 18; 89 Am. Dec. 401.

<sup>4</sup> *Hexter v. Schneider*, 14 Or. 184.

<sup>5</sup> *Edmunds v. Hill*, 133 Mass. 445.

<sup>6</sup> *Purves v. Moltz*, 2 Abb. Pr., N. S., 409; 32 How. Pr. 478.

<sup>7</sup> *Homan v. Labor*, 1 Neb. 210; *Lewis v. Masters*, 8 Blackf. 244; *Prime v. Cobb*, 63 Me. 200.

<sup>8</sup> *Appleton v. Barrett*, 29 Wis. 221.

<sup>9</sup> *Parker v. Palmer*, 13 R. I. 359.

<sup>10</sup> *Barnes v. Gardner*, 60 Mich. 133.

**ILLUSTRATIONS.**—A married woman hired chattels. When she wanted to deliver them to the lessor, she made a demand for them in the lessor's name on her husband, who held them in her right. He refused to deliver them up. *Held*, a sufficient demand on which to base a replevin suit by the lessor: *Brown v. Poland*, 54 Conn. 313. By the terms of a trust deed the trustee was granted right of possession on default in payment. *Held*, that no precedent demand was necessary to an action of replevin for the goods: *Morris v. Rucks*, 62 Miss. 76. An action of replevin was brought before demand, the writ being made to be used only in case of the defendant's refusal to give up the property. *Held*, not to have been prematurely commenced: *O'Neil v. Bailey*, 68 Me. 429.

§ 3648. **Defenses.**—An action of replevin is barred by any proof that the plaintiff, when he began the suit, had no right to the possession.<sup>1</sup> Notwithstanding the true owner has been guilty of a breach of the peace in retaking it from a person who has wrongfully obtained possession, he may show his title, in defense of an action by such person, brought to recover possession. The wrongful possessor cannot maintain an action to recover possession merely upon the breach of the peace.<sup>2</sup> Evidence is admissible in defense that plaintiff had sold the property to defendant, even though plaintiff's title, at the time of such sale had been qualified, and not absolute.<sup>3</sup> An action to recover possession of personal property may be defeated by a showing that, during the pendency of the action, and before a trial thereof, the defendant has been required to deliver, and has delivered, the property to a third person entitled to its possession as against both plaintiff and defendant.<sup>4</sup> The defendant in replevin, under a plea of property in a stranger, may prove that a sale by such stranger, under which the plaintiff claims, was fraudulent.<sup>5</sup> Title in a third person not a party to an action cannot be

<sup>1</sup> *Clark v. West*, 23 Mich. 242; *Belden v. Laing*, 8 Mich. 500. And see *ante*, § 3644.

<sup>2</sup> *Alabrook v. Shields*, 67 N. C. 333.

<sup>3</sup> *Bragdon v. Penney*, 35 Minn. 204.

<sup>4</sup> *Bolander v. Gentry*, 36 Cal. 105; 95 Am. Dec. 162.

<sup>5</sup> *Quincy v. Hall*, 1 Pick. 357; 11 Am. Dec. 198.

shown in defense to a suit in replevin.<sup>1</sup> A third party's lien is no defense in replevin; the plaintiff takes subject thereto.<sup>2</sup> The fact that horses taken from plaintiff in replevin were designed by him to be transferred to the winner in an unlawful lottery cannot be availed of to defeat plaintiff's right to recover.<sup>3</sup>

§ 3649. **Pleading and Practice—By Plaintiff.**—Under the statutes, the forms and methods of pleading and practice are particularly set out, and should be consulted by the practitioner.<sup>4</sup> The petition must show that defendant was in possession of the property at the time the action was commenced;<sup>5</sup> and that the property is wrongfully detained, or facts from which a wrongful detention may be implied;<sup>6</sup> and that the goods taken are plaintiff's property, and that they were taken out of his possession.<sup>7</sup> An allegation that the plaintiff is "owner" and "entitled to possession" is sufficient, the latter part being rejected as surplusage.<sup>8</sup> An allegation that the defendant "wrong-

<sup>1</sup> *Reed v. Reed*, 13 Iowa, 5; *Corbitt v. Heisey*, 15 Iowa, 296; *McClung v. Bergfield*, 4 Minn. 148.

<sup>2</sup> *McGill v. Howard*, 61 Miss. 411.

<sup>3</sup> *Martin v. Hodge*, 47 Ark. 378; 58 Am. Rep. 763.

<sup>4</sup> A writ of replevin is a writ of summons, not attachment, and service upon the defendant must conform to the provisions of the statute as to the service of writs of summons. Delivery of a copy to the agent of the defendant, the latter being out of the state, is not sufficient: *Gaffield v. Avery*, 43 Vt. 668. In replevin, the statutory affidavit describing the goods, and averring right of possession in plaintiff, is an absolute prerequisite to an order for delivery: *Bardwell v. Stubbart*, 17 Neb. 485; *Wilber v. Flood*, 14 Mich. 40; 93 Am. Dec. 203; *Milliken v. Lyle*, 6 Hill, 623. But it is held in Missouri that a replevin suit is maintainable although there is no statutory affidavit, the want thereof not going to the jurisdiction: *Bingham v. Morrow*, 29 Mo. App. 448. On motion to quash a writ of replevin, on the ground that

no affidavit appears on file as required by statute, parol evidence is admissible to show that the affidavit was made and filed, and that it has been lost or mislaid: *Morgan v. Morgan*, 31 Miss. 546.

<sup>5</sup> *Davis v. Randolph*, 3 Mo. App. 454. See *ante*, § 3644. It is sufficient if it avers ownership and a right of possession, without averring that the property was not taken in execution, etc.: *Daniels v. Cole*, 21 Neb. 156.

<sup>6</sup> *Staley House Furnishing Co. v. Wallace*, 21 Mo. App. 128.

<sup>7</sup> *Luther v. Arnold*, 8 Rich. 24; 62 Am. Dec. 422. A complaint in replevin that does not allege ownership of the property, but only alleges a promise of the defendant to vest the ownership in the plaintiff on certain conditions being complied with, is bad; *Bailey v. Troxell*, 43 Ind. 432. The burden of proof is upon plaintiff in replevin where the answer sets up, in substance, property in the defendant: *Turner v. Cool*, 23 Ind. 56; 85 Am. Dec. 449.

<sup>8</sup> *Pattison v. Adams, Hill & D.* 428.

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fully detains from the plaintiff the following goods and chattels of the plaintiff" is a sufficient averment of property in the plaintiff.<sup>1</sup> An allegation that a party is "entitled to the possession" of property of which he sues to recover the rents and profits is bad, because it asserts merely a conclusion of law.<sup>2</sup> The declaration or petition, however, must contain a sufficient description of the property to identify it.<sup>3</sup> The fact that the property was so mingled by defendants with similar property of their own that plaintiff's property cannot be identified does not relieve him from the necessity of identification.<sup>4</sup> But while a complaint in replevin should describe the property with reasonable certainty, the defendant, in whose possession the property remains, and who cannot, under the circumstances, be affected by an indefinite description, cannot object to it.<sup>5</sup> In the following cases the declarations were held sufficient: A description of the property as "two yearlings, red and white in color";<sup>6</sup> or as "six oxen";<sup>7</sup> or as "fourteen skimmers and ladles," without saying how many of each;<sup>8</sup> or as "one white shoat of the value of fourteen dollars";<sup>9</sup> or for "a box of skin and furs, marked J. Windoes, Logansport, Indiana";<sup>10</sup> or as "a certain storehouse, warehouse, and the goods herein contained, being the store in Council Bluffs known and designated as the store of your petitioner";<sup>11</sup> or as "goods, stock, and fixtures in store at Johnston, at a place called Dry Dock, occupied by said Leach, the defendant, of the value of eight hundred dollars, and the books of account and evidence of indebtedness of persons

<sup>1</sup> *Simmons v. Lyons*, 55 N. Y. 671; 35 N. Y. Sup. Ct. 557; *Van der Minden v. Elsas*, 6 Thomp. & C. 67.

<sup>2</sup> *Sheridan v. Jackson*, 72 N. Y. 173.

<sup>3</sup> *Stevens v. Osman*, 1 Mich. 92; 48 Am. Dec. 696. A description in the affidavit annexed to the writ is not sufficient: *Paterson v. Parsell*, 38 Mich. 607.

<sup>4</sup> *Ames v. Mississippi etc. Co.*, 8 Minn. 467.

<sup>5</sup> *Foredice v. Rinehart*, 11 Or. 208.

<sup>6</sup> *Kelso v. Saxton*, 40 Mich. 666.

<sup>7</sup> *Farwell v. Fox*, 18 Mich. 166.

<sup>8</sup> *Bourn v. Mattaire*, 2 Strange, 1015.

<sup>9</sup> *Onstatt v. Ream*, 30 Ind. 259; 95 Am. Dec. 695.

<sup>10</sup> *Minchrod v. Windoes*, 29 Ind. 288.

<sup>11</sup> *Ellsworth v. Henshall*, 4 G. Greene, 417.

to said Leach, of the value of fifty dollars";<sup>1</sup> or as "goods and chattels of him, the said plaintiff, to wit, two carriages and two horses of the value of seven hundred dollars";<sup>2</sup> or "the goods and chattels following, viz., the contents of a grocery store," describing the store and naming the person by whom the goods were taken and held;<sup>3</sup> or "one crib of corn, said crib being the north crib of three cribs situated south of the house."<sup>4</sup> But if a plaintiff describe the property as two bay horses, and the proof shows one of them was a sorrel, the variance is fatal.<sup>5</sup> In replevin for several articles, it is not necessary to state the separate value of each article, but only the value of the whole;<sup>6</sup> nor in replevin for property taken in execution, and claimed as exempt, is it necessary to specifically set out the character of the property in the declaration, so as to show the exemption.<sup>7</sup>

The writ need not allege the value of the goods replevied.<sup>8</sup> An allegation of venue is necessary to the jurisdiction in an action to recover specific personal property.<sup>9</sup> Special damages for the detention may be proved and recovered without being alleged in the declaration.<sup>10</sup> The subject-matter of litigation in replevin is the property mentioned in the complaint; and the defendant cannot, in the same action, claim the return of other property not mentioned therein.<sup>11</sup> Replevin to recover property owned by two persons jointly, and without susceptibility of separation, must be brought in their joint name.<sup>12</sup>

§ 3650. **By Defendant.**—The plea of *non cepit* or *non detinet* admits the right of property in the plaintiff, but

<sup>1</sup> Waldron v. Leach, 9 R. I. 588.

<sup>2</sup> Ruch v. Morris, 28 Pa. St. 245.

<sup>3</sup> Litchman v. Potter, 116 Mass. 371.

<sup>4</sup> Smith v. Stanford, 62 Ind. 392.

<sup>5</sup> Taylor v. Riddle, 35 Ill. 557.

<sup>6</sup> Root v. Woodruff, 6 Hill. 418.

<sup>7</sup> Elliott v. Whitmore, 5 Mich. 532.

<sup>8</sup> Blake v. Darling, 116 Mass. 300;  
Litchman v. Potter, 116 Mass. 371.  
As to when value of the property must  
be alleged in the complaint, see Pom-

eroy v. Trimper, 8 Allen, 398; 85 Am.  
Dec. 714. The jurisdiction of actions  
in replevin depends not upon the alleg-  
ations of the writ, or the estimate of  
the appraisers, but upon the actual  
value of the goods: Davenport v.  
Burke, 9 Allen, 116.

<sup>9</sup> Stiles v. James, 2 Wash. 194.

<sup>10</sup> Clark v. Martin, 120 Mass. 543.

<sup>11</sup> Lovensohn v. Ward, 45 Cal. 8.

<sup>12</sup> Collier v. Yearwood, 5 Baxt. 581.

denies the taking and detention.<sup>1</sup> A defendant in replevin, as in other actions, may plead several pleas.<sup>2</sup> Pleas of *non cepit* and property are not inconsistent.<sup>3</sup> In replevin a plea of property in the defendant or a stranger is good.<sup>4</sup> The general issue raises the question of the property of the plaintiff.<sup>5</sup> The general issue puts in issue every fact stated in the declaration necessary to sustain plaintiff's action, and not the detention of the property only.<sup>6</sup> Not guilty is the general issue in replevin in Missouri.<sup>7</sup> In replevin an officer may plead the general issue, and give special matter in evidence, without notice.<sup>8</sup> Under a plea of not guilty, the defendant can give evidence of special matter showing that plaintiff is not entitled to the possession.<sup>9</sup> Under the general issue defendant may show that he holds the goods as sheriff, under attachment against a third person.<sup>10</sup> Where the answer is a general

<sup>1</sup> Van Namee v. Bradley, 69 Ill. 299; Mackinley v. McGregor, 3 Whart. 369; 31 Am. Dec. 522; Harper v. Baker, 3 T. B. Mon. 422; 16 Am. Dec. 112. The plea of *non cepit* puts in issue only the taking; Carroll v. Harris, 19 Ark. 237; Ringo v. Field, 6 Ark. 43; Vose v. Hart, 12 Ill. 378; Bourk v. Riggs, 38 Ill. 320; Wilson v. Royston, 2 Ark. 315; Trotter v. Taylor, 5 Blackf. 431; Galusha v. Butterfield, 3 Ill. 227; Harper v. Baker, 3 T. B. Mon. 421; 16 Am. Dec. 112; Vickery v. Sherborne, 20 Me. 34; Ely v. Ehle, 3 N. Y. 506; Rowland v. Mann, 6 Ired. 38. *Non detinet* admits the fact of the wrongful taking alleged in a declaration in replevin; Simmons v. Jenkins, 76 Ill. 479. *Non cepit*, in replevin, puts in issue the question of general property only, and not of special property. On *non cepit* the issue must be for the defendant, if there was not a wrongful taking of the goods from the possession of another; Meany v. Head, 1 Mason, 319. Where there are pleas of property and *non cepit*, the latter plea must be disposed of before there can be a final judgment; Hamilton v. Colt, 14 R. I. 209.

<sup>2</sup> Martin v. Ray, 1 Blackf. 291.

<sup>3</sup> Dickson v. Mathers, Hemp. 65;

Whitwell v. Wells, 24 Pick. 25; Simpson v. McFarland, 18 Pick. 427; 20 Am. Dec. 602; Shuter v. Page, 11 Johns. 196; Cummings v. Gann, 52 Pa. St. 484.

<sup>4</sup> Dermott v. Wallach, 1 Black. 96; Edwards v. McCurdy, 13 Ill. 496; Martin v. Ray, 1 Blackf. 291; Hall v. Henline, 9 Ind. 256; Chambers v. Hunt, 18 N. J. L. 339; Harrison v. McIntosh, 1 Johns. 380; Ingraham v. Mead, 1 Hill, 353. Plea of "property in defendant" is a claim of the entire thing, and puts the plaintiff on proof of his right to it; Melvaine v. Holland, 5 Harr. (Del.) 10. An averment by the defendant in replevin that he bought the property of a third party is a sufficient denial of the plaintiff's allegation of ownership; Litchfield v. Halligan, 48 Iowa, 126.

<sup>5</sup> Ashby v. West, 3 Ind. 170; Dillingham v. Smith, 30 Me. 370; Huron v. Beckwith, 1 Wis. 17; Scudder v. Worster, 11 Cush. 573.

<sup>6</sup> Loomis v. Foster, 1 Mich. 165; Child v. Child, 13 Wis. 17; Snook v. Davis, 6 Mich. 156.

<sup>7</sup> Gibson v. Mozier, 9 Mo. 256.

<sup>8</sup> Coon v. Congden, 12 Wend. 496.

<sup>9</sup> Holliday v. McKinne, 22 Fla. 153.

<sup>10</sup> Young v. Glascock, 79 Mo. 574.

denial, it will not be required to be made more definite and certain.<sup>1</sup>

In some states it is held that an answer of property in a stranger or in the defendant in effect denies the property or ownership of the plaintiff, and is a good plea in bar, and completes the issue without a reply.<sup>2</sup> In others, the rule is, that if defendant pleads property in himself or a third person, he must in the same plea traverse the plaintiff's allegation of right. The allegation of property in the defendant or in a third person is only considered as inducement to the traverse of the plaintiff's right, and the plaintiff must take issue on the traverse, and not on the inducement; and on such an issue the substantial matter in dispute is the right of the plaintiff to the property. The plaintiff holds the affirmative of the issue, and must sustain his right or fail in the action.<sup>3</sup> Under the plea of property, the defendant is not bound to give notice that he claims under any special title; as, for instance, a lien for work thereon. The plaintiff, thereupon, must prove the right of exclusive possession.<sup>4</sup> A general denial by defendant in replevin, even if followed by a special averment of title in him, will not relieve plaintiff from showing that he was entitled to possession of the property, and that defendant had the possession in fact at the commencement of the action.<sup>5</sup> The defendant need not deny the amount of value or allegation of damages. They must be proved, though defendant puts in no answer. This was the practice before the codes, and is so now.<sup>6</sup>

<sup>1</sup> Aultman v. Stichler, 21 Neb. 72.

<sup>2</sup> Landers v. George, 40 Ind. 160.

<sup>3</sup> Atkins v. Byrnes, 71 Ill. 326; Peake v. Conlan, 43 Iowa, 297; Pope v. Jackson, 65 Me. 162; Van Namee v. Bradley, 69 Ill. 299; McFarlan v. McClellan, 3 Ill. App. 295. The onus of proof is not thrown on defendant by plea of property in replevin, and therefore he is not entitled to commence and conclude the argument: Marsh v. Pier, 4 Rawle, 273; 26 Am. Dec. 131; Williamson v. Ringgold, 4

Cranch C. C. 39; Pennington v. Chandler, 5 Harr. (Del.) 394; Anderson v. Talcott, 6 Ill. 365; Turner v. Cool, 23 Ind. 56; 85 Am. Dec. 449; Hunt v. Chambers, 21 N. J. L. 620; Harwood v. Smethurst, 29 N. J. L. 195; 80 Am. Dec. 207.

<sup>4</sup> Mathias v. Sellers, 86 Pa. St. 486.

<sup>5</sup> Wheeler and Wilson Mfg. Co. v. Teetzlaff, 53 Wis. 211.

<sup>6</sup> Jenkins v. Steanka, 19 Wis. 126; 88 Am. Dec. 675.

§ 3651. **Verdict and Judgment.**—The verdict and judgment in replevin must determine the right to the possession of all the property involved, even though a part thereof was not taken from the defendant, and the answer did not claim a return of the property.<sup>1</sup> Where plaintiff claims the ownership, the verdict must pass on the question, or no judgment can be rendered for the plaintiff.<sup>2</sup> A verdict for parties who have replevied property should find the value of the various items, as they have the right, under the statute, to return a part in satisfaction *pro tanto*.<sup>3</sup> Plaintiff cannot complain if the jury find the value of the goods to be that sworn to by him when he sued out the writ, due allowance being made for the difference in value between that time and the time of trial.<sup>4</sup> Where the property has already been delivered to the plaintiff, a general verdict in his favor is sufficient, without an assessment of value. Nor is the verdict defective in not finding on the question of damages, even though damages are claimed.<sup>5</sup> A general verdict for defendant in replevin finds all the issues against plaintiff.<sup>6</sup>

The judgment is conclusive on the question of ownership,<sup>7</sup> and it concludes the parties as to the value of the property as well as to its ownership.<sup>8</sup> A judgment similar to that rendered in *assumpsit* is not proper in a replevin suit, and should be arrested.<sup>9</sup> In replevin, there can be no judgment for damages where there can be none for

<sup>1</sup> *Carrier v. Carrier*, 71 Wis. 111.

<sup>2</sup> *Phipps v. Taylor*, 15 Or. 484.

<sup>3</sup> *Cook v. Halsell*, 65 Tex. 1.

<sup>4</sup> *Schultz v. Hickman*, 27 Mo. App. 21.

<sup>5</sup> *Prescott v. Heilner*, 13 Or. 200.

<sup>6</sup> *Baldwin v. Burrows*, 95 Ind. 81.

<sup>7</sup> *McFadden v. Fritz*, 110 Ind. 1.

<sup>8</sup> *Smith v. Mosby*, 98 Ind. 445. But a judgment for defendant in replevin is not invalidated because the value of each separate article was not found: *Whetmore v. Rupe*, 65 Cal. 237. Under the Texas statute, in order to render judgment in an action of re-

plevin, it is essential that the value of the property should be ascertained, and the sheriff is required to assess its value when taking the bond required of the claimant. This estimate may be acquiesced in by the parties to the suit and taken as the true value for the purpose of rendition and enforcement of judgment; but it has never been held that the estimate of value thus made was conclusive upon the parties: *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 283.

<sup>9</sup> *Hamilton v. Clark*, 25 Mo. App. 428.



return.<sup>1</sup> A judgment in an action to recover the possession of personal property which is not in the alternative form prescribed by statute is erroneous.<sup>2</sup> A replevin suit is a possessory action, and the judgment does not determine the right of property, where it is not put in issue.<sup>3</sup> A judgment in replevin will not be reversed because of uncertainty in the description of the property, where the record, as a whole, sufficiently indicates and points it out.<sup>4</sup> A nonsuit should not be granted in replevin.<sup>5</sup>

§ 3652. **Damages.**—The primary purpose of replevin is to recover the property in specie, not its value.<sup>6</sup> Replevin is a mixed action. It is a demand for the thing itself, and also for damages for the taking and detention. The defendant has his election to deliver the property on the writ when the sheriff calls for it, or to retain it on giving security. If the property be delivered to the plaintiff, the defendant is answerable in damages for the taking and detention up to the time of delivery; if retained, he is answerable, in addition, for the full value. In no event can the property itself be recovered at law from the defendant, nor can he tender it, afterwards, in discharge of the action.<sup>7</sup> Nominal damages follow a judgment for the plaintiff as of course.<sup>8</sup> Damages for the detention are recoverable only in case of a return.<sup>9</sup> Damages for defendant cannot exceed the value of the property.<sup>10</sup> To warrant any judgment for damages in replevin, the verdict must assess damages as such; assessing the value of the property will not answer this purpose.<sup>11</sup> Where the plaintiff fails in an action of replevin, in the absence of proof of actual damages, the defendant is entitled to the

<sup>1</sup> *Neis v. Gillen*, 27 Ark. 184.

<sup>2</sup> *Stewart v. Taylor*, 68 Cal. 5.

<sup>3</sup> *McFadden v. Ross*, 108 Ind. 512.

<sup>4</sup> *Coleman v. Reed*, 75 Iowa, 304; 9 Am. St. Rep. 484.

<sup>5</sup> *Ahlman v. Meyer*, 19 Neb. 63.

<sup>6</sup> *Herdie v. Young*, 55 Pa. St. 176; 93 Am. Dec. 739.

<sup>7</sup> *Fisher v. Whoolery*, 25 Pa. St. 197.

<sup>8</sup> *Hammond v. Solliday*, 8 Col. 610.

<sup>9</sup> *Romberg v. Hughes*, 18 Neb. 579.

<sup>10</sup> *Cruts v. Wray*, 19 Neb. 581.

<sup>11</sup> *Black v. Winterstein*, 6 Neb. 224.

nominal damages only.<sup>1</sup> A defendant in replevin who has prevented the plaintiffs obtaining actual possession of the property is not entitled to damages for its detention; and if there has never been an actual change of possession, an order for a return is unnecessary.<sup>2</sup>

The measure of damages where the property cannot be returned or the plaintiff takes judgment for its value is the same in replevin as in trover or trespass;<sup>3</sup> being, ordinarily, the value of the property at the time it was replevied, with interest to the time of trial.<sup>4</sup> The jury may give such damages as they think the plaintiff is justly entitled to as an equivalent for the injury sustained.<sup>5</sup> The jury are to find the value of the party's interest who recovers in replevin if the pleadings and evidence show that he has only a special interest in the property, and that the general property is in the other party.<sup>6</sup> They are to assess the full value of the goods, where the pleadings and evidence show that the party recovering is the general owner, or is a bailee, and connects himself with the general owner.<sup>7</sup> Damages where the property levied upon is replevied from the sheriff, and the verdict is for the defendant, will be the amount of the execution, with interest and costs, if the value of the property exceed such amount; and if it be less, the damages will be for the full value of the property.<sup>8</sup> Exemplary damages may be allowed in some cases,<sup>9</sup> as where the property was taken by

<sup>1</sup> *Seabury v. Ross*, 69 Ill. 533.

<sup>2</sup> *Ware River R. R. Co. v. Vibbard*, 114 Mass. 458.

<sup>3</sup> See next chapter; *Washington Ice Co. v. Webster*, 62 Me. 341; 16 Am. Rep. 462; *Heard v. James*, 49 Miss. 236. In replevin of property having a usable value (as a horse), the value of its use during the time of detention is a proper item of damages: *Allen v. Fox*, 51 N. Y. 562; 10 Am. Rep. 641; *Yandle v. Kingsbury*, 17 Kan. 195; 22 Am. Rep. 282.

<sup>4</sup> *Berthold v. Fox*, 13 Minn. 501; 94 Am. Dec. 243; *Hainer v. Lee*, 12 Neb.

452; *Dodge v. Rumels*, 20 Neb. 33; *Hanselman v. Kegel*, 60 Mich. 540. But see *Hooster v. Tepe*, 27 Mo. App. 207.

<sup>5</sup> *Dorsey v. Gassaway*, 2 Har. & J. 402; 3 Am. Dec. 557.

<sup>6</sup> *Booth v. Ableman*, 20 Wis. 21; 88 Am. Dec. 730.

<sup>7</sup> *Booth v. Ableman*, 20 Wis. 21; 88 Am. Dec. 730.

<sup>8</sup> *Jennings v. Johnson*, 17 Ohio, 154; 49 Am. Dec. 451; *Sutcliffe v. Dohrman*, 18 Ohio, 181; 51 Am. Dec. 450; *Welton v. Beltezore*, 17 Neb. 399.

<sup>9</sup> *McDonald v. Scaife*, 11 Pa. St. 385; 51 Am. Dec. 556.

force,<sup>1</sup> or where circumstances of aggravation or outrage attend the taking or detention.<sup>2</sup>

§ 3653. **Return of Property.**—The judgment in an action of replevin should be in the alternative for the property or its value, as ascertained by the jury, if delivery cannot be had.<sup>3</sup> The delivery of the property in replevin is the primary object of the action. The value is to be recovered in lieu of it only in case a delivery of the specific property cannot be had.<sup>4</sup> An alternative judgment against defendant in replevin does not give him an election to pay the assessed value of the property, and retain it as his own, against the will of the plaintiff, although he has given a bond for the performance of the judgment, and had the property restored to him by the sheriff.<sup>5</sup> Defendant cannot have judgment for a return of the property where he prevails under a plea of *non cepit* in replevin, but he may have a return awarded where he pleads property in himself or another.<sup>6</sup> A return will not be awarded upon judgment in favor of the defendant in an action of replevin, where, from a view of all the facts of the case, it appears that at the time the writ was sued out, or by reason of events subsequently occurring before the rendition of the judgment, the defendant is not entitled to the possession of the goods.<sup>7</sup> But in opposing a return the plaintiff must bring himself within some of the exceptions to the general rule requiring a return where the verdict is for the defendant on an issue of property and

<sup>1</sup> Moore v. Shenk, 3 Pa. St. 13; 45 Am. Dec. 618.

<sup>2</sup> McDonald v. Scaife, 11 Pa. St. 381; 51 Am. Dec. 556; Herdic v. Young, 55 Pa. St. 176; 93 Am. Dec. 739.

<sup>3</sup> Jetton v. Smead, 29 Ark. 372.

<sup>4</sup> Swantz v. Pillow, 50 Ark. 300; 7 Am. St. Rep. 98.

<sup>5</sup> Swantz v. Pillow, 50 Ark. 300; 7 Am. St. Rep. 98.

<sup>6</sup> Simpson v. McFarland, 18 Pick. 427; 29 Am. Dec. 602. To entitle the

defendant in replevin to a return of the property, he must by a proper plea contest the plaintiff's right, either by formally traversing his allegation of title or by specially pleading that the right is in some other person. *Non cepit* or *non detinet* would not suffice: Chandler v. Lincoln, 52 Ill. 74.

<sup>7</sup> Bartlett v. Kidder, 14 Gray, 452; Davis v. Harding, 3 Allen, 303; Ware River R. R. Co. v. Vibbard, 114 Mass. 463; all citing Simpson v. McFarland, 18 Pick. 427; 29 Am. Dec. 602.

right of possession.<sup>1</sup> The defendant may waive return of the property, and take judgment for its value alone, where the plaintiff has obtained possession of the property, and the jury find the defendant entitled to possession.<sup>2</sup> The defendant may avail himself of a delivery to him of the same property pursuant to a writ of replevin issued out of a court of competent jurisdiction of another state previously, while the parties to the action and the property in dispute were within the jurisdiction and subject to the law of the place of delivery.<sup>3</sup> Where defendant in replevin has waived return he is entitled to a verdict for the value of such property in his possession as is claimed by the declaration, but as to the ownership of which there is no evidence.<sup>4</sup> A judgment for the return of property or its value may not be resisted upon the ground that the property has been destroyed by the act of God.<sup>5</sup> Property not the identical property taken under the replevin writ need not be accepted in satisfaction of a judgment for a return.<sup>6</sup>

**§ 3654. The Bond.**—The plaintiff is required to give a bond with sureties to return the chattel if a return be

<sup>1</sup> *Barry v. O'Brien*, 103 Mass. 522.

<sup>2</sup> *Farmers' Loan etc. Co. v. Commercial Bank*, 15 Wis. 424; 82 Am. Dec. 689.

<sup>3</sup> *Lowry v. Hall*, 2 Watts & S. 129; 37 Am. Dec. 495.

<sup>4</sup> *White v. White*, 58 Mich. 546.

<sup>5</sup> *De Thomas v. Witherby*, 61 Cal. 92; 44 Am. Rep. 542. In a New York case it was held one obtaining the possession of personal property by replevin is excused from returning the same in case it has died since the seizure, without any neglect or fault on his part: *Carpenter v. Stevens*, 12 Wend. 589. And see *Melvin v. Winslow*, 10 Me. 397; *Bobo v. Patton*, 6 Heisk. 172; 19 Am. Rep. 593. But the New York case has been frequently disapproved: See *Suyden v. Jenkins*, 3 Sand. 614; *Wells on Replevin*, secs. 600-602; 2 *Sedwick on Damages*, 500. In the California case above the court say: "The weight of authority is manifestly against excusing the party who has

replevined goods from returning the same or responding in damages for their value because they have been lost by the act of God, and it appears to us that upon no sound principle can he be excused. A plaintiff, not being the owner of goods, who takes them out of the possession of the real owner, holds them in his own wrong and at his own risk. He has deprived the real owner of the possession, and has also deprived him of the means of disposing of the property pending the litigation; and when at the end of perhaps a protracted litigation it is determined that the plaintiff in the replevin suit had no right to the possession of the goods, and judgment is rendered against him for the return of the property or its value, he cannot, on principle or authority, be excused from satisfying said judgment under a plea that the property has been lost in his hands, even by the act of God."

<sup>6</sup> *Irvin v. Smith*, 68 Wis. 227.

ordered, or to pay all costs and damages resulting from the wrongful suing out of the writ.<sup>1</sup> The undertaking requires no further consideration to support it than the claim itself.<sup>2</sup> The execution of the bond gives the right of possession to the defendant.<sup>3</sup> After a replevin, if it appears that the bond is insufficient, a new one may be ordered, and if filed without an order, the want of an order cannot be pleaded by way of defense to a suit on the bond.<sup>4</sup> The sheriff is a trespasser, if, in replevin, he fails to take a bond in double the real value of the goods, unless defendant shall have waived his right of action by resorting to the bond for his remedy, or in some other way.<sup>5</sup> But the fact that the penalty named in a replevin bond is less than double the value of the property cannot be set up as a defense in a suit on the bond, especially where the writ of replevin had been issued, and possession of the property obtained upon it.<sup>6</sup> The sureties cannot controvert the validity of the judgment. If a return be awarded in the replevin suit, the surety is liable on the condition of the bond to return, and this without execution or other demand for its return. The judgment establishes the liability.<sup>7</sup> In an action against the sureties, the ownership and right to possession and the value of the property are *res adjudicata*.<sup>8</sup> By signing the bond the

<sup>1</sup> The taking of a bond by the sheriff from the plaintiff in replevin is a prerequisite to the service of the writ: *Pirani v. Barden*, 5 Ark. 81; *Pool v. Loomis*, 5 Ark. 110; *Baldwin v. Whittier*, 16 Me. 33; *Smith v. McFall*, 18 Wend. 521; *State v. Stephens*, 14 Ark. 264; *Kimball v. True*, 34 Me. 84; *Cady v. Eggleston*, 11 Mass. 285; *Graves v. Sittig*, 5 Wis. 219. The bond must be attested by the court approving it: *Hogland v. State*, 43 Ind. 527. The omission of the name of the defendant is a fatal defect: *Arter v. People*, 54 Ill. 228; *Matthews v. Stones*, 72 Ill. 316. The bond is void, the writ being void by reason of the demand being beyond the jurisdiction: *Rosen v. Fischel*, 44 Conn. 371.

<sup>2</sup> *Harrison v. Utley*, 6 Hun. 565.

<sup>3</sup> *Linard v. Crossland*, 10 Tex. 462; 60 Am. Dec. 213.

<sup>4</sup> *Treman v. Morris*, 9 Ill. App. 237.

<sup>5</sup> *Hall v. Monroe*, 73 Me. 123.

<sup>6</sup> *Trueblood v. Knox*, 73 Ind. 310.

<sup>7</sup> *Sweeney v. Lomme*, 22 Wall. 208; *Cantril v. Babcock*, 11 Col. 143. There is no breach of a replevy bond until after the appropriate special judgment has been entered for the amount of the lien; which amount, when thus fixed, is the eventual condemnation money: *Triest v. Watts*, 58 Ga. 73.

<sup>8</sup> *Woods v. Kessler*, 93 Ind. 356; *Cantril v. Babcock*, 11 Col. 143.

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surety submits himself to the jurisdiction of the court, and is not entitled to notice to defend, but is bound by the judgment against his principal.<sup>1</sup> There is no difference between a judgment confessed and a judgment on a verdict. Sureties on the bond are liable in the one case as in the other. If, however, the judgment confessed includes matters outside the replevin suit, the sureties cannot be held.<sup>2</sup> The obligors are estopped by the recitals of the bond from showing that the property therein alleged to be retained was never in their possession;<sup>3</sup> or from asserting that less property was replevied than is described in the bond.<sup>4</sup> A defense which should have been set up in the principal action cannot first be interposed in an action on the redelivery bond.<sup>5</sup> Obligors in a replevin bond may be held liable, although there were irregularities in the institution or prosecution of the replevin suits, or technical defects in the bond itself.<sup>6</sup> A replevin bond represents the debt, and if the property is lost before trial, judgment will be given on the bond.<sup>7</sup>

Where there is no judgment in a replevin suit, there can be no action on the replevin bond.<sup>8</sup> Where, however, plaintiff dismisses the replevin suit, an action on the bond may be maintained.<sup>9</sup> A condition to prosecute "with effect" is broken by a dismissal of the action.<sup>10</sup> The failure to enter a replevin writ in court and to prosecute the same to judgment, when due service has been

<sup>1</sup> Moore v. Kepner, 7 Neb. 291.  
<sup>2</sup> Bradford v. Frederick, 101 Pa. St. 445.  
<sup>3</sup> Schnaider Brewing Co. v. Niederweiser, 28 Mo. App. 233; Diossy v. Morgan, 74 N. Y. II.  
<sup>4</sup> Knowles v. Lord, 4 Whart. 500; 34 Am. Dec. 525.  
<sup>5</sup> Boyd v. Huffaker, 39 Kan. 525.  
<sup>6</sup> Nichols v. Standish, 48 Conn. 321.  
<sup>7</sup> Epperson v. Van Pelt, 9 Baxt. 73.  
<sup>8</sup> Boyer v. Fowler, 1 Wash. 101.  
<sup>9</sup> Meigs v. Keach, 1 Wash. 305. A dismissal of a replevin suit constitutes a breach of the bond entitling the

obligee to an action for a return of the property or its value, even though the dismissal was ordered on his own motion for defect in the writ: Waddell v. Bradway, 84 Ind. 537.  
<sup>10</sup> Boom v. St. Paul Foundry and Mfg. Co., 33 Minn. 253. A condition of a replevin bond that the writ shall be prosecuted to final judgment is not satisfied by a dismissal of the suit for want of jurisdiction: Pierce v. King, 14 R. I. 611. If the principal in a replevin bond abandons the suit, the surety may be permitted to prosecute it for his own protection: Hoffman v. Steinau, 34 Hun, 239.

made upon the defendant, constitutes a breach of the replevin bond.<sup>1</sup> So after the dismissal of a replevin suit, the failure to return the property in accordance with the judgment of the court is a breach of the replevin bond.<sup>2</sup> But the object of a replevin bond is indemnity. Where the only breach is of the condition to prosecute the replevin suit to effect, actual damage must be shown in an action on the bond, to justify a recovery of more than nominal damages.<sup>3</sup> A statutory replevin bond, though conditioned on the prosecution of the suit to effect, and the return of the property in case judgment is rendered for defendant, supports an action only when the writ of return, or other execution, issued in defendant's favor, has been returned unsatisfied; and the fact that the replevin suit abated does not, under the statute, give the right to sue on the bond, even though plaintiff retains the property. The surety's liability is fixed by the statute, and cannot be enlarged.<sup>4</sup> After a replevin suit is compromised and settled by the parties, no suit can be maintained on the bond.<sup>5</sup> A surety is liable for the damages and costs of the suit, as well as for the return of the property.<sup>6</sup> If the return upon a replevin writ does not state precisely what property is thereby replevied, the sureties on the replevin bond are not liable to return what was not taken.<sup>7</sup> For the plaintiff's non-prosecution to final judgment, the defendant in replevin may have judgment for nominal damages in an action on the bond, even if he had no lawful title in the replevied property.<sup>8</sup> Upon the condition in the bond to prosecute the suit to effect, and without delay, damages for detention of the property, pending the replevin suit, and before judgment for return was given, cannot be recovered unless they were awarded in the replevin suit.<sup>9</sup> The sureties are lia-

<sup>1</sup> Jones v. Smith, 79 Me. 452.

<sup>2</sup> Schweer v. Schwabacher, 17 Ill. App. 78.

<sup>3</sup> Imel v. Van Deren, 8 Col. 90.

<sup>4</sup> Scott v. Scott, 50 Mich. 372.

<sup>5</sup> Gerard v. Dill, 96 Ind. 101.

<sup>6</sup> Morrill v. Daniel, 47 Ark. 316.

<sup>7</sup> Miller v. Moses, 56 Me. 128.

<sup>8</sup> Smith v. Whiting, 100 Mass. 122.

<sup>9</sup> Sopris v. Lilley, 2 Col. 496.

ble only for the value of the property not forthcoming on demand; and an execution cannot issue against them for a greater amount than their bond.<sup>1</sup> Although a statute requires the jury, in a replevin suit, to assess the value of the property, the failure of the jury so to do does not affect the right of plaintiff in a suit on the replevin bond to prove the value and damage, where a return of the property is not made as ordered.<sup>2</sup> Upon the condition in the bond to return the property replevied, if return thereof shall be awarded, in the absence of evidence showing the value of such property and the value of its use since judgment was given in the replevin suit, only nominal damages can be allowed.<sup>3</sup> When the bond recites the gross value of the property replevied, such recital may be evidence of the value of all the articles mentioned collectively.<sup>4</sup> But if a portion of the property has been returned to the sheriff, according to the condition of the bond, such recital affords no evidence of the value of the remainder which has not been returned.<sup>5</sup>

The recital in the bond of the value of the property is sufficient evidence of the value, in an action on the bond, and estops the plaintiff and his sureties from denying the same.<sup>6</sup> The defendant in replevin should, upon the bond, recover no more than his legal damages, which depend upon the nature of his right to the property, or the character in which he held it. If he had merely a possessory or partial interest in the property, and was in no position to hold the entire interest for some one else, then he should not recover the full value.<sup>7</sup> The measure of damages, if the value of the property taken is greater at the time of the order for a return than at the time of the replevin, is the value at the time of the order for a return.<sup>8</sup> The measure of damages

<sup>1</sup> *Miles v. Davis*, 36 Tex. 690.

<sup>2</sup> *Yelton v. Slinkard*, 85 Ind. 190.

<sup>3</sup> *Sopris v. Lilley*, 2 Col. 496.

<sup>4</sup> *Sopris v. Lilley*, 2 Col. 496.

<sup>5</sup> *Sopris v. Lilley*, 2 Col. 496.

<sup>6</sup> *Wiseman v. Lynn*, 39 Ind. 250.

<sup>7</sup> *Pearl v. Garlock*, 61 Mich. 419; 1 Am. St. Rep. 603.

<sup>8</sup> *Treman v. Morris*, 9 Ill. App. 237.



in an action on the bond is the amount of the judgment recovered in the replevin suit when a return of the property is waived and a judgment for its value obtained in accordance with the statute; and the damages cannot be reduced by showing that the plaintiff, in the action on the bond, was but a part owner of the property.<sup>1</sup> An action on a replevin bond cannot be maintained by one neither a party to the replevin suit nor an obligee in the bond.<sup>2</sup> A judgment for damages against the officer in a replevin suit is no bar to an action on the indemnifying bond.<sup>3</sup> The statutory bond in a replevin proceeding is no protection to the officer against the claims of persons having no interest in the controversy. The officer seizing the property of a stranger, and delivering it to the plaintiff, does so at his peril.<sup>4</sup> In a suit on the bond, evidence is admissible to show that the plaintiff has received the value of the property replevied, and therefore is entitled to less damages.<sup>5</sup> So the sureties may show that the principal owned the property, notwithstanding that, in the replevin suit, there was judgment for a return.<sup>6</sup>

ILLUSTRATIONS. — A replevin suit was discontinued by the plaintiff; the defendant took judgment for a return of the property, and issued an execution, which was returned unsatisfied. In a suit on the replevin bond for failure to return, *held*, that the defendants were entitled to show that the principal defendant (plaintiff in the replevin suit) was the owner of the property at the time it was replevied, and was still such owner: *Pearl v. Garlock*, 61 Mich. 419; 1 Am. St. Rep. 603. The plaintiff gave a bond conditioned to pay the damages and to return the property in as good condition as when taken. Judgment went against him, and he paid the damages awarded by the verdict, but did not return the property. In an action on the bond, *held*, that the obligee was entitled to recover the amount found by the jury in the replevin suit to have been the value of the

<sup>1</sup> *Williams v. Vail*, 9 Mich. 162; 80 Am. Dec. 76.

<sup>2</sup> *Pipher v. Johnson*, 108 Ind. 401.

<sup>3</sup> *McAllister v. Clopton*, 60 Miss. 207.

<sup>4</sup> *Dowell v. Taylor*, 2 Mo. App. 329.

<sup>5</sup> *Vinton v. Mansfield*, 48 Conn. 474.

<sup>6</sup> *Pearl v. Garlock*, 61 Mich. 419; 1 Am. St. Rep. 603.

property when taken, with interest from the date of the verdict in that suit; that the obligor could not show the value to be less than as stated in the replevin writ and bond, but that the obligee could show the value to be more; and that the finding of the value by the jury in the replevin suit concluded the obligor: *Washington Ice Co. v. Webster*, 125 U. S. 426. Defendants executed a bond for the purpose of procuring a writ of replevin, which bond a justice of the peace approved, and thereupon issued a writ of replevin for certain property in plaintiff's possession, and which he claimed to own. The property was taken under the writ. The value of the property exceeded the amount for which the justice of the peace had jurisdiction, and on the hearing of the cause the justice dismissed the proceedings on that ground, and directed a return of the property to the plaintiff. The defendants refusing to return the property, this action was brought upon the bond. *Held*, that the justice not having jurisdiction of the subject-matter, the bond was void, and no action could be maintained thereon, and that the defendants were not estopped by the recitals in the bond: *Caffrey v. Dudgeon*, 38 Ind. 512; 10 Am. Rep. 126.

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## PART VI.—TRESPASS AND TROVER.

## CHAPTER CLXXXII.

## TRESPASS AND TROVER.

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§ 3655. **Trespass Defined — What is.** — A trespass to property is the unlawful disturbance by force of its possession.<sup>1</sup> Laying hold of, removing, or carrying away

<sup>1</sup> Cooley on Torts, 436; State v. Fearman, Phill. (N. C.) 371. The action of case as distinguished from trespass lies at common law, where the

the goods of another is a trespass;<sup>1</sup> as a mere levy upon personal property, by an officer, where it is not authorized by law, without either a sale or a removal;<sup>2</sup> or the wanton and unnecessary destruction of the property of another in removing obstructions from the highway;<sup>3</sup> or refusing to give up property placed in another's hands for safe-keeping or other purposes.<sup>4</sup> Actual forcible dis-

injury was the secondary and not the direct result of the act. "As regards the directness of the injury which will distinguish a case in trespass from one in which the remedy must be sought on the special case, there seems to be no better test than this: that if the unlawful force caused the injury before it was spent, this injury must be deemed direct; but if, after the unlawful force was spent, the injury occurred as a collateral or secondary consequence, it is to be considered indirect. Thus where one was injured by the throwing of a lighted squib into a crowd, which only reached him after several persons, in self-protection, had repelled it from themselves, this was a trespass, because the plaintiff was injured as a direct consequence of the unlawful act, and before its force was spent. So it is a trespass if one injure another in the careless handling of fire-arms. So 'if a man throws a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case, because it is only prejudicial in consequence, for which originally I could have no action at all.' So it is a trespass if one turn a stream upon his neighbor's land by carrying a ditch over the line; but if he only set up a spout on other lands, which may carry water there when it rains, or a dam, which may turn it there, the injury, when it comes, will arise on the special case. So if one carelessly drives against another, this is a trespass; but if his servant is guilty of the like want of care, the action should be case. So though one of several stage proprietors, who is himself driving the coach, might be sued in trespass for carelessly driving against the

plaintiff and injuring him, yet if other proprietors are sued with him who were not personally connected with the force the action must be case": *Cooley on Torts*, 439; *Cate v. Cate*, 50 N. H. 144; 9 Am. Rep. 179; *Percival v. Hickey*, 18 Johns. 257; 9 Am. Dec. 210; *Dodson v. Mock*, 4 Dev. & B. 146; 32 Am. Dec. 677; *Waterman v. Hill*, 17 Vt. 128; 42 Am. Dec. 484; *Jordan v. Wyatt*, 4 Gratt. 151; 47 Am. Dec. 720; *Holly v. Boston Gas Co.*, 8 Gray, 123; 69 Am. Dec. 233.

<sup>1</sup> *Ely v. Ehle*, 3 N. Y. 506; *Parker v. Hall*, 55 Me. 362; *Erisman v. Waters*, 26 Pa. St. 467. One who after lawfully entering on premises carefully removes property there situated, and so leaves it that the owner, by exercising reasonable diligence, can take it uninjured, is not liable for injuries sustained to it by the owner's unreasonable delay in taking it: *United States Mfg. Co. v. Stevens*, 52 Mich. 330. Trespass will not lie to recover damages for the removal by defendant from his own land of saw-logs which had been deposited there by plaintiff, under an agreement with defendant that plaintiff should remove them by a certain time, he having failed, after notice, to do so: *Knapp v. Hortung*, 103 Pa. St. 400.

<sup>2</sup> *Stewart v. Wells*, 6 Barb. 79; *Gibbs v. Chase*, 10 Mass. 125; *Robinson v. Mansfield*, 13 Pick. 139; *Miller v. Baker*, 1 Met. 27; *Stevens v. Somerindyke*, 4 E. D. Smith, 418; *Welsh v. Bell*, 32 Pa. St. 12.

<sup>3</sup> *Beardslee v. French*, 7 Conn. 125.

<sup>4</sup> *Hurd v. West*, 7 Cow. 752. Taking a bill of sale as security for a contract which the taker then intended not to carry out is a fraud, and taking possession of the goods under it as much a trespass as if the bill had never passed: *Butler v. Collins*, 12 Cal. 457.

possession is not necessary; any unlawful interference with the property or exercise of dominion over it by which the owner is damaged is sufficient.<sup>1</sup>

§ 3656. **Degree of Force Immaterial.**—The degree of force used is immaterial.<sup>2</sup> Any interference, however slight, which unlawfully disturbs another in the enjoyment of his property is a trespass,<sup>3</sup> even without a manual seizing.<sup>4</sup> If one's horse is hitched where he had a right to hitch him, it is a trespass if another, without permission, unhitches and removes him to another post, however near.<sup>5</sup> It is a trespass for a sheriff to levy on another's property, taking a receipt and inventory to prevent its removal.<sup>6</sup> Where, on a highway, one purposely starts his horse up while another is attempting to pass him, thus bringing about a collision, the one so starting his horses is liable in trespass.<sup>7</sup>

§ 3657. **Who has and has not a "Possession."**—The owner of the property in his possession has, of course, a possession in it sufficient to maintain the action,<sup>8</sup> or if he has a right to take it;<sup>9</sup> so has a mortgagee,<sup>10</sup> an agister,<sup>11</sup> a bailee,<sup>12</sup> even without compensation for the keeping,<sup>13</sup> or a guardian, of infant's lands.<sup>14</sup> So one who has possession

<sup>1</sup> Phillips v. Hall, 8 Wend. 610; 24 Am. Dec. 108; Dexter v. Cole, 6 Wis. 319; 70 Am. Dec. 465; Hardy v. Clendenning, 25 Ark. 436.

<sup>2</sup> Cooley on Torts, 439.

<sup>3</sup> Rand v. Sargent, 23 Me. 326; 39 Am. Dec. 625; Brittain v. McKay, 1 Ired. 265; 35 Am. Dec. 738.

<sup>4</sup> Haythorn v. Rushforth, 19 N. J. L. 160; 38 Am. Dec. 540.

<sup>5</sup> Bruch v. Carter, 32 N. J. L. 554. But see Gilman v. Emery, 54 Me. 460.

<sup>6</sup> Fonda v. Van Horne, 15 Wend. 631; 30 Am. Dec. 77.

<sup>7</sup> Pigott v. Engle, 60 Mich. 221.

<sup>8</sup> Cooley on Torts, 436.

<sup>9</sup> Edwards v. Edwards, 11 Vt. 587; 34 Am. Dec. 711. One who has paid for goods with his own money, though he shipped in another's name, and is

himself only occasionally in his store, conducting his business by clerks, is the real possessor in whose name trespass for wrongful seizure of the goods must be brought: Willis v. Hudson, 63 Tex. 678.

<sup>10</sup> Cooley on Torts, 430; Woodruff v. Halsey, 8 Pick. 333; 19 Am. Dec. 329.

<sup>11</sup> Bass v. Pierce, 16 Barb. 595.

<sup>12</sup> Cooley on Torts, 436. Where the owner of a chattel agrees to leave it in the hands of a bailee "until called for," he can maintain trespass therefor against a wrong-doer without proving that he has "called for" it: Staples v. Smith, 48 Me. 470.

<sup>13</sup> Faulkner v. Brown, 13 Wend. 63; Cowing v. Snow, 11 Mass. 415.

<sup>14</sup> Truss v. Old, 6 Rand. 556; 18 Am. Dec. 748.

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merely for one in possession has a good title against all the world except the true owner.<sup>1</sup> An officer has, by virtue of an attachment on mesne process or seizure on execution sufficient property to maintain trespass.<sup>2</sup> But a mere servant in possession of his master's goods has not such a special property as gives him a right of action.<sup>3</sup> One for whom a wagon has been manufactured in pursuance of a contract has not such a title to it as will support an action of trespass, until there has been an express or implied delivery and acceptance of it.<sup>4</sup> Where one willfully sets fire to and burns wheat brought to a machine to be thrashed, the owner of the machine may, in an action of trespass, recover from him the value of the wheat destroyed.<sup>5</sup> A party who plants oysters in navigable waters opposite to the land of another person does not thereby acquire such a possession of them as will enable him to maintain trespass against the owner of the adjacent land who takes them away.<sup>6</sup> A tree standing directly upon the line between adjoining owners is the common property of both parties, and trespass will lie if one cuts and destroys it without the consent of the other.<sup>7</sup> Trespass by him who has a special property in goods will lie against him who has the general property.<sup>8</sup>

<sup>1</sup> *Armory v. Delamirie*, 1 Strange, 505; *Sickles v. Gould*, 51 How. Pr. 22; *Bruch v. Blanchard*, 19 Ill. 31; *Scott v. Bryson*, 74 Ill. 420; *Carson v. Prater*, 6 Cold. 565; *Potter v. Washburn*, 13 Vt. 558; 37 Am. Dec. 615; *Brown v. Ware*, 25 Me. 411; *Lumbert v. Feun*, 32 Conn. 158; *Roberts v. Wentworth*, 5 Cush. 192; *Beecher v. Crouse*, 19 Wend. 306; *Hyde v. Stone*, 7 Wend. 354; 22 Am. Dec. 582; *Faulkner v. Brown*, 13 Wend. 63; *Squire v. Hollenbeck*, 9 Pick. 551; 20 Am. Dec. 506; *Barron v. Cobleigh*, 11 N. H. 557; 35 Am. Dec. 505; *Chandler v. Walker*, 21 N. H. 282; 53 Am. Dec. 202; *Linard v. Crossland*, 10 Tex. 462; 60 Am. Dec. 213; *Hutchinson v. Lord*, 1 Wis. 286; 60 Am. Dec. 381; *Ware v. Collins*, 35 Miss. 223; 72 Am. Dec. 122; *Wuslland v. Potterfield*, 9 W.

Va. 438; *Miller v. Clay*, 57 Ala. 162; *Wheeler v. Lawson*, 103 N. Y. 40.

<sup>2</sup> *Brownell v. Manchester*, 1 Pick. 232. See *Bond v. Padelford*, 13 Mass. 394; *Barker v. Miller*, 6 Johns. 195; *Trovillo v. Tilford*, 6 Watts, 468. But the creditor or the officer's receiptor has not: *Ladd v. North*, 2 Mass. 514. See *Bond v. Padelford*, 13 Mass. 394.

<sup>3</sup> *Faulkner v. Brown*, 13 Wend. 63; *Tuthill v. Wheeler*, 6 Barb. 362.

<sup>4</sup> *Ledbetter v. Blassingame*, 31 Ala. 495.

<sup>5</sup> *Ripley v. Miller*, 1 Jones, 479; 62 Am. Dec. 177.

<sup>6</sup> *Brinckerhoff v. Starkins*, 11 Barb. 248.

<sup>7</sup> *Griffin v. Bixby*, 12 N. H. 454; 37 Am. Dec. 225.

<sup>8</sup> *Burdick v. Murray*, 3 Vt. 302; 21 Am. Dec. 583.

It is not a trespass which consists merely in some wrong done to property by one to whom, for any purpose, the possession has been transferred by the owner, and who at the time of the wrong was lawfully holding it.<sup>1</sup> But a possession obtained by fraud and for the very purpose of the wrong is not a lawful possession, and an injury by force, while it continues, is a trespass on the possession of the owner.<sup>2</sup>

ILLUSTRATIONS. — A caught up a mare and colt, which were straying, and kept them for a year and more, and worked the mare, and the mare was shot dead by the defendant. *Held*, that A's possession was sufficient to maintain trespass: *Boston v. Neat*, 12 Mo. 125. A sheriff had seized, on execution against the plaintiff's agent, flour in the possession of the latter, made from wheat purchased with the plaintiff's money, and manufactured and set apart for him by his agent. *Held*, that the plaintiff had such a right to immediate possession of the flour as would enable him to maintain an action of trespass: *Thomas v. Snyder*, 23 Pa. St. 515. A agreed to furnish B with a machine, to be put up by A in the mill of B, B to cart the machine to his mill, and if B was satisfied with the way it worked, to pay for it, otherwise A to take it away; and, before it was entirely put up, it was tried and did not work satisfactorily. *Held*, that A had possession sufficiently to maintain trespass against the officer attaching the machine, as the property of B, on the day of the trial: *Phelps v. Willard*, 16 Pick. 29. An infant hired a chaise without the knowledge of his father, and the father afterwards ratified the act by directing the infant to pay the hire out of his wages, which belonged to the father. *Held*, that the father had such a special property in the chaise as would enable him to maintain trespass for an injury done it during the term of hire: *Boynston v. Turner*, 13 Mass. 391. A sheriff made a levy on personal property of A, and left it in the possession of two other persons, taking from them a paper under seal, by which they acknowledged the receipt of the property, agreed to deliver it at a specified time and place, and, on failure thereof, authorized a confession of judgment against them for the amount of the debt and costs in the suit, and the cost of the writ. *Held*, that trespass would not lie by the sheriff against A

<sup>1</sup> *Furlong v. Bartlett*, 21 Pick. 401; *Bradley v. Davis*, 14 Me. 44; 30 Am. Dec. 729. Where an officer, on a writ against A, seizes B's property, and B's agent regains possession of it without

a breach of the peace, the officer cannot maintain trespass: *Burt v. Blake*, 14 Ill. App. 324.

<sup>2</sup> *Butler v. Collins*, 12 Cal. 457.

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for taking away the property before the time for delivery had expired: *Lewis v. Carshaw*, 15 Pa. St. 31. Two persons cultivated a crop of corn in a field to which each claimed but neither had a title, and of which neither had the actual possession, and one of them afterwards gathered the corn, piled it in heaps, and left it for a week. *Held*, that he did not thereby acquire such an exclusive possession of the corn as to enable him to maintain an action against the other for removing it: *McGahey v. Moore*, 3 Ired. 35. Nine arches of bricks were assigned as collateral security, but were neither separated from the rest nor specifically designated, and the assignor, by subsequent sales, reduced the number of arches, and the remaining bricks were attached by another creditor. *Held*, that the assignee took no property in the bricks, and could not maintain trespass against the attaching officer: *Merrill v. Hunnewell*, 13 Pick. 213.

§ 3658. **Constructive Possession.**—And there may be a constructive possession. Thus the owner of goods in the hands of another, with a right to resume possession on demand, has such a constructive possession as to entitle him to maintain an action against a trespasser.<sup>1</sup> Where the property is in the actual custody of no one, plaintiff's right to the property will draw the possession with it.<sup>2</sup> So of the owner of a lost chattel while in the hands of a finder.<sup>3</sup> So where one cuts wood on another's land, he has, as to all third persons, the possession of the wood cut, and may bring suits as possessor against intermeddlers; but if he has cut without right, the wood belongs to the owner of the land, and is considered in possession.<sup>4</sup> But he has no such right when the goods are placed in the hands of another for a certain time, and he cannot compel their redelivery before its expiration.<sup>5</sup>

<sup>1</sup> *Overby v. McGee*, 15 Ark. 459; 63 Am. Dec. 49; *White v. Brantley*, 37 Ala. 430; *Staples v. Smith*, 48 Me. 470; *Strong v. Adams*, 30 Vt. 221; 73 Am. Dec. 305; *White v. Webb*, 15 Conn. 302; *Carson v. Noblet*, 1 Car. Law Rep. 522; 6 Am. Dec. 554; *Orser v. Storms*, 9 Cow. 687; 18 Am. Dec. 543; *Buck v. Aiken*, 1 Wend. 466; 19 Am. Dec. 535; *Root v. Chandler*, 10 Wend. 110; 25 Am. Dec. 546; *Haythorn v. Rushforth*, 19 N. J. L. 160; 38 Am. Dec. 540. See note to *Orser v. Storms*, 18 Am. Dec. 547-560.

<sup>2</sup> *More v. Perry*, 61 Mo. 174.

<sup>3</sup> *Armory v. Delamirie*, 1 Strange, 505; *Oxley v. Watts*, 1 Term Rep. 12; *Clark v. Maloney*, 3 Harr. (Del.) 68.

<sup>4</sup> *Ward v. Andrews*, 2 Chit. 636; *Bulkley v. Dolbeare*, 7 Conn. 232.

<sup>5</sup> *Putnam v. Wiley*, 8 Johns. 432; 5 Am. Dec. 347.



ILLUSTRATIONS.—A had placed goods with an auctioneer for sale, reserving for himself the right to resume possession at his pleasure, the auctioneer not having any claim or charge upon such goods. *Held*, that A had a right of action in trespass against a sheriff for making a levy upon those goods as the property of another, the sheriff having been notified of the facts before the levy: *Gauche v. Mayer*, 27 Ill. 134. Plaintiffs loaned money to a manufacturing corporation, and entered into a contract with them to make further advances, to act as selling agents, and were to have the right at their option, upon breach of agreement by the corporation, "to take possession of the factory, machinery, etc., and to run the factory at the risk and for the account of the corporation till they [the plaintiffs] were paid," and at the same time took a mortgage on the same property, which gave them the same power. They afterwards took possession under the power, an agent appointed by vote of the directors delivering up the property to them. The business was then carried on by the plaintiffs until part of the property was attached in behalf of a creditor of the corporation, when they brought trespass against the officer for making the attachment. *Held*, that the plaintiffs were not to be considered as the mere agents of the corporation, and that their possession was coupled with an interest of which they could not be deprived without payment of their just claims against the corporation, and that the action could be maintained: *Howe v. Keeler*, 27 Conn. 538. A sleigh in an unfinished state was in the shop of a painter, who was to finish it by a time specified, and the owner of the sleigh went to the shop with the plaintiff, and there sold the sleigh to the plaintiff at a price agreed upon, and no payment was made, and the sleigh was not then actually delivered to the plaintiff, but it was agreed that it should be when it was finished, and the painter, who was present, was directed so to deliver it when it was finished, and agreed so to do. *Held*, that the plaintiff might maintain trespass against a sheriff who attached and took away the sleigh before it was finished, on a writ of attachment against the vendor: *Willard v. Lull*, 17 Vt. 412.

### § 3659. What Property and Rights the Subject of.—

Any kind of property which the law recognizes as such is the subject of trespass.<sup>1</sup> But not property in which the plaintiff has only a reversionary interest.<sup>2</sup> The disturbance of an incorporeal hereditament is not a trespass.<sup>3</sup>

<sup>1</sup> See *ante*, Titles Personal Property, Real Property.

<sup>2</sup> *Hall v. Pickard*, 3 Camp. 187; *Lunt v. Brown*, 13 Me. 236. Nor can

trover be brought in such case: *Steele v. Williams*, Dud. (S. C.) 16; 31 Am. Dec. 546.

<sup>3</sup> *Cooley on Torts*, 440.

§ 3660. **Accidental Trespass.**—An accidental trespass is not actionable.<sup>1</sup> And trespass cannot be maintained by the owner for property which has strayed onto the land of another.<sup>2</sup> But infringement of the rights of another cannot be justified on the ground that the act is a benefit to the owner, if done against his will.<sup>3</sup>

§ 3361. **Effect of Mistake.**—But if the thing is done purposely, and the injury is the immediate consequence of the act,<sup>4</sup> it is no defense that it was done by mistake,<sup>5</sup> or without a bad intent.<sup>6</sup> Thus where a man goes upon another's land to take away his own sheep, and by mistake takes away some belonging to another person, he is a trespasser.<sup>7</sup>

§ 3662. **Damages.**—In actions of trespass the damages are not always to be measured by the actual cost of the thing injured or destroyed. The whole loss sustained is to be taken into view, and this depends upon its uses, its profits, the particular season or time or occasion of the

<sup>1</sup> See *ante*, Title Torts—Accident; Vincent v. Stinehour, 7 Vt. 62; 29 Am. Dec. 145.

<sup>2</sup> State v. Flowers, 2 Murph. 225.

<sup>3</sup> Tillotson v. Smith, 32 N. H. 90; 64 Am. Dec. 355.

<sup>4</sup> Guille v. Swaa, 19 Johns. 381; 10 Am. Dec. 234; Newsom v. Anderson, 2 Ired. 42; 37 Am. Dec. 406.

<sup>5</sup> Cooley on Torts, 438; Higginson v. York, 5 Mass. 341; Dexter v. Cole, 6 Wis. 319; 70 Am. Dec. 465.

<sup>6</sup> Bruch v. Carter, 32 N. J. L. 554; Hobart v. Hagget, 12 Me. 67; 28 Am. Dec. 159; Humphreys v. Douglass, 11 Vt. 22; 34 Am. Dec. 668; Stanley v. Gaylord, 1 Cush. 536; 48 Am. Dec. 643; Gibbons v. Farwell, 63 Mich. 344; 6 Am. St. Rep. 301.

<sup>7</sup> Dexter v. Cole, 6 Wis. 319; 70 Am. Dec. 465; the court saying: "We have no doubt but the action of trespass would lie in this case. In driving off the sheep the defendant in error without doubt unlawfully in-

terfered with the property of Dexter; and it has been frequently decided that to maintain trespass *de bonis asportatis* it was not necessary to prove actual, forcible dispossession of property, but that evidence of any unlawful interference with or exercise of acts of ownership over property, to the exclusion of the owner, would sustain the action: Gibbs v. Chase, 10 Mass. 128; Miller v. Baker, 1 Met. 27; Phillips v. Hall, 8 Wend. 610; 24 Am. Dec. 108; Morgan v. Varick, 8 Wend. 587; Wintringham v. Lafoey, 7 Cow. 735; Reynolds v. Shuler, 5 Cow. 325; 1 Chit. Pl., 11th Am. ed., 170, and cases cited in the notes. Neither is it necessary to prove that the act was done with a wrongful intent, it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake: 2 Greenl. Ev., sec. 622; Guille v. Swan, 19 Johns. 381; 10 Am. Dec. 234."

injury done, and the benefits or advantages lost thereby.<sup>1</sup> The measure of damages in an action of trespass for breaking plaintiff's close and taking away his goods and chattels is the value of the goods, together with the incidental damages.<sup>2</sup> The measure in an action of trespass for taking and selling the personal property of one person under an execution against another is the value of the owner's interest in the property sold,<sup>3</sup> with interest to the time of the trial.<sup>4</sup> In trespass for taking a chattel the plaintiff may recover both the value of the property and damages for the violence used.<sup>5</sup> But unless the value of the goods at the time is proved, only nominal damages can be recovered.<sup>6</sup> The owner of property sold under illegal process, purchasing the same at such sale, either personally or by his agent, can recover only the amount of his bid and interest thereon in trespass for the unlawful taking.<sup>7</sup> In an action for trespass in wrongfully carrying away plaintiff's mule and mare while he was engaged in farming, damages resulting to his farming operations therefrom is too remote.<sup>8</sup> Exemplary damages are properly given where the injury was accompanied with fraud, malice, oppression, or other aggravating circumstances.<sup>9</sup> If a defendant in trespass has returned the goods taken, he may show, in mitigation of damages, the actual subsequent benefit derived from the goods by the plaintiff. If they were afterwards taken on execution against the plaintiff, the law will presume his assent to the sale thereunder to the extent of the proceeds as for his benefit.<sup>10</sup> In trespass for taking away personal property, a judgment in replevin

<sup>1</sup> *Post v. Munn*, 4 N. J. L. 61; 7 Am. Dec. 570; *Coolidge v. Choate*, 11 Met. 79.

<sup>2</sup> *Woolley v. Carter*, 7 N. J. L. 85; 11 Am. Dec. 520.

<sup>3</sup> *Rose v. Story*, 1 Pa. St. 190; 44 Ar. Dec. 121.

<sup>4</sup> *Walker v. Borland*, 21 Mo. 281.

<sup>5</sup> *Hite v. Long*, 6 Rand. 457; 18 Am. Dec. 720.

<sup>6</sup> *Niemetz v. Ass'n*, 5 Mo. App. 59.

<sup>7</sup> *Baker v. Freeman*, 9 Wead. 36; 24 Am. Dec. 117.

<sup>8</sup> *Street v. Sinclair*, 71 Ala. 110.

<sup>9</sup> *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384; 27 Am. Dec. 682; *Milburn v. Beach*, 14 Mo. 104; 55 Am. Dec. 91; *Wylie v. Smitherman*, 8 Ired. 236.

See note in 27 Am. Dec. 685-689.

<sup>10</sup> *Clark v. Bates*, 1 Dak. Ter. 42.

may be shown in mitigation of damages.<sup>1</sup> Statutes giving treble damages for trespass on timber-lands have generally been construed to cover cases only of willful and intentional trespasses. If done by mistake or accident, only the actual damage suffered is recoverable.<sup>2</sup> Under the codes abolishing distinctions in forms as to trespass, all damages therefrom may be recovered in one action.<sup>3</sup>

§ 3663. **Trover—Distinguished from Trespass.**—The action of trover lies by any person having a general or special property in goods against any person wrongfully withholding them from his possession.<sup>4</sup> The distinction between the action of trover and trespass is this: in trespass there is always either an original wrongful taking, or a taking made wrongful *ab initio* by subsequent misconduct,<sup>5</sup> while in trover the original taking is supposed or assumed to be lawful, and often the only wrong consists in a refusal to surrender a possession which was originally rightful, but the right to which has terminated.<sup>6</sup> Whenever trespass will lie for taking goods, trover may be maintained.<sup>7</sup> To sustain an action of trover, it is sufficient to show a wrongful assumption of dominion by the defendant over the plaintiff's property, and in violation of the plaintiff's rights.<sup>8</sup> So trespass lies for any wrongful force, but the wrongful force is no conversion where it is employed in recognition of the

<sup>1</sup> Briggs v. Milburn, 40 Mich. 512.

<sup>2</sup> Batchelder v. Kelly, 10 N. H. 436; 34 Am. Dec. 174; Barnes v. Jones, 51 Cal. 303; Cohn v. Neeves, 40 Wis. 401; Morrison v. Bedell, 22 N. H. 237; Whitcroft v. Vandever, 12 Ill. 335; Perkins v. Hackelman, 26 Miss. 41; 59 Am. Dec. 243; Russell v. Irby, 13 Ala. 131.

<sup>3</sup> Clark v. Bates, 1 Dak. Ter. 42.

<sup>4</sup> "In form the action is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and

has been brought in many cases, where, in truth, the defendant has got the possession lawfully. Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten"; Cooper v. Chitty, 1 Burr. 31.

<sup>5</sup> Van Brunt v. Schenck, 11 Johns. 377; Parker v. Walrod, 13 Wend. 296; 16 Wend. 514; 30 Am. Dec. 124; Bradley v. Davis, 14 Me. 44; 30 Am. Dec. 729.

<sup>6</sup> Cooley on Torts, 442.

<sup>7</sup> Ireland v. Horseman, 65 Mo. 511.

<sup>8</sup> Donahue v. Shippee, 15 R. I. 453.

owner's right, and with no purpose to deprive him of his right, temporarily or permanently. Thus if one take up the beast of another, in order to prevent his straying away, and afterwards turns him out again, he may be liable in trespass for so doing, but his act is no conversion, because the owner's dominion is not disputed, and the intent to make a wrongful appropriation is absent.<sup>1</sup> One cannot carve two suits out of one cause of action. Therefore, when the plaintiff's team was stopped by the defendant, and a horse taken therefrom, it was held that the plaintiff could not bring trover for the horse taken, and trespass for stopping the team and delaying his journey, because it was all one act.<sup>2</sup> So one cannot recover in trover, although there has been technical conversion, if his real and substantial claim is merely to recover damages for the breach of an illegal contract.<sup>3</sup> Trover is a transitory action, and lies for conversion of personal property in a foreign jurisdiction.<sup>4</sup>

When property has been wrongfully taken and converted, and the owner brings *assumpsit*, though either trespass or trover would lie also, he not only waives all right to recover damages for the tortious taking and conversion of the property, but he subjects himself to the consequences of having his demand considered as a debt, against which the defendant may set off any counter-demand he may have against the plaintiff.<sup>5</sup> If trespass be brought in such a case, the plaintiff may recover as well the value of the property as damages for the tortious taking and malicious conversion of it; and the measure of damages is for the jury, under the facts as developed by the evidence. But if, out of the three forms of action thus open to him, the plaintiff selects trover, his recovery will

<sup>1</sup> Cooley on Torts, 442; Wilson v. McLaughlin, 107 Mass. 587.

<sup>2</sup> Hite v. Long, 6 Rand. 457; 18 Am. Dec. 720.

<sup>3</sup> Woodman v. Hubbard, 25 N. H. 67; 57 Am. Dec. 310.

<sup>4</sup> Whidden v. Seelye, 40 Me. 247; 63 Am. Dec. 662.

<sup>5</sup> Garrison v. Bryant, 10 Phila. 474.

generally be limited within the ordinary scope of that action, namely, the value of the property at the time of its conversion, with interest, though when its value has in some way been enhanced by the wrong-doer, if its identity has been preserved, the damages may be increased to correspond with such enhanced value and interest.<sup>1</sup> The place of the taking is the place of conversion; the refusal of the taker to deliver, on demand made in another jurisdiction, is not a new conversion. He is only liable for the value at the place of conversion, and interest, unless the case calls for exemplary damages.<sup>2</sup>

ILLUSTRATIONS. — One who had purchased lands, converted to his own use, without knowledge of the true ownership, certain fence-rails which had been borrowed and placed upon the land by a tenant of the land under the vendor. *Held*, that the remedy of the true owner of the rails was (after demand and refusal) by action of trover, not trespass: *Ogden v. Lucas*, 48 Ill. 492. The complaint alleged that on, etc., defendant broke and entered upon plaintiff's farm, and took from his possession certain personal property of the plaintiff, carried it away, and converted it to his own use. *Held*, an action *de bonis asportatis*, and not of trover: *Grafton v. Carmichael*, 48 Wis. 660. Trover was brought by a railroad company against an oil-refiner who had converted to his use three unmarked cars of oil left, by the plaintiff's mistake, on the side-track of his refinery. *Held*, that he might prove in defense that he so converted the oil unwittingly, and that he was at that time entitled to receive from the plaintiffs three car-loads of oil: *Waring v. R. R. Co.*, 76 Pa. St. 491.

§ 3664. Possession Alone Sufficient — Defendant cannot Dispute Plaintiff's Title. — Possession alone is sufficient to enable one to bring trover; the defendant cannot defend by showing that the title to the chattels is in a third person.<sup>3</sup> By showing that property in his posses-

<sup>1</sup> *Garrison v. Bryant*, 10 Phila. 474.

<sup>2</sup> *Ward v. Wood Co.*, 13 Nev. 44.

<sup>3</sup> *Daniels v. Ball*, 11 Wend. 57; *Duncan v. Spear*, 11 Wend. 54; *Bartlett v. Hoyt*, 29 N. H. 317; *Knapp v. Winchester*, 11 Vt. 351; *Carter v. Bennett*, 4 Fla. 283, 355; *Burke v. Savage*, 13

*Allen*, 408; *Hubbard v. Lyman*, 8 Allen, 520; *Magee v. Scott*, 9 Cush. 148; 55 Am. Dec. 49; *Cook v. Patterson*, 35 Ala. 102; *Vining v. Baker*, 53 Me. 544; *Coffin v. Anderson*, 4 Blackf. 395; *Ingersoll v. Emerson*, 1 Ind. 76; *O'Brien v. Hilburn*, 22 Tex. 616; *Rogers*

sion at the time taken from him, he shows *prima facie* a right to sue.<sup>1</sup> To authorize a recovery in an action of trover, it is only essential that the plaintiff should prove either a general or special property in himself.<sup>2</sup> One has sufficient property to maintain trover when he is part owner of the property converted and has the possession and complete control of all of it.<sup>3</sup> A person who is entitled to the temporary possession of a chattel, and delivers it back to the owner for an especial purpose, may, after that purpose is satisfied, and during his temporary right, maintain trover for it against the owner.<sup>4</sup> The right of property draws to it the right of possession, and hence if one's goods are held without right by another, the owner may bring an action against a third person

*v. Arnold*, 12 Wend. 30; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670; *Brown v. Ware*, 25 Me. 411; *Linscott v. Trask*, 35 Me. 150; *Gilson v. Wood*, 20 Ill. 37; *Harrington v. King*, 121 Mass. 160; *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188; *Edwards v. Frank*, 40 Mich. 616; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Stevenson v. Fitzgerald*, 47 Mich. 166; *Skinner v. Pinney*, 19 Fla. 42; 45 Am. Rep. 1; *Grubb v. Guilford*, 4 Watts, 223; 28 Am. Dec. 700; *Jeffries v. R. R. Co.*, 5 El. & B. 802; the court saying: "The law is, that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrong-doer, and cannot defend himself by showing that there was a title in some third person; for against a wrong-doer possession is title. The law is so stated by the very learned annotator in note to *Wilbraham v. Snow*, 2 Wms. Saund. 47 f, and I think it most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrong-doers. . . . It is not disputed that the *jus tertii* cannot be set up as a defense to an action of trespass for disturbing the possession. In this respect I see no difference between trespass and trover; for, in truth, the presumption of law is that the person

who has the possession has the property. Can that presumption be rebutted by evidence that the property was in a third person, when offered as a defense by one who admits that he himself had no title and was a wrong-doer when he converted the goods? I am of opinion that this cannot be done." But there are cases holding that the defendant may defeat a recovery by proving the title to be in a third person: *Clapp v. Glidden*, 39 Me. 448; *Tuthill v. Wheeler*, 6 Barb. 362; *Rotan v. Fletcher*, 15 Johns. 206; *Hostler v. Skull*, Tayl. 152; 1 Am. Dec. 583, and see note pp. 585-589; *Laspeyre v. McFarland*, N. C. Term Rep. 187; 7 Am. Dec. 705; *Buck v. Aikin*, 1 Wend. 466; 19 Am. Dec. 535; *Brazier v. Ansley*, 11 Fred. 12; 51 Am. Dec. 408; *Boyce v. Williams*, 84 N. C. 275; 37 Am. Rep. 618.

<sup>1</sup> *Foster v. Chamberlain*, 41 Ala. 158; *Odiorne v. Colley*, 2 N. H. 66; 9 Am. Dec. 39; *Jones v. Sinclair*, 2 N. H. 319; 9 Am. Dec. 75.

<sup>2</sup> *Kemp v. Thompson*, 17 Ala. 9; *Glaze v. McMillion*, 7 Port. 279; *Traylor v. Horrall*, 4 Blackf. 317; *Barton v. Dunning*, 6 Blackf. 209; *Grady v. Newby*, 6 Blackf. 442; *Hostler v. Skull*, 1 Tayl. 152; 1 Am. Dec. 583; *Slack v. Littlefield*, Harp. 298.

<sup>3</sup> *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508.

<sup>4</sup> *Roberts v. Wyatt*, 2 Taunt. 268.

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who converts them.<sup>1</sup> So the owner of land out of possession may maintain trover for timber cut thereon by one not in actual possession of the premises.<sup>2</sup> So one who enters on unoccupied land, or land under a claim of right, and cuts timber, may maintain trover for its conversion by one showing no right or title to it or to the land.<sup>3</sup> A sheriff has a sufficient property in goods he has levied on to maintain trover.<sup>4</sup> So has a finder, against every one but the true owner.<sup>5</sup> Possessory title in the state of drafts of county treasurers, sent to the state treasury in payment of taxes, is sufficient to maintain an action for conversion against a mere wrong-doer without title.<sup>6</sup> A township may maintain trover against its outgoing treasurer who refuses to pay over.<sup>7</sup> A bailee may maintain trover against a trespasser or wrong-doer.<sup>8</sup> Where the legal title to property is in a trustee, he can maintain trover for its conversion.<sup>9</sup> If one obtains goods fraudulently, and delivers them to an assignee for the benefit of creditors, the seller of the goods may maintain trover against the assignee.<sup>10</sup> One from whose hands property of an estate has been wrongfully taken may bring trover for its recovery against the tortious holder, although there has been no administration.<sup>11</sup> Trover lies at the suit of defendants in replevin for the value of property not found,

<sup>1</sup> Clark v. Rideout, 39 N. H. 238; Eggleston v. Mundy, 4 Mich. 295; Carter v. Kingman, 103 Mass. 518; Gage v. Allison, 1 Brev. 495; 2 Am. Dec. 682; Bird v. Clark, 3 Day, 272; 3 Am. Dec. 269.

<sup>2</sup> Wright v. Guier, 9 Watts, 172; 36 Am. Dec. 108.

<sup>3</sup> Lyon v. Sellow, 34 Hun, 124; Putnam v. Lewis, 133 Mass. 264.

<sup>4</sup> Lockwood v. Bull, 1 Cow. 322; 13 Am. Dec. 539; Brewster v. Vail, 20 N. J. L. 56; 38 Am. Dec. 547; Dezell v. Odell, 3 Hill, 215; 38 Am. Dec. 628. A sheriff having attached personal chattels, a person to whom he delivers them for safe-keeping is merely his servant, having no legal interest in the chattels, and cannot, therefore, main-

tain trover for them; Ludden v. Leavitt, 9 Mass. 104; 6 Am. Dec. 45.

<sup>5</sup> Brandon v. Huntsville Bank, 1 Stew. 320; 18 Am. Dec. 48, and see note pp. 55-59.

<sup>6</sup> People v. Sherwin, 2 Thomp. & C. 528.

<sup>7</sup> Monroe v. Whipple, 56 Mich. 516.

<sup>8</sup> Hollenback v. Todd, 19 Ill. App. 452.

<sup>9</sup> Myers v. Hale, 17 Mo. App. 204; Coleson v. Blanton, 3 Hayw. (Tenn.) 152; Thompson v. Ford, 7 Ired. 418. So beneficiaries entitled to the possession of the trust property may maintain trover; Howard v. Snelling, 28 Ga. 469.

<sup>10</sup> Artman v. Walton, 12 Phila. 442.

<sup>11</sup> Harpes v. Harpes, 62 Ga. 394.



on execution issued in their favor for its return.<sup>1</sup> The appraisement and inventory made by a sheriff in levying execution gives him such special property in the goods as enables him to maintain an action for their conversion.<sup>2</sup> A person to whom a letter sent by mail is addressed may maintain an action of trover in a state court against the postmaster unlawfully refusing to deliver it.<sup>3</sup> A person enjoined from removing property out of the state may maintain trover for a conversion of it.<sup>4</sup> A person who is the owner of a note, although he cannot maintain an action thereon in his own name, may maintain an action of trover in his own name for the conversion of it.<sup>5</sup> A person taking yarn to manufacture into cloth for a commission may have trover for the cloth, although in the possession of a third person, whom he hired to do the work for him.<sup>6</sup> A valid attachment, or seizure on execution, gives the officer, while it lasts, sufficient special property to maintain trover.<sup>7</sup> But the owner cannot sue where he has parted with the possession for a term, under a contract of lease or bailment, and the term has not expired.<sup>8</sup> But *aliter* where they are to be returned on demand.<sup>9</sup> Trover founded on possession can only be defeated when the true owner is known; a mere possibility that such owner will afterwards be discovered will not

<sup>1</sup> Smith v. Demarrais, 39 Mich. 14.

<sup>2</sup> Hargadine v. Ford, 5 Houst. (Del.) 380.

<sup>3</sup> Teal v. Felton, 12 How. 284.

<sup>4</sup> McGowen v. Young, 2 Stew. 276.

<sup>5</sup> Donnell v. Thompson, 13 Ala. 440.

<sup>6</sup> Eaton v. Lynde, 15 Mass. 242.

<sup>7</sup> Brownell v. Manchester, 1 Pick. 232; Caldwell v. Eaton, 5 Mass. 399. See Gibbs v. Chase, 10 Mass. 125; Badlam v. Tucker, 1 Pick. 389; Lockwood v. Bull, 1 Cow. 322. But his keeper merely, or a receptor, cannot maintain it: Ludden v. Leavitt, 9 Mass. 104; Warren v. Leland, 9 Mass. 265; Commonwealth v. Morse, 14

Mass. 217. But see Waterman v. Robinson, 5 Mass. 303; Poole v. Symonds, 1 N. H. 289.

<sup>8</sup> Gordon v. Harper, 7 Term Rep. 9; Wheeler v. Train, 3 Pick. 255, 258; Fairbank v. Phelps, 22 Pick. 535; Caldwell v. Cowan, 9 Yerg. 262; Clark v. Draper, 19 N. H. 419; Forth v. Pursley, 82 Ill. 152; Winship v. Neale, 10 Gray, 382; McGowan v. Chapen, 2 Murph. 61; Hillard v. Dortch, 3 Hawks, 246; Ayer v. Bartlett, 9 Pick. 156; Marshall v. Davis, 1 Wend. 109; 19 Am. Dec. 463; Arthur v. Gayle, 38 Ala. 259; Swift v. Mosely, 10 Vt. 208; 33 Am. Dec. 197.

<sup>9</sup> Poole v. Symonds, 1 N. H. 289; 8 Am. Dec. 71.

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defeat such action.<sup>1</sup> But the right of which he complains he has been deprived must have been either a right actually in possession, or a right immediately to take possession; it is not enough that it be merely a right in action or a right to take possession at some future day;<sup>2</sup> as the right of the owner of a chattel in remainder or reversion.<sup>3</sup> The plaintiff must have a right to property itself, not a mere lien on it; a legal title, or present right to possession.<sup>4</sup> Trover will not lie for a portion purchased of a larger quantity of like property, where, subsequently to the purchase, there has been no further act done to specify and identify the part sold.<sup>5</sup> A mortgagee who assigns his title and records the assignment after the mortgaged property has been attached in an action against the mortgagor cannot afterwards maintain an action against the officer for an unlawful conversion.<sup>6</sup> One who "consigns" goods to another, to be paid for only as they are sold by him, has not such possession or right to immediate possession as will support an action of tort for the conversion of the goods.<sup>7</sup> A claim to timber, based on a merely equitable claim to the land from which it is cut, will not support an action at law for taking and converting the timber.<sup>8</sup> If a chattel is sold and delivered upon condition that it shall be paid for on a certain day, and shall remain the property of the seller until paid for, the seller has not such possession or right to immediate possession as will sup-

<sup>1</sup> Branch v. Morrison, 5 Jones, 16; 69 Am. Dec. 770.

<sup>2</sup> Cooley on Torts, 445; Wilson v. Wilson, 37 Md. 1; 11 Am. Rep. 518; Dudley v. Abner, 52 Ala. 572; Floyd v. Day, 3 Mass. 403; 3 Am. Dec. 171. Creditors to whom goods have been consigned in payment, but who have neither asked for nor accepted such consignment, have no title to such goods, and cannot maintain trover against a third person for their conversion; Gibbons v. Farwell, 58 Mich. 233.

<sup>3</sup> Lewis v. Mobley, 4 Dev. & B. 323; 34 Am. Dec. 379.

<sup>4</sup> Street v. Nelson, 80 Ala. 230. A landlord cannot, by virtue of his lien on his tenant's crops, maintain trover against one who has converted them: Corbitt v. Reynolds, 68 Ala. 378; Anderson v. Bowles, 44 Ark. 108.

<sup>5</sup> Woods v. McGee, 7 Ohio, pt. 2, 127; 30 Am. Dec. 202.

<sup>6</sup> Horne v. Briggs, 98 Mass. 510.

<sup>7</sup> Hardy v. Munroe, 127 Mass. 64.

<sup>8</sup> Northern Pacific R. R. Co. v. Paine, 119 U. S. 561.

port an action of tort in the nature of trover against an officer who has attached the chattel as the property of the purchaser, brought before the day named for payment.<sup>1</sup> The right of a receiver to assets of the estate not actually passed into his possession is not such *jus in re* as will enable him to maintain trover for them without leave of the court.<sup>2</sup>

ILLUSTRATIONS.—PLAINTIFF'S RIGHT SUSTAINED.—Plaintiff raked into heaps manure that had accumulated in the street, the fee of which was in the borough, intending to remove it. Before he could do so, and within twenty-four hours, defendant carted it away. *Held*, that plaintiff could maintain trover: *Haslem v. Lockwood*, 37 Conn. 500; 9 Am. Rep. 350. An action was brought for conversion against an officer who had attached a yacht for a creditor of the seller. The defendant answered that the yacht had been unlawfully purchased by the plaintiff, an inspector of customs, contrary to a statute which provides, under a penalty, that no person in that branch of public service shall "own any vessel, or interest therein." *Held*, no defense; the plaintiff's possession was his title against the officer: *Bliss v. Winslow*, 80 Me. 274; 6 Am. St. Rep. 195. A sold an engine-lathe to B, taking back a mortgage thereof, which contained a covenant for possession by the mortgagor until breach of condition, and delivered the machine to a carrier, to be taken to the town of B's residence; B, on the same day, pledged the machine for a valuable consideration to C, and promised to have it sent to him on its arrival; the next morning C went to the carrier, and directed a teamster to take it home, which he did on the same day; after this order, but before the delivery, A recorded his mortgage; C afterwards sold and delivered the machine to another person, and, on A's demanding it, answered that he had sold it, and did not know where it was, and refused to assist A in finding it. *Held*, that there was sufficient evidence of title in A and conversion by C to support an action of trover: *Chamberlain v. Clemence*, 8 Gray, 389. Defendant leased to plaintiff a farm for one year, and by the contract was to provide a horse for plaintiff to use upon the farm during the term. At the commencement of the term he furnished a horse, but took him away and sold him, before the expiration of the term, without providing another. *Held*, that the plaintiff acquired a special property in the horse by the bailment, and was entitled to recover in an action of trover for the horse so taken away: *Hickok v. Buck*, 22 Vt. 149.

<sup>1</sup> *Newhall v. Kingsbury*, 131 Mass. 445.

<sup>2</sup> *Singerly v. Fox*, 75 Pa. St. 112.

On a contract for the conveyance of land by warranty deed, L. tendered the money to H. for the purpose of procuring the deed, and H. received the money, at the same time handing to L. a quitclaim deed without a revenue stamp, and with no name inserted as grantee, and L. demanded back the money, which H. refused to give back, and L. then went away. *Held*, that L. might maintain trover for the money: *Hinckley v. Lewis*, 45 Ill. 327. A was the lessee of a house and furniture under an agreement by which he was to board the lessor, and let him use the things leased, and to receive at the end of each week a fixed sum of money. *Held*, to have a right to maintain an action against the lessor for taking away the furniture, although he has refused to furnish board, when the lessor failed to pay the sums as stipulated: *Chamberlain v. Neale*, 9 Allen, 410. The owner of beds let them for hire, at a stipulated price by the month, payable in advance, and the hirer, before the expiration of the month for which the last payment was made, abandoned the house in which he used the beds, leaving them there, and sending word to the owner that they were ready for him. *Held*, that the owner thereby became entitled to immediate possession of the beds, and might maintain an action of trover therefor before he received knowledge of the abandonment: *Hardy v. Reed*, 6 Cush. 252. A father, owning certain horses and carriages, put them into the possession of his son, to enable him to earn his livelihood, making no stipulation as to the length of time during which the son should keep the property, and telling him that whenever he (the father) should be put to expense on account of it, he should take it away and sell it. The son established a livery-stable accordingly, paying the expenses himself, and taking the profits to his own use, and on one occasion let a horse and carriage to go to a particular place, but the hirer drove them to another place, where they were attached as the son's property on a writ against him, and the attaching officer refused to give them up when demanded by the father. *Held*, that the father had such a right of possession as entitled him to maintain trover for them against the officer: *Morgan v. Ide*, 8 Cush. 420. A carrier, by an innocent mistake, left a lot of hides at a tannery, and seasonably notified the tanner that they were claimed by another person, but produced no proof of the ownership, and the tanner's servants appropriated them for his benefit. *Held*, that the carrier might maintain trover for their conversion: *Cheshire R. R. Co. v. Foster*, 51 N. H. 490. A landlord was to receive rent in wheat, to be delivered, when thrashed, in the granary. The wheat was levied upon by a creditor of the landlord, while growing, and sold on execution, and a portion of the wheat, when thrashed by the

tenant, was set aside for the landlord. *Held*, that the latter might maintain trover against the purchaser for said portion which had been delivered to his agent: *Koob v. Ammann*, 6 Ill. App. 160. Plaintiff, having two distinct contracts for the delivery of staves at a specified place, to be paid for on delivery, paid for the staves delivered under one contract only, but brought trover for all the staves embraced in both contracts. *Held*, that he might recover for those delivered and paid for: *Haines v. Cochran*, 26 W. Va. 719.

ILLUSTRATIONS (CONTINUED).—PLAINTIFF'S RIGHT NOT SUSTAINED. — A purchased seventy-five out of one hundred tons of hay standing in stacks, no part of the hay being set off or designated, his vendor delivering to him twenty tons. *Held*, that A had no such title to the remainder as would enable him to maintain conversion therefor: *Holmes v. Bailey*, 16 Neb. 300. A party purchased eight out of ten bales of cotton, which was unginned, but when it was ginned, there turned out to be only six bales. *Held*, insufficient title to maintain an action of trover: *Baldwin v. McKay*, 41 Miss. 358. O. had a watch which both he and W. and R. claimed. The watch was left by O. with a jeweler to be repaired. When it was sent for, the jeweler, by mistake, sent another watch to O. W. and R., by possessory warrant against O., got possession of this watch, and, to regain it, O. brought trover against them. *Held*, that he had no title sufficient to maintain his action: *Wallis v. Osteen*, 38 Ga. 250. A bought a melodeon of the plaintiffs, and gave a promissory note for it, with a condition that the melodeon should remain the property of the plaintiffs until the note was paid. He afterwards sold the instrument to the defendant, and the plaintiffs transferred the note to a third party. *Held*, that plaintiffs could not maintain an action of trover: *Esty v. Graham*, 46 N. H. 169. A allowed B to deposit his money in a bank, which gave B a certificate in his own name, knowing it was A's money. A manifested no disapproval, and B presented the certificate and drew out the money. A continued to regard the money as loaned to B until his insolvency, when he sued the bank in trover. *Held*, that he could not recover: *Montreal Bank v. Dewar*, 6 Ill. App. 294. A and B agreed to exchange horses, and after they had been mutually delivered, A, being dissatisfied with the bargain, immediately took back his horse. B likewise took his back, and sued A and recovered ten dollars. A afterwards brought an action of trover against B for the horse so exchanged by him, and on the trial it appeared that the horse which A had offered to exchange with B belonged to C, who had intrusted him to A to sell. *Held*, that, admitting there

was a valid exchange of horses, A had no property sufficient to maintain the action; for the property in the horse of B, if it passed by the exchange, vested in C, and not in A, his agent: *Dyer v. Vandenberg*, 11 Johns. 149. Ten sacks of salt were bought with the funds of A, and five others were bought at the same time with the funds of B, the whole being delivered to B without any marks to distinguish which were A's and which were B's, and C, having received the whole from B, converted them to his own use. *Held*, that A could not maintain an action for the sacks belonging to him, as no specific sacks had ever been set apart as his: *Hill v. Robison*, 3 Jones, 501. The holder of a note surrendered it upon a dispute as to its consideration, and left it with a depository. The maker took possession of it without the consent of the depositor, but on complaint of the holder, and at the request of the depository, gave it up to him for the payee, but again possessed himself of it. It appeared that the maker had reasonable ground to contest his liability in whole or in part. *Held*, that the payee could not maintain trover for the taking of the note: *Alexander v. Rundle*, 75 Ill. 85.

#### § 3665. When Defendant may Dispute Plaintiff's Title.

—Where one has only a bare possession, and the chattels are taken from him without right, the taker may defend by showing that he had been notified by the real owner to retain the property for him,<sup>1</sup> or that he had surrendered the possession to the real owner.<sup>2</sup> If one purchases property to be paid for on delivery, and pays part only, he cannot bring trover against a subsequent vendee from his vendor, as he never was invested with the right of possession.<sup>3</sup> "There must also be many cases in which a mere showing of the wrongful character of the plaintiff's possession would defeat his action, as where a thief sues the officer for the stolen property taken from him in making the arrest, or a trespasser brings suit against one who stops him while carrying off the goods he has wrongfully taken. These are cases in which it cannot be said that in law a possession has been gained; and one who

<sup>1</sup> *Thorne v. Tilbury*, 3 Hurl. & N. 534. *King v. Richards*, 6 Whart. 418; 37 Am. Dec. 420.

<sup>2</sup> *Ogle v. Atkinson*, 5 Taunt. 759; <sup>3</sup> *Owens v. Weedham*, 82 Ill. 400.

disturbs this wrongful manual possession may defend in the right of the owner, whether expressly authorized to do so or not."<sup>1</sup> In other words, the possession of the plaintiff must have been a rightful one.<sup>2</sup> Thus it has been held that a trespasser on the lands of the United States cutting lumber thereon cannot acquire any property in the chattels, either general or special, and cannot maintain trover against a third person who hauls them away and converts them to his own use.<sup>3</sup> One trespasser or wrong-doer cannot maintain trover against another.<sup>4</sup> A person who found a horse in the possession of a man apprehended for felony, and kept him, but without complying with the requisitions of the statutes respecting estrays, cannot maintain trover against another person subsequently obtaining possession by purchase from a stranger, without notice of the plaintiff's claim.<sup>5</sup> In trover against a sheriff's officer for a wrongful seizure of chattels on execution, the defendant may show that the plaintiff had no right of possession in his own name.<sup>6</sup> So it is a good defense that the property belongs to a third party, between whom and the defendant there is no privity.<sup>7</sup>

**§ 3666. What may be Converted — Value.** — Any species of personal property may be the subject of conversion,<sup>8</sup> provided it is not property which it is unlawful to have, as counterfeit coin, instruments for manufacturing it, and the like;<sup>9</sup> nor will trover lie for a

<sup>1</sup> Cooley on Torts, 446; Laclouch v. Towne, 3 Esp. 114; Cheesman v. Exall, 6 Ex. 341.

<sup>2</sup> Turley v. Tucker, 6 Mo. 583; 35 Am. Dec. 449; Merry v. Green, 7 Mees. & W. 623; People v. Anderson, 14 Johns. 294; 7 Am. Dec. 462; Kemp v. Thompson, 17 Ala. 9; Buckley v. Gross, 3 Best & S. 546; Ransom v. State, 22 Conn. 153; Graham v. Warner, 3 Dana, 146; 28 Am. Dec. 65.

<sup>3</sup> Turley v. Tucker, 6 Mo. 583; 35 Am. Dec. 449; Keeton v. Audsley, 19 Mo. 364; 61 Am. Dec. 560; Wilson v. Petty, 21 Mo. 419. *Contra*, James

v. Snelson, 3 Mo. 393; Wincher v. Shrewsbury, 2 Scam. 283; 35 Am. Dec. 108.

<sup>4</sup> Turley v. Tucker, 6 Mo. 583; 35 Am. Dec. 449.

<sup>5</sup> Geohagan v. Baker, 3 Bibb, 284.

<sup>6</sup> Stearns v. Vincent, 50 Mich. 209; 45 Am. Rep. 37.

<sup>7</sup> Boyce v. Williams, 84 N. C. 275; 37 Am. Rep. 618.

<sup>8</sup> As to what is "personal property," see *ante*, Title Personal Property.

<sup>9</sup> Spalding v. Preston, 21 Vt. 9; 50 Am. Dec. 68. The defendant illegally traveled on Sunday to the defendant's

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note given to suppress a criminal prosecution;<sup>1</sup> Trover will lie for a bank note sealed in a letter;<sup>2</sup> a building which has been erected under an agreement that it should be removable or treated as personal property;<sup>3</sup> a contract for the sale of lands;<sup>4</sup> coal or other minerals mined from one's land;<sup>5</sup> copies of accounts;<sup>6</sup> crops raised on one's land without authority;<sup>7</sup> dogs;<sup>8</sup> fruit of a tree standing wholly on one's land, but extending its roots into and its branches over the land of another;<sup>9</sup> a judgment rendered by a justice of the peace;<sup>10</sup> a writ of execution;<sup>11</sup> manure from a

hotel, and remained there overnight, leaving his team and robe in charge of the defendant's servant, and on Monday morning the robe was missing. Held, that the action might be maintained, after demand: *Cox v. Cook*, 14 Allen, 165.

<sup>1</sup> *Morrill v. Goodenow*, 65 Me. 178.

<sup>2</sup> *Moody v. Keener*, 7 Port. 218.

<sup>3</sup> *Smith v. Benson*, 1 Hill, 176; *Osgood v. Howard*, 6 Greenl. 452; 20 Am. Dec. 322; *Harris v. Powers*, 57 Ala. 139; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; *Korbe v. Barfour*, 130 Mass. 255. So trover can be maintained for the conversion of lumber used in building a house, under an agreement that the house is to remain the property of the builder, as in such a case it does not become realty: *Powers v. Harris*, 68 Ala. 409.

<sup>4</sup> *Hazewell v. Courseen*, 45 N. Y. Sup. Ct. 22.

<sup>5</sup> *Forsyth v. Wells*, 41 Pa. St. 291; 80 Am. Dec. 617.

<sup>6</sup> *Fullam v. Cummings*, 16 Vt. 697. A refusal to redeliver to the owner a written account which he has presented for payment is a conversion, and the defendant cannot excuse himself by showing that nothing was due: *O'Donoghue v. Corby*, 22 Mo. 394.

<sup>7</sup> *Simpkins v. Rogers*, 15 Ill. 397. So a land-owner or his licensee may, without demand, maintain trover against one who has purchased and received possession of wild berries from persons who had picked them from the land as trespassers: *Freeman v. Underwood*, 66 Me. 229.

<sup>8</sup> *Cummings v. Perham*, 1 Met. 555.

<sup>9</sup> *Lyman v. Hale*, 11 Conn. 177; 27 Am. Dec. 723.

<sup>10</sup> *Hudspeth v. Wilson*, 2 Dev. 372; 21 Am. Dec. 345; the court saying: "Trover will not lie to cover a record, but it will lie to cover letters patent, being but the copy of a record: *Hardr. 111*. It lies for a bond without alleging that it was due to the plaintiff: *Wilson v. Chambers*, Cro. Car. 262. It also lies for a note in which the plaintiff has no legal interest: *Murray v. Burling*, 10 Johns. 172. It will lie against the finder of a bank-bill, but not against his assignee: *Anonymous*, 1 Salk. 126. It lies upon a special property. A stranger may maintain it upon a special property by bailment as well as the obligee himself. And a stranger as well as the obligee may declare in trover *ut de scripto suo obligatorio*; and the *scriptum suum* is not inserted to declare that the defendant has converted the duty or chose in action which belonged to the plaintiff, but to show what sort of a deed it is which is converted: *Arnold v. Jefferson*, 1 Ld. Raym. 275; 2 Salk. 654. It is stated in *Watson v. Smith*, Cro. Eliz. 723, that trover will not lie for a bond. But the author of *Bacon's Abridgment*, Trover, D, says that other authorities, besides being more modern, seem to be the better opinion. I think the principle to be extracted from authorities on this subject is that trover will lie upon a general or special property. The plaintiff had a property in the judgment in question, and therefore this action will lie." *Contra*, *Platt v. Potts*, 11 Ired. 266; 53 Am. Dec. 412.

<sup>11</sup> *Keeler v. Fassett*, 21 Vt. 539; 52 Am. Dec. 71.



farm;<sup>1</sup> money that can be identified, as specie on special deposit, or bank-bills, by proof of denomination, letter, etc., showing the particular bills;<sup>2</sup> a negotiable instrument,<sup>3</sup> as a promissory note, or a title deed, or certificate of stock;<sup>4</sup> parish records;<sup>5</sup> a saw-mill built on another's land with his consent;<sup>6</sup> a share of stock;<sup>7</sup> timber cut from trees;<sup>8</sup> animals of a domestic nature;<sup>9</sup> wild animals, as geese, which have strayed away without gaining their natural liberty;<sup>10</sup> a whale killed and anchored.<sup>11</sup> Trover lies to recover property appropriated by theft, as well as that taken by fraudulent means or by trespass.<sup>12</sup> A patron of a skating-rink who leaves his skates with the person appointed by the proprietor to receive them may maintain trover against the proprietor if they are lost.<sup>13</sup> And the value of the property is immaterial; it may have no value at all except to the owner.<sup>14</sup>

<sup>1</sup> *Stone v. Proctor*, 2 D. Chip. 116.

<sup>2</sup> *Graves v. Dudley*, 20 N. Y. 76.

<sup>3</sup> *Griswold v. Judd*, 1 Root, 221; *Comparet v. Burr*, 5 Blackf. 419; *Brickhouse v. Brickhouse*, 11 Ired. 404. Trover lies by the maker of a note after payment against the payee who refuses to deliver it up: *Otisfield v. Mayberry*, 63 Me. 197; *Stone v. Clough*, 41 N. H. 290. The fact that, in a promissory note for the conversion of which suit is brought, the amount to be paid is left indefinite, being for a certain sum less an uncertain sum to be deducted, constitutes no defense. The measure of damages is the amount of plaintiff's interest in it: *Penniman v. Winner*, 54 Md. 127.

<sup>4</sup> *Kingham v. Pierce*, 17 Mass. 247; *Day v. Whitney*, 1 Pick. 503; *Towle v. Lovet*, 6 Mass. 394; *Jarvis v. Rogers*, 15 Mass. 389; *Todd v. Crookshanks*, 3 Johns. 432; *Davis v. Funk*, 39 Pa. St. 243; 80 Am. Dec. 519; *Payne v. Elliott*, 54 Cal. 339; 35 Am. Rep. 80. It will not lie for a "share of stock," but will for the certificate: *Neiler v. Kelley*, 69 Pa. St. 403.

<sup>5</sup> *Sawyer v. Baldwin*, 11 Pick. 492; *Stebbins v. Jennings*, 10 Pick. 172.

<sup>6</sup> *Russell v. Richards*, 11 Me. 371; 26 Am. Dec. 532.

<sup>7</sup> *Budd v. R. R. Co.*, 12 Or. 271; 53 Am. Rep. 355.

<sup>8</sup> *Sampson v. Hammond*, 4 Cal. 184. A trespasses on land in possession of B, and cuts down trees, making them into logs, and takes them away from the land. B may maintain an action of trover for the conversion of the logs: *Skinner v. Pinney*, 19 Fla. 42.

<sup>9</sup> *Drew v. Spaulding*, 45 N. H. 472; *Platt v. Tuttle*, 23 Conn. 233.

<sup>10</sup> *Amory v. Flynn*, 10 Johns. 102; 6 Am. Dec. 316.

<sup>11</sup> *Taber v. Jenny*, 1 Sprague, 315.

<sup>12</sup> *Hutchinson v. Bank*, 41 Pa. St. 42; 80 Am. Dec. 596.

<sup>13</sup> *Donlin v. McQuade*, 61 Mich. 275.

<sup>14</sup> *Cooley on Torts*, 447; *Pierce v. Gibson*, 9 Vt. 216. In *Platt v. Potts*, 11 Ired. 266, 53 Am. Dec. 412, it was held that trover would not lie for a note after judgment obtained on it. "A note after judgment on it," said the court, "is defunct, has no existence, and is not a thing, either in fact or in contemplation of law, and therefore trover cannot be sustained." The same has been held of a paid note: *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188. And see *Pierce v. Gibson*, 9 Vt. 216.

But trover will not lie for a bond, paid but not taken up;<sup>1</sup> chattels, since their taking annexed to the freehold;<sup>2</sup> court records;<sup>3</sup> fixtures;<sup>4</sup> money, being the amount of a prize ticket drawn in a lottery, unless the money has been set apart in kind, so that the right could specifically attach;<sup>5</sup> oysters planted in a public river, where oysters are usually found, although no oysters were to be found where they were planted, at the time of planting.<sup>6</sup>

ILLUSTRATIONS.—L. sued for the conversion of a file of the newspaper of which he was editor for two years. This was the only editorial service he had ever performed, and at the time of the trial he was not an editor. *Held*, that the loss of the file was an injury too speculative and remote to entitle him to recover: *Leffingwell v. Gilchrist*, 40 Iowa, 416. A purchaser of an iron mine at an execution sale, after the time for redemption had expired, and he had received his deed, brought trover against one who had bought of the judgment debtor iron ore which had been taken from the mine after the sale. The declaration did not aver any injury to the freehold. *Held*, that the action could not be maintained: *Ward v. Carp River Iron Co.*, 47 Mich. 65. An action of trover was brought to recover a half-interest in four bales of cotton, described separately, and their weights given. It appeared that defendant properly disposed of a part of the cotton. *Held*, that this would not preclude a recovery for the balance: *Huntington v. Bonds*, 68 Ga. 23. Plaintiff sued in trover for a dwelling-house, and testified that he built the house, when in possession of the land under a parol contract for its purchase. It appeared that after plaintiff had occupied for some time, he had leased to a tenant, who was ousted by defendant under a claim of title. *Held*,

<sup>1</sup> *Besherer v. Swisher*, 3 N. J. L. 748.

<sup>2</sup> *Jackson v. Walton*, 28 Vt. 43; *Raddin v. Arnold*, 116 Mass. 270.

Trover may be maintained for a cotton-screw detached from the realty and carried away, even though it was reattached in another place: *Woods v. McCall*, 67 Ga. 506. Where machinery has become incorporated in a mill, so as to be a part of the real estate, the use of it in that state by the owners of the mill does not constitute a conversion for which trover will lie: *Woodruff etc. Iron Works v. Adams*, 37 Conn. 233. Where ties were taken and used by the subcontractor for

building a railroad, and the road was in use before it was delivered to the company, the owner of the ties, after waiting until they had become realty, cannot bring trover against the company as for their conversion: *Detroit and Bay City R. R. Co. v. Busch*, 43 Mich. 571.

<sup>3</sup> *Keeler v. Fassett*, 21 Vt. 539; 52 Am. Dec. 71.

<sup>4</sup> *Prescott v. Wells*, 3 Nev. 82; *Thweat v. Stamps*, 67 Ala. 96; *Overton v. Williams*, 31 Pa. St. 155.

<sup>5</sup> *Petit v. Bouju*, 1 Mo. 64.

<sup>6</sup> *Shepherd v. Leverson*, 2 N. J. L. 391.

that plaintiff could not recover, his claim that the house was personalty being inconsistent with his claim that it was a part of the realty: *Bracelin v. McLaren*, 59 Mich. 327. A lease entitled the tenant to remove his building from the land at the expiration of the term. Tenant held over under a verbal agreement, and afterwards surrendered the premises, the landlord verbally agreeing to insure the building and keep it in repair, and receive the rents until the tenant should wish to remove it. *Held*, that the landlord's refusal afterwards to permit its removal constituted a conversion: *Neiswanger v. Squier*, 73 Mo. 192.

### § 3667. What Constitutes Conversion — In General. —

Any distinct act of dominion wrongfully exercised over another's property, in denial of his right or inconsistent with it, is a conversion.<sup>1</sup> A conversion may arise from a wrongful taking, an illegal assumption of ownership, an illegal use or misuse, or a wrongful detention.<sup>2</sup> It is not requisite to show a manual taking, nor that the defendant has applied it to his own use.<sup>3</sup> Any intermeddling with the property of another in a manner subversive of the owner's dominion over it is sufficient evidence of a conversion.<sup>4</sup> It is not necessary, to constitute conversion, that

<sup>1</sup> Cooley on Torts, 448; Burroughes v. Bayne, 5 Hurl. & N. 296; Hare v. Pearson, 4 Ired. 76; Gilman v. Hill, 36 N. H. 311; Boyce v. Brockway, 31 N. Y. 490; Reid v. Colcock, 1 Nott & McC. 592; 9 Am. Dec. 729; West Jersey R. R. Co. v. Trenton etc. Co., 32 N. J. L. 517; Webber v. Davis, 44 Me. 147; 69 Am. Dec. 87; Mohr v. Barton, 27 Minn. 530; Fouldes v. Willoughby, 8 Mees. & W. 540; Mead v. Thompson, 78 Ill. 63; Bristol v. Burt, 7 Johns. 254; 5 Am. Dec. 264; Hale v. Ames, 2 T. B. Mon. 143; 15 Am. Dec. 150; Woodbury v. Long, 8 Pick. 543; 19 Am. Dec. 345; Phillips v. Hall, 8 Wend. 610; 24 Am. Dec. 108; Ragsdale v. Williams, 8 Ired. 478; 49 Am. Dec. 406; Allen v. McMonagle, 77 Mo. 478. See note to Hale v. Ames, in 15 Am. Dec. 151-153. In *Liptrot v. Holmes*, 1 Ga. 391, the court say: "The action of trover being founded on a conjunct right of property and possession, any act of the defendant which

negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use"; *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184.

<sup>2</sup> *Glaze v. McMillion*, 7 Port. 279; *St. John v. O'Connel*, 7 Port. 466.

<sup>3</sup> *Bristol v. Burt*, 7 Johns. 254; 5 Am. Dec. 264; *Hall v. Ames*, 5 T. B. Mon. 89; 17 Am. Dec. 42; *Allen v. Crary*, 10 Wend. 349; 25 Am. Dec. 566; *Dodge v. Meyer*, 61 Cal. 405; *Johnson v. Farr*, 60 N. H. 426.

<sup>4</sup> *Reid v. Colcock*, 1 Nott & McC. 592; 9 Am. Dec. 729.

the owner should be completely deprived of the possession of the property; a partial or temporary deprivation is sufficient. Thus trover will lie for the conversion of a certificate of stock, although defendant could make no use of the certificate.<sup>1</sup> An act may be a conversion, though its result was not contemplated.<sup>2</sup> It is conversion to take one's property and sell or otherwise dispose of it;<sup>3</sup> or driving a horse to one place, hired to go to another place;<sup>4</sup> driving the cattle of another upon a highway in a direction known to him to be opposite to the owner's residence;<sup>5</sup> drawing off part of a cask of liquor and filling it

<sup>1</sup> *Daggett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91; the court saying: "In this case there neither was nor could be any conversion of the stock, for, though the defendant had the certificate in his possession, he could not make use of it. It stood in the name of the plaintiff, and could not be transferred without the plaintiff's indorsement, which it did not have, and the defendant could make neither the certificate nor the shares the property either of himself or of any third person by anything he could do with the certificate: *Anderson v. Nicholas*, 28 N. Y. 600, 604, per Denio, C. J. If, therefore, it were necessary to show a conversion of the stock in order to make out a conversion of the certificate, this suit would fail. But conversion does not necessarily imply a complete and absolute deprivation of property; there may be a deprivation which is only partial or temporary, and where the property of the plaintiff remains in or is restored to him: *Liptrot v. Holmes*, 1 Ga. 381, 391; *Fisher v. Kyle*, 27 Mich. 454; *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30. An illustration is where one hires a horse for one use and puts it to another, subsequently returning it to the owner: *Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136; 22 Am. Dec. 414; *Crocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 118; *Horsely v. Branch*, 1 Humph. 199. The difference between such a case and one in which the property is wholly made away with is one affecting the dam-

ages only; the damages go to the whole value of the property in the one case, and are commonly less in the other: *Wheelock v. Wheelwright*, 5 Mass. 104; *Long v. Lamkin*, 9 Cush. 361; *Reynolds v. Shuler*, 5 Cow. 323; *Cook v. Loomis*, 26 Conn. 483; *Brady v. Whitney*, 24 Mich. 153, 156. There may, therefore, have been a technical conversion in this case, though no use was made of the certificate."

<sup>2</sup> *Lavery v. Snethen*, 63 N. Y. 522; 23 Am. Rep. 184; *Hiort v. Bott*, 43 L. J. Ex. 81; L. R. 9 Ex. 86.

<sup>3</sup> *Thompson v. Currier*, 24 N. H. 237; *Pickering v. Coleman*, 22 N. H. 148; *Shaw v. Peckett*, 25 Vt. 423; *Blood v. Sayre*, 17 Vt. 609.

<sup>4</sup> *Homer v. Thwing*, 3 Pick. 492; *Hall v. Corcoran*, 107 Mass. 351; 9 Am. Rep. 30; *Fisher v. Kyle*, 27 Mich. 454; *Crocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 118; *Horsely v. Branch*, 1 Humph. 199; *Frost v. Plumb*, 40 Conn. 111; 16 Am. Rep. 18; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 310. See *Rotch v. Hawes*, 12 Pick. 136; 22 Am. Dec. 414. One who hires a horse to drive to a particular place, and in returning takes a wrong road by mistake, and on discovering his mistake takes what he considers the best way back, which carries him by a circuit through another town, is not liable in trover for conversion: *Spooner v. Manchester*, 133 Mass. 270; 43 Am. Rep. 514.

<sup>5</sup> *Tobin v. Deal*, 60 Wis. 87; 50 Am. Rep. 345.

with water;<sup>1</sup> permitting (by an agent) his principal's property to go out of his hands, contrary to his instructions;<sup>2</sup> refusing to surrender a paid note to the maker;<sup>3</sup> refusing to deliver up a note made by the maker, but not delivered to the payee;<sup>4</sup> sawing trees cut by and belonging to another into logs;<sup>5</sup> taking a thing, even for a temporary purpose, in disregard of the plaintiff's right;<sup>6</sup> or the cutting of timber, without carrying it away;<sup>7</sup> or a sale on execution, without removal, of personal property belonging to a third party;<sup>8</sup> or transferring a promissory note by the payee, in violation of the agreement pursuant to which it was given.<sup>9</sup> A vendee in a conditional sale is liable in trover if he disposes of the article before he has acquired any property by making payment.<sup>10</sup> An action of trover may be maintained for the recovery of property delivered in exchange for other property fraudulently described and not owned by defendant.<sup>11</sup> So if one obtains property by fraudulently pretending to have a lien upon it, when he has not, the owner, though he delivered possession when the fraudulent claim was made, may bring trover for the value, the taking from him being wrongful.<sup>12</sup> So if an officer levies upon property which is exempt from execution, and proceeds to a sale of the same, the owner may treat this as a conversion.<sup>13</sup> If an innkeeper sells goods upon which he has a lien, the lien is broken, and he is guilty of a conversion, for which the owner of the goods

<sup>1</sup> *Richardson v. Atkinson*, 1 Strange, 576.

<sup>2</sup> *Laverty v. Snethen* 68 N. Y. 522; 23 Am. Rep. 184; *Haas v. Damou*, 9 Iowa, 589.

<sup>3</sup> *Pierce v. Gilson*, 9 Vt. 216; *Spencer v. Dearth*, 43 Vt. 98; *Stone v. Clough*, 41 N. H. 290. *Contra*, *Todd v. Crookshanks*, 3 Johns. 432; *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188.

<sup>4</sup> *Groggerley v. Cuthbert*, 5 Bos. & P. 170; *Evens v. Kymer*, 1 Barn v. Adol. 528; *Neal v. Hanson*, 60 Me. 84.

<sup>5</sup> *Baker v. Wheeler*, 8 Wend. 505; 24 Am. Dec. 67.

<sup>6</sup> *Cooley on Torts*, 448.

<sup>7</sup> *Sanderson v. Haverstick*, 8 Pa. St. 294.

<sup>8</sup> *Scudder v. Anderson*, 54 Mich. 122.

<sup>9</sup> *Buck v. Kent*, 3 Vt. 99; 21 Am. Dec. 576.

<sup>10</sup> *Sargent v. Gile*, 8 N. H. 325; *Grace v. McKissack*, 49 Ala. 163. So is the purchaser: *Eaton v. Munroe*, 52 Me. 63.

<sup>11</sup> *Waters v. Van Winkle*, 3 N. J. L. 567; 4 Am. Dec. 387.

<sup>12</sup> *Dudley v. Abner*, 52 Ala. 572.

<sup>13</sup> *Sanborn v. Hamilton*, 18 Vt. 590.

can maintain an action against him, and recover the whole of the proceeds of the sale as damages.<sup>1</sup> One who aids and abets another in keeping property from its rightful owner is guilty of conversion.<sup>2</sup> Trover by the purchaser at an execution sale will lie, notwithstanding the conversion may have taken place before the sale.<sup>3</sup>

And the following in special cases have been held to amount to a conversion, viz.: Where J. forbade W. to enter upon J.'s land to remove cord-wood of W.'s lying thereon, and claimed it as J.'s own;<sup>4</sup> where J. executed a chattel mortgage to S. upon a field of growing corn, but remained in possession as S.'s tenant, and P. caused an execution to be levied on the corn as the property of J., with whom it was left as B.'s agent;<sup>5</sup> where A received from his debtor certain property to be sold, and the proceeds applied upon the indebtedness, and a creditor of A's debtor attached the property in A's possession;<sup>6</sup> where beer was shipped by railroad to a buyer, who agreed to return the kegs, and when he received the bill of lading, he paid the freight, and allowed the kegs of beer to stand in the depot, but refused to return them after demand;<sup>7</sup> where a debtor, after delivering goods to the creditor to be sold, and the proceeds to be applied to paying the debt after discharging an execution lien, interrupted the sale and excluded the creditor's agent from the store;<sup>8</sup> where the owner of land felled the timber and sold it, without requiring the purchaser to remove it immediately, and subsequently sold the land, notifying the vendee that the felled timber had been sold, and the vendee refused to permit the owner of the timber to remove it, and afterwards sold part of it;<sup>9</sup> where a plaintiff had asked permission to take his

<sup>1</sup> Mulliner v. Florence, L. R. 3 Q. B. Div. 484.

<sup>2</sup> Scott v. Perkins, 28 Me. 22; 48 Am. Dec. 470.

<sup>3</sup> Jewett v. Patridge, 12 Me. 243; 28 Am. Dec. 173.

<sup>4</sup> Woodis v. Jordan, 62 Me. 490.

<sup>5</sup> Stuart v. Phelps, 39 Iowa, 14.

<sup>6</sup> Fish v. Clifford, 54 Vt. 344.

<sup>7</sup> Hare v. Atlanta City Brewing Co., 65 Ga. 348.

<sup>8</sup> Roush v. Washburn, 88 Ill. 215.

<sup>9</sup> Sherman v. Way, 56 Barb. 188.

property from the land of another, and been refused;<sup>1</sup> where a horse had been seized, under pretense of necessity, for the public service, and was refused to be delivered, on demand made, after the exigency which induced the seizure had passed;<sup>2</sup> an unjustifiable refusal, by a master, to proceed on the voyage or deliver the cargo;<sup>3</sup> cutting growing corn, and carrying it away;<sup>4</sup> taking property under the color of a license, which was in fact revoked;<sup>5</sup> where wood was one day in the plaintiff's possession, and two days afterwards was found in the unexplained possession of the defendant, in his yard;<sup>6</sup> where a constable did not apply goods levied on by virtue of an execution according to direction of the execution, but converted them to his own use;<sup>7</sup> where a debtor, to whom collaterals were redelivered in order that he might collect them for the creditor, converted them to his own use;<sup>8</sup> where an administrator pledged, for his own purposes, notes belonging to the estate;<sup>9</sup> the unauthorized transfer, by the secretary of an incorporated insurance company, of promissory notes and bills of exchange belonging to the company;<sup>10</sup> where A sold hay to B, and because B did not remove it when ordered, A sold it over again;<sup>11</sup> where defendant, in making levy as sheriff upon wheat belonging to plaintiff's father-in-law, had taken away part of a common mass and put the rest in another bin, after being warned by plaintiff that he had wheat there which must not be taken;<sup>12</sup> where the grantee of land knew that the timber had been sold to another, with the right to

<sup>1</sup> *Nicholas v. Newson*, 1 L. R. 227.

<sup>2</sup> *Fryer v. McRae*, 8 Port. 187.

<sup>3</sup> *Portland Bank v. Stubbs*, 6 Mass. 422; 4 Am. Dec. 151.

<sup>4</sup> *Nelson v. Burt*, 15 Mass. 204.

<sup>5</sup> *Holland v. Osgood*, 8 Vt. 281.

<sup>6</sup> *Thomas v. Steele*, 22 Wis. 207.

<sup>7</sup> *Mershon v. McCullough*, 3 N. J. L. 416.

<sup>8</sup> *Hurst v. Coley*, 15 Fed. Rep. 645.

<sup>9</sup> *State v. Berning*, 74 Mo. 87. And

treverlies against an executor for a conversion by the testator in his lifetime: *Locke v. Garrett*, 16 Ala. 698; *Brummett v. Golden*, 9 Gill, 95; *Decrow v. Mone*, 1 Hayw. (N. C.) 21; *Clark v. Keonan*, 1 Hayw. (N. C.) 308; *Avery v. Moore*, 1 Hayw. (N. C.) 362; 1 Am. Dec. 560.

<sup>10</sup> *Firemen's Ins. Co. v. Cochran*, 27 Ala. 228.

<sup>11</sup> *Koon v. Brinkerhoff*, 39 Hun, 130.

<sup>12</sup> *Behler v. Drury*, 51 Mich. 111.

take his own time to remove it, and without giving notice cut the timber down.<sup>1</sup>

To constitute a conversion, there must be some exercise of dominion over the property in repudiation of or inconsistent with the owner's rights.<sup>2</sup> The bare removal of the chattels of another, without any intent to deprive him of their possession, and which does not affect their condition, is not a conversion.<sup>3</sup> The assertion of ownership over property in one's possession is not evidence of conversion, when made to a stranger not within sight of the property nor in the presence of the real owner.<sup>4</sup> Where words are relied upon to constitute a conversion, they must be uttered in proximity to the property, under such circumstances as to show a determination to exercise dominion and control over it, and a defiance of the owner's rights.<sup>5</sup> Proof of the taking of exclusive possession of a building by a person who has a right to such possession, and of his putting a new lock on a door, the key of which he knows is held by the owner of some furniture in the building, will not warrant a finding of a conversion of the furniture by him, in the absence of any evidence that he ever made claim to the furniture or hindered its owner from removing it.<sup>6</sup> Trover does not lie to recover goods due under an executory contract.<sup>7</sup> Trover will not lie to recover the value of securities lent by plaintiff to defendant, where there is no evidence of a wrongful appropriation or detention of them, and the relation of the parties was simply that of debtor and creditor.<sup>8</sup> And trover does not lie against one coming into possession by delivery or finding of goods, without proof

<sup>1</sup> Wood v. Elliott, 51 Mich. 320.

<sup>2</sup> Evans v. Mason, 64 N. H. 98.

<sup>3</sup> Sparks v. Purdy, 11 Mo. 219. As where a confectioner's utensils and furniture were carefully taken from a fair-ground tenement, and stored near by, by a party who believed the lease to be terminated: Niemetz v. St. Louis

Agri. and Mech. Ass'n., 5 Mo. App. 59.

<sup>4</sup> Irish v. Cloyes, 8 Vt. 30; 30 Am. Dec. 446.

<sup>5</sup> Gillet v. Roberts, 57 N. Y. 28.

<sup>6</sup> Poor v. Oakman, 104 Mass. 309.

<sup>7</sup> Wood v. Atkinson, 2 Murph. 87.

<sup>8</sup> Borland v. Stokes, 120 Pa. St. 273.

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308; Avery  
C.) 362; 1  
Coehran, 27  
Hun, 130.  
ch. 111.



of some tortious act on his part.<sup>1</sup> The fact of a party's removal from the state is not evidence of conversion of property previously consigned to him for sale.<sup>2</sup> A delay by a carrier in delivering property is not a conversion.<sup>3</sup>

A mere accidental or unintentional act is not a conversion.<sup>4</sup> Thus a bailee is not liable in trover for the loss of the property by larceny or negligence.<sup>5</sup> The accidental loss or destruction of a bill of exchange by the drawee, to whom it has been presented for acceptance, is not a conversion.<sup>6</sup> But the conversion necessary to support trover need not be willful or corrupt.<sup>7</sup> Refusal of a mechanic to deliver goods made by him after accepting security for their price will not work a conversion of the goods manufactured, if such refusal was by reason of his ignorance as to whether or not the debt was secured; nor can the person in such case making the demand recover the price of the goods because of such refusal. On a demand for goods, the payment of which has been secured at a distant day, the manufacturer, when he is not in a condition to know, will be entitled to a reasonable time to ascertain

<sup>1</sup> *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289; *Ragsdale v. Williams*, 8 Ired. 498; 49 Am. Dec. 406; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; *Rogers v. Huie*, 2 Cal. 571; 56 Am. Dec. 363.

<sup>2</sup> *Pattee v. Gilmore*, 18 N. H. 460; 45 Am. Dec. 385.

<sup>3</sup> *Briggs v. R. R. Co.*, 28 Barb. 515.

<sup>4</sup> *Simmons v. Lillystone*, 8 Ex. 431. A negligent injury is not conversion: *Nelson v. Whitmore*, 1 Rich. 318. T. bought lumber of E., who agreed to have it surveyed by L., to be paid for according to his survey; which being done, T. immediately resold the lumber, without seeing it, by the same survey. One car-load was accidentally omitted from the survey. Held, that E. could not maintain trover therefor against T.: *Eames v. Trickey*, 62 Me. 126. But trover lies against a person who removes a quantity of fence from the land of its owner, although such

person was acting at the time under the direction of town officers, and mistakenly supposed the fence to be upon the land of the town: *Smith v. Colby*, 67 Me. 169. And a wrongful sale by one, however innocently, of another's goods, is a conversion, for which he is liable to the latter: *Levi v. Booth*, 58 Md. 305.

<sup>5</sup> *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Packard v. Getman*, 4 Wend. 613; 21 Am. Dec. 166; *Dorman v. Kane*, 5 Allen, 38; *Dearborn v. Union Bank*, 58 Me. 273. But one who wrongfully converts personal property to his own use is liable to the true owner for the value thereof, though the property was destroyed by a public enemy, subsequently to the conversion: *Mason v. O'Brien*, 42 Miss. 420.

<sup>6</sup> *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; 8 Am. Rep. 564.

<sup>7</sup> *Haddix v. Einstman*, 14 Ill. App. 443.

<sup>1</sup> *Farn*  
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<sup>2</sup> *Davis*  
*Burnside*  
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<sup>3</sup> *Lacey*

the character of such security before delivering the goods.<sup>1</sup> Merely selling and giving a deed of land by the landlord is no conversion of the tenant's fixtures; the tenant's right to take them away is not affected by the conveyance;<sup>2</sup> nor is enjoining a tenant's removal of fixtures.<sup>3</sup> And the following have been held not to be a conversion: Driving an estray from one's close into the highway; or a mere omission to pursue the course prescribed by the statutes;<sup>4</sup> taking an article in pledge from a person having a lawful possession, and afterwards permitting him to sell and deliver it to a third person, on his promise to pay the purchase-money to the pledgee;<sup>5</sup> where one, knowing that property is under an attachment, suffers it to be sent away, and sold by the owner, and receives the avails arising from the sale, in pursuance of a previous arrangement to that effect.<sup>6</sup>

ILLUSTRATIONS.—ACT HELD A CONVERSION.—A creditor of a tenant attached the crops of the latter, upon which the landlord had a lien for rent, and, after the levy of the distress warrant, purchased the same at the sale under his attachment, and transferred his bid to a third person, who took and disposed of the crops. *Held*, that the creditor, by bidding off the property and transferring his bid, assumed such control over the property as amounted to a conversion, and rendered him equally liable with his assignee to the landlord for the amount of his lien for rent: *Mead v. Thompson*, 78 Ill. 63. A vendee takes possession and lets the premises, together with the use of chattels thereon belonging to the vendor, and receives pay for such use. *Held*, a conversion: *Miller v. Plumb*, 6 Cow. 665; 16 Am. Dec. 456. The owner of a store left it in charge of a person with no authority to dispose of the goods other than that of an ordinary salesman, and not returning at the time appointed, the bailee permitted an alleged creditor of the owner to enter without process, and without the owner's knowledge, sell off the stock and close out the concern. *Held*, a conversion by the latter: *Bane v. Detrick*, 52 Ill. 19. Defendant applied to another for

<sup>1</sup> *Farman v. Ratcliff*, 1 Wils. (Ind.) 145.

<sup>2</sup> *Davis v. Buffum*, 51 Me. 160; *Burnside v. Twitchell*, 43 N. H. 390;

*Walsh v. Siebler*, 20 Mo. App. 374.

<sup>3</sup> *Lacey v. Beaudry*, 53 Cal. 693.

<sup>4</sup> *Stevens v. Curtis*, 18 Pick. 227; *Nelson v. Merriam*, 4 Pick. 249.

<sup>5</sup> *Leonard v. Tidd*, 3 Met. 6.

<sup>6</sup> *Polley v. Lenox Iron Works*, 2 Allen, 182.

the loan of a horse. He replied that he had none, but defendant might take plaintiff's horse, plaintiff being absent. The defendant knew that he had no authority to loan the horse; but defendant took him, and, while riding, the horse was accidentally killed. *Held*, that the act of the defendant amounted to a conversion, rendering him liable to the plaintiff for the loss: *Childress v. Ford*, 1 Heisk. 463. A, owning a public warehouse, in which was stored, mingled in bins, grain owned by different persons, conveyed the warehouse, in trust, to secure a debt due to a national bank, who took possession of the warehouse and grain, placing the same in charge of B as the agent. C, holding a warehouse receipt for grain delivered to A, presented it to B, and demanded the grain represented thereby, which was refused. *Held*, that C might maintain trover against the bank for the conversion of the grain called for; its liability was not affected by the commingling of the grain, nor by its want of authority to conduct such business: *German Bank v. Meadowcroft*, 95 Ill. 124; 35 Am. Rep. 137. While the defendant was negotiating for the purchase of the plaintiff's farm, the parties made a distinct oral agreement for buying the manure on the farm, the plaintiff agreeing to put up the manure for sale at auction, and the defendant to take it if he was the highest bidder. The plaintiff conveyed the farm to the defendant, and put up the manure for sale at auction, but the defendant forbade the sale, claimed the manure as his own, and spread it upon the land. *Held*, a conversion of the plaintiff's property: *Strong v. Doyle*, 110 Mass. 92. A gratuitous loan by the president of a railroad company to his brother of bonds of the state issued to the company under the improvement act, the latter merely obligating himself to return them upon request, *held*, to be a conversion, and both to be liable to the company for the value of the bonds at the time thereof, with interest, the borrower primarily: *Branner v. Branner*, 1 Lea, 101. Eight drafts which had been indorsed to the state treasurer, and delivered into his office by a county treasurer for the payment of taxes due the state, were, without authority, indorsed by P., a clerk in the office, and negotiated. *Held*, that a bank which took them from the indorsees, collected the money, and surrendered them to the drawees, was liable to the state for a conversion of the drafts; and an action might be maintained in the name of the people therefor: *People v. North America Bank*, 75 N. Y. 547. A borrowed from B, an incorporated bank, four thousand dollars in confederate treasury notes, to be returned within ten days, and left with B, as security, four thousand dollars in its own bills, the latter being more valuable than the former. A, within the limited time, offered to return four thousand dollars

in confederate treasury notes, and demanded back the four thousand dollars he had left with B as security. The latter refused to take the one or return the other. *Held*, that B's refusal to return the four thousand dollars in its own bills was a conversion of those bills, and that trover lay for such conversion: *Abrahams v. Southwestern Railroad Bank*, 1 S. C. 441; 7 Am. Rep. 33. One agreed to saw logs into boards, taking his pay either in money or a share of the boards, and afterwards sold all the boards. *Held*, that trover would lie: *Vickery v. Taft*, 1 D. Chip. 241. A building containing a beer-room and an ice-house connected by slides was in the lawful possession of defendant as mortgagee. Defendant notified plaintiffs, who were owners of the ice in the ice-house, to remove it, which they neglected to do. The defendant afterwards opened the slides, causing the plaintiff's ice to melt. *Held*, that this was a conversion, and defendant was liable for the ice thus destroyed: *Aschermann v. Philip Best Brewing Co.*, 45 Wis. 262. A, having agreed to erect a brick building for B, and to furnish all the materials, wrongfully took bricks belonging to C, but without B's direction. C thereupon notified B of the facts, and that he should look to him for payment if the bricks were used in building the house. They were so used, and B paid A the sum specified in the agreement. *Held*, that B was liable to C for the value of the bricks: *Dawson v. Powell*, 9 Bush, 663; 15 Am. Rep. 745. The horses of one man were taken for government use as the property of another, and the latter was allowed and paid the price therefor. *Held*, a conversion by him: *Thomas v. Sternheimer*, 29 Md. 268. P., the owner of a promissory note past due, placed it in the hands of B. for collection; B. sold it to S., and S. converted it to his own use. *Held*, that P. might maintain trover therefor against S.: *Seago v. Pomeroy*, 46 Ga. 227.

ILLUSTRATIONS (CONTINUED).—ACT HELD NOT A CONVERSION. —A, a chemist, was in the habit of filling a certain soda-fountain for B, who rented it, with another fountain, from C. B absconded, leaving the fountain in the possession of A. C brought trover against A. *Held*, that there was no such conversion as would enable C to maintain his action: *Parkerson v. Simons*, 2 McMull. 188. A surveyor of highways lawfully removed wood which was placed within the limits of the highway, and gave notice to the owner of the wood where he had put it, and told him that he might have it on paying for the removal of it. *Held*, no conversion: *Plumer v. Brown*, 8 Met. 578. An officer counted certain logs frozen in the ice, declared them to be attached, took a receipt for them, made a return upon his writ to that effect, of which he lodged a copy with the town clerk. In ten days the action was settled and the attach-

ment dissolved. *Held*, not a conversion: *Fernald v. Chase*, 37 Me. 289. A placed his horse with B to be cured. When A came for it, it was not in a condition to be moved. A refused to take the horse away, and demanded pay for it. *Held*, that trover would not lie: *Taylor v. Hanlon*, 103 Pa. St. 504. A debtor agreed with his creditor to let him have a bed and furniture of the value of twenty-eight dollars, but no particular bed and furniture were pointed out and delivered. *Held*, that, on the refusal of the debtor to deliver any bed, etc., the creditor could not maintain trover for the same: *Jones v. Morris*, 7 Ired. 370. Defendant, as plaintiff's agent, purchased certain stock for her, and, at her request, gave a memorandum showing, with reasonable clearness, that certain stock therein mentioned was hers. Afterwards her shares were sold at a loss, and she sought to hold defendant as for a conversion, on the ground that the memorandum was unintelligible, or that she did not read it, and that she supposed certain other shares to be hers. *Held*, that the action could not be maintained: *Metcalf v. Williams*, 144 Mass. 452. Defendant received bills of exchange for acceptance, and on being afterwards asked for them by the persons entitled, searched for them, but not finding them, said that he had perhaps burned them up with papers he considered of no value. *Held*, that he was not liable in trover, there being no evidence of a voluntary or intentional destruction or loss of the bills: *Salt Springs National Bank v. Wheeler*, 48 N. Y. 492; 8 Am. Rep. 564. A borrowed money of a bank, giving as collateral stock indorsed in blank, with a power of attorney to transfer on the corporation books, and an agreement that the bank, if the debt was not paid at maturity, might sell the stock. Before the debt became due, the bank caused the stock to be transferred to it on the corporation books, and insisted on its right to vote on the stock and to a dividend declared. *Held*, no conversion, the bank not intending a conversion; *Union and Planters' Bank v. Farrington*, 13 Lea, 333. One received a yoke of oxen to keep for the owner, and agreed to feed them for their work, and return them at a fixed day, or pay a certain sum of money for them, in which case the owner was to release his right. The bailee sold them, and his vendee resold them. On the expiration of the term, the money not having been paid, the owner demanded the oxen, and upon refusal, brought an action of trover for them. *Held*, that trover would not lie: *Vincent v. Cornell*, 13 Pick. 294; 23 Am. Dec. 683.

§ 3668. **Vendee of Chattels.**— One who buys property must, at his peril, ascertain the ownership, and if he buys of one who has no authority to sell, his taking pos-

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session, in denial of the owner's right, is a conversion;<sup>1</sup> and it is no answer that he (the purchaser) believed in good faith that the seller was the owner.<sup>2</sup> Trover lies against one who has bought and sold from the conditional vendee chattels as to which the lien is recorded.<sup>3</sup> But on a sale of goods, the delivery to be considered conditional until they are paid for in ten days, and a failure of the seller to demand them till a month after the ten days have elapsed, he cannot maintain trover against the buyer for having meanwhile sold them.<sup>4</sup> One buying personal property, and failing to fulfill his promise made to the mortgagor before the law day to satisfy a mortgage thereon, may be guilty of a conversion.<sup>5</sup> It is a conversion to buy fruit stolen from the plaintiff's land.<sup>6</sup> One who, having purchased stolen goods in the ordinary course of business in good faith, before knowledge of the owner's rights, sells and delivers them to a third person, is liable to the owner without demand, and this, although the goods were never in his actual possession.<sup>7</sup> A purchase in good faith from one who has no title and no right to transfer the property will not ordinarily constitute a defense to an action for its conversion; but this rule does

<sup>1</sup> *Miller v. Thompson*, 60 Me. 322; *Gilmore v. Newton*, 9 Allen, 171; 85 Am. Dec. 749; *Burroughs v. Bayne*, 5 Hurl. & N. 296; *Grant v. King*, 14 Vt. 367; *Hart v. Carpenter*, 24 Conn. 427; *Chamberlain v. Smith*, 44 Pa. St. 431; *Sargent v. Gile*, 8 N. H. 325; *Riford v. Montgomery*, 7 Vt. 411; *Heacock v. Walker*, 1 Tyler, 338; *Nowell v. Pratt*, 5 Cush. 111; *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 509; *Linnen v. Cruger*, 40 Barb. 633; *Covill v. Hill*, 4 Denio, 323; *Saunborn v. Colman*, 6 N. H. 14; 23 Am. Dec. 703; *Donald v. Arnold*, 28 Tex. 97; *Roland v. Gundy*, 5 Ohio, 202; *Stanley v. Gaylord*, 1 Cush. 536; 48 Am. Dec. 643; *Buckmaster v. Mower*, 21 Vt. 204; *Wooster v. Sherwood*, 25 N. Y. 278; *Hartap v. Hoare*, 3 Atk. 44; *Newcomb-Buchanan*

*Co. v. Baskett*, 14 Bush, 658; *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 258; *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604; *Agnew v. Johnson*, 22 Pa. St. 471; 62 Am. Dec. 303; *Webber v. Davis*, 44 Me. 147; 69 Am. Dec. 87; *Mann v. Ark. Land Co.*, 24 Fed. Rep. 261; *Houston v. Dyche*, Meigs, 76; 33 Am. Dec. 130; *Chapman v. Cole*, 12 Gray, 141; 71 Am. Dec. 739. See note in 25 Am. Dec. 605-616.

<sup>2</sup> *Hardman v. Booth*, 1 Hurl. & C. 803; *Hollins v. Fowler*, L. R. 7 H. L. Cas. 757; L. R. 7 Q. B. 616; *Baker v. Page*, 11 Me. 381; 26 Am. Dec. 510; *Porter v. Foster*, 20 Me. 391; 37 Am. Dec. 59.

<sup>3</sup> *Church v. McLeod*, 58 Vt. 541.

<sup>4</sup> *Bunting v. Dessau*, 9 Phila. 31.

<sup>5</sup> *Prescott v. Jordan*, 57 Ala. 272.

<sup>6</sup> *Freeman v. Underwood*, 66 Me. 229.

<sup>7</sup> *Pease v. Smith*, 61 N. Y. 477.

not apply where the act of appropriation can be justified, as having been authorized in any manner by the owner of the property.<sup>1</sup> One who innocently purchases personal property from one who received the same under a will which was allowed does not become liable in trover to the next of kin when such will is set aside.<sup>2</sup>

ILLUSTRATIONS. — A, falsely representing himself to be a member of a firm, bought, in the name of the firm, goods from B, who sent them by a carrier to the firm. On the refusal of the firm to receive them, A sold them to C, to whom they were delivered by the carrier, at A's request. *Held*, that A had no title to the goods, and that an action for their conversion would lie by B against C, although the latter was a purchaser in good faith: *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394. One who had received household furniture from the owner, on condition that he should not sell or remove it till paid for, sold it in violation of the condition. *Held*, that the new purchaser was liable to the owner for a conversion, although he had acted in good faith, and had parted with the goods before any demand upon him: *Carter v. Kingman*, 103 Mass. 517. A sent diamonds to B, to show to his customers. B sold them to one who bought in good faith, and without knowledge of B's want of authority to sell. *Held*, that A could reclaim them: *Smith v. Clews*, 33 Hun, 501. One representing himself to be a member of a responsible firm obtained goods from the owner, giving a forged check of the firm in payment; he then shipped the goods to the firm, who in good faith sold them on his account to an innocent purchaser, who in turn sold them. *Held*, that the owner, being innocent, and not negligent, was entitled to recover for their value from the last purchaser: *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180. A received a quantity of black salts from the plaintiff, to be manufactured into pearl-ashes, and, when manufactured, to be redelivered to the plaintiff. And they were so delivered by putting them into the highway, to be at the disposal of the plaintiff. A then sold them to the defendant, who had notice of the plaintiff's claim. *Held*, a conversion: *Babcock v. Gill*, 10 Johns. 287. A, being the owner of a blacksmith-shop, placed it upon the land of B, under a parol license from the latter, setting it upon stone pillars, and building the forge upon the ground. B afterwards conveyed the land, making no reservation of the shop, and the purchasers entered and converted the shop to their own use. *Held*, that they were liable to A in an action of

<sup>1</sup> *Hills v. Snell*, 104 Mass. 173; 6 Am. Rep. 216.

<sup>2</sup> *Thompson v. Samson*, 64 Cal. 330.

trover for the value of the shop: *Hilborne v. Brown*, 12 Me. 162. Plaintiff delivered a watch to A, under a conditional bargain that, if he kept it, he should pay an agreed price; or if he returned it, he should pay a specific rent. A died, the price of the watch not having been paid, and his wife, with knowledge of the contract, administered upon his estate, embraced the watch in her inventory; the estate being settled as an insolvent estate, she received the watch, under a decree of the probate court, as part of her allowance, and subsequently sold it as her own private property. *Held*, that the plaintiff had not lost his property in the watch; that the sale by the wife was a wrongful conversion; and that the plaintiff might maintain trover to recover the value of the watch: *Jillson v. Wilbur*, 41 N. H. 106. A stranger in Chicago was induced to exchange a diamond ring worth nearly \$1,200 for \$250 and a "city lot," represented by the vendor to be worth \$1,000, but, after the deed was recorded, found that the lot was five by ten feet in dimensions, and located fourteen miles south of Court House Square. *Held*, that, on tendering the \$250 and a reconveyance of the lot, and vainly demanding the diamond, he was entitled to recover in trover therefor: *Hayes v. Houston*, 86 Ill. 487. A had a lease from the owner of land to cut and sell wood therefrom. Wood cut by A, under the lease, was sold on execution against him. *Held*, that the owner of the land could not maintain trover against the purchaser for taking away the wood: *Garesche v. Boyce*, 8 Mo. 228. K. sold to F. his interest in the business and stock of the firm of B. & K., on condition that the property should not pass until paid for, or until the assumed liabilities of the firm should be paid. F., with B.'s consent, sold some of the property without then intending to appropriate the avails contrary to the agreement, but afterwards converted the avails to his private use and abandoned the business. *Held*, that K. could not maintain trover against F. therefor: *Kellogg v. Fox*, 45 Vt. 348.

§ 3669. **Mortgagor and Mortgagee.**—A mortgagor in possession has not only such a property to enable him to bring trover, but he has an equity of redemption which he may sell, and such a sale is not a conversion of the mortgagee's interest.<sup>1</sup> The mortgagor of a chattel who,

<sup>1</sup> *White v. Phelps*, 12 N. H. 382. If a mortgagor consents to the removal of the property from his possession by a third person, such removal does not amount to a conversion; and the mortgagee cannot maintain an action therefor against such person:

*Jones v. Goodwillie*, 143 Mass. 281. Where a mortgagor of chattels, having the right of possession, sells them, the mortgagee cannot maintain trover until a default has occurred: *Heflin v. Slay*, 78 Ala. 180.

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with the mortgagee's consent, remains in possession after condition broken may maintain trover against one who has wrongfully converted it.<sup>1</sup> The mortgagee has a title sufficient for the maintenance of trover against a subsequent purchaser from the mortgagor.<sup>2</sup> Trover lies by a mortgagee in possession against a stranger for cutting trees upon the former's premises and taking them away, the severance constituting the trees personal property, and the taking away the asportation for which the action lies.<sup>3</sup> Neither the first mortgagee, nor one to whom he has sold the property, is liable in trover to the second mortgagee. Having the right of possession, defeasible only on performance of the condition of the mortgage, he may assign his mortgage and sell his mortgaged property to a third person, subject only to the right of redemption of the mortgagor and those who claim under him.<sup>4</sup> But he cannot sell out the property in parcels, and if he should, trover would lie, as this would impair and perhaps defeat the right to redeem.<sup>5</sup> A second mortgagee of personal property, who is not in actual possession, cannot maintain an action of trover for its conversion.<sup>6</sup> To enable a mortgagee to maintain trover for the mortgaged chattels, a foreclosure is not necessary. If he has taken possession, this is enough as against one having no title.<sup>7</sup> When property is wrongfully seized and sold under a chattel mortgage, the owner is not confined to his remedy by contesting the foreclosure, but may maintain an action at law at once to recover the property or its value.<sup>8</sup> A purchaser without notice of mortgaged personalty, the mortgage not being recorded, is not liable to the mortgagee for conversion.<sup>9</sup> One who purchases mortgaged

<sup>1</sup> *Buddington v. Mastbrook*, 17 Mo. App. 577.

<sup>2</sup> *Marks v. Robinson*, 82 Ala. 69.

<sup>3</sup> *Whidden v. Seelye*, 40 Me. 247; 63 Am. Dec. 662.

<sup>4</sup> *Landon v. Emmons*, 97 Mass. 37. *Aliter* if he assumes to sell the complete title: *Ashmead v. Kellogg*, 23 Conn. 70.

<sup>5</sup> *Spaulding v. Barnes*, 4 Gray, 330.

<sup>6</sup> *Ring v. Neale*, 114 Mass. 111; 19 Am. Rep. 316.

<sup>7</sup> *Gregory v. North Pacific Lumbering Co.*, 15 Or. 447.

<sup>8</sup> *Black v. Howell*, 56 Iowa, 630.

<sup>9</sup> *Rogers v. Pierce*, 12 Neb. 48.

chattels before default of the mortgagor in possession, and sells them again before default in payment, and before demand of possession, is not liable for conversion.<sup>1</sup>

ILLUSTRATIONS. — A mortgagor of chattels, with intent to defraud the mortgagee, sold them to a purchaser with notice, who refused to deliver the property to the mortgagee on demand. *Held*, a conversion by such purchaser: *Jorgensen v. Tait*, 26 Minn. 327. The mortgagor of a chattel, on demand of the mortgagee, agreed to pay the mortgage or deliver the property on a certain day, and on that day failed to do either. *Held*, that this was sufficient proof of conversion: *Mattingly v. Paul*, 88 Ind. 95.

§ 3670. **Agents.** — Trover may be maintained for the conversion of property which the plaintiff has been induced by fraud to consign to the defendant.<sup>2</sup> An agent intrusted with property to hold and sell, when directed by his principal, and to account for the proceeds, is liable as for a conversion of the property in case he wrongfully refuses to sell or to account when directed, but unlawfully retains possession against the wishes of his principal.<sup>3</sup> Where an agent to sell a horse exchanges him for another, it is a conversion, and trover will lie for the value without a demand.<sup>4</sup> So one intrusted with chattels to sell, who pledges them without authority for his own debt, is liable for a conversion.<sup>5</sup> So where money is placed by A in the hands of B, to be loaned in A's name, and B loans it in his own name, it is a conversion, and B can sue for it and damages, without a previous demand.<sup>6</sup> But it is not a conversion, but a mere breach of duty for an agent intrusted with property to sell at a certain price, to sell it at a less price.<sup>7</sup> To render a factor liable for conversion of goods, demand must be made while the property or its proceeds are in his hands, or it must be shown that he had notice of the

<sup>1</sup> *Hathaway v. Brayman*, 42 N. Y. 322; 1 Am. Rep. 524.

<sup>2</sup> *McCrillis v. Allen*, 57 Vt. 505.

<sup>3</sup> *Coleman v. Pearce*, 26 Minn. 123.

<sup>4</sup> *Ainsworth v. Partillo*, 13 Ala. 460.

<sup>5</sup> *Nichols v. Gage*, 10 Or. 82.

<sup>6</sup> *Farrand v. Hurlbut*, 7 Minn. 477.

<sup>7</sup> *Moore v. McKibbin*, 33 Barb. 246.

owner's rights, or of the want of title of the party placing the goods in his hands.<sup>1</sup> In conversion, plaintiff by suing ratifies the defendant's act in making for him a collection of the money sued for, but does not confirm his act in turning it over to another, who was also liable to account to plaintiff. Nor does the suit ratify expenses incurred in making the collection.<sup>2</sup> A servant is not liable in trover for goods bought by a master at an unauthorized sale, by a mortgagor in possession, and delivered by the mortgagor to the servant to be carried to his master, where the servant carries and delivers them, but has no knowledge of the want of authority to sell, and is guilty of no tortious act.<sup>3</sup>

ILLUSTRATIONS. — Plaintiff delivered to the defendant a promissory note to get discounted, with instructions not to let it go out of his hands without receiving the proceeds. The defendant, without wrongful intent, delivered the note to F., who promised to get and return the money on it. F. got the money, but appropriated it to his own use. *Held*, that defendant was liable for a conversion of the note: *Laverty v. Snethen*, 68 N. Y. 522; 23 Am. Rep. 184. Plaintiff sent cotton to his agent, with directions to forward it to defendants, who were commission merchants, to be sold on plaintiff's account. The agent shipped it to defendants in his own name and as his property, and they sold it according to his instructions and remitted the proceeds to him. The defendants acted in good faith, and without knowledge of plaintiff's title. *Held*, that defendants were not liable to plaintiff for a conversion of the cotton: *Roach v. Turk*, 9 Heisk. 708; 24 Am. Rep. 360. A having intrusted to B money to pay A's indebtedness to C, and B having converted the same, *held*, that A could recover the amount, though he had not paid C: *Worley v. Moore*, 97 Ind. 15. A. delivered to G. a number of shares of stock in a mining company, as collateral security, and to be sold by G. whenever he could obtain not less than a specified sum per share. G. disposed of a part of these shares on his own account for less than a sum agreed, and in settlement with A., transferred to him an equal number of other shares of the same stock and of the same value. A. alleged fraud in the settlement, and brought action to recover

<sup>1</sup> *Roach v. Turk*, 9 Heisk. 708; 24 Am. Rep. 360.      <sup>2</sup> *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289.

<sup>3</sup> *Knowlton v. Logansport*, 75 Ind. 103.

the money received for the shares sold. G. set up as a defense that he at all times had and held for A.'s use an equal number of shares of equal value, and that he has so replaced them. *Held*, that G. did not become responsible for the proceeds of the sale of the shares: *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 282. A deposited with B certain non-negotiable bonds for safe-keeping, and directed him to ascertain on what terms A could raise money on them. B transferred the bonds to C, who had no notice of A's right to them. *Held*, that A might, maintain trover against C: *Blackman v. Lehman*, 63 Ala. 547. 35 Am. Rep. 57. A, the common agent for the sale of fertilizers of B and C, sold some of B's, which, as B's bags were old, he shipped in bags of C, and the purchaser's cotton note was made by mistake to A as agent of C. C, on maturity of the note, received and sold the cotton as his. *Held*, that B could maintain trover therefor: *Seal v. Zell*, 63 Md. 356. Certain coupons of United States bonds belonging to S. had been stolen from him and delivered by one who received them from the thief to H., and by him, acting as agent, and in good faith, without gross negligence, sold and turned into money, which he paid to the person from whom he received them. *Held*, that H. was not liable to S. for their conversion: *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491.

§ 3671. **Tenants in Common.**—A culpable loss or destruction by one tenant in common of his co-tenant's interest will render him liable for a conversion.<sup>1</sup> But acts of one of two joint tenants of chattel property,—e. g., a raft of logs,—performed in the endeavor to save it from loss or depreciation, although they amount to preventing his co-tenant from exercising ownership, and are against his consent, will not be deemed a conversion, nor warrant an action of trover by the co-tenant.<sup>2</sup> An assertion of ownership in entirety by a tenant in common in possession of personal property, as against his co-tenant, coupled with a refusal to allow the latter to hold at all, is equivalent to an ouster by him of his co-tenant, and works as complete a disseisin of the foundation on which the

<sup>1</sup> *Mayhew v. Herrick*, 7 Com. B. 229; *White v. Brooks*, 43 N. H. 402; *Hyde v. Stone*, 9 Cow. 230; 18 Am. Dec. 501. Trover lies by a part owner of a vessel against the other owner, who sends her to sea, where she is lost: *Lowthorp v. Smith*, 1 Hayw. (N. C.) 255.

<sup>2</sup> *Kilgore v. Wood*, 56 Me. 150; 96 Am. Dec. 404.

latter might take and justify possession as would a sale of the whole to a stranger. Such conduct amounts in legal effect to a conversion.<sup>1</sup> In England, says Cooley,<sup>2</sup> it is held that neither a claim to exclusive ownership by one, nor the exclusion of the other from possession, nor even a sale of the whole, can be treated in the law as the equivalent of loss or destruction, or be considered a conversion;<sup>3</sup> and this rule is adopted in some cases in Vermont;<sup>4</sup> and in North Carolina it is also followed, but with this qualification, that a sale of the property out of the state may be treated as a loss or destruction.<sup>5</sup> In other cases it has been held that even a sale is not necessary to make out a conversion; that the doctrine that one tenant in common cannot maintain trover against his co-tenant without proving a loss, destruction, or sale of the article applies only to things in their nature so far indivisible that the share of one cannot be distinguished from that of the other. It can have no reasonable application to such commodities as are readily divisible, by tale or measure, into portions absolutely alike in quality, such as grain or money. Thus if one is entitled to the half of a certain number of bushels of wheat, he is entitled to the half in severalty; and if his co-tenant in actual possession refuse to surrender the half on demand, and deny his right, this is a conversion, because it deprives him of his right as effectually as would a sale.<sup>6</sup> This doctrine has been applied to an interest in a machine which one of the tenants in common had taken and annexed to the freehold, denying the right of the other.<sup>7</sup> The use of

<sup>1</sup> *Bray v. Bray*, 30 Mich. 479; *Dela-ney v. Root*, 99 Mass. 546.

<sup>2</sup> Cooley on Torts, 455.

<sup>3</sup> *Mayhew v. Herrick*, 7 Com. B. 229.

<sup>4</sup> *Tabbs v. Richardson*, 6 Vt. 442; 27 Am. Dec. 570; *Sauborn v. Morrill*, 15 Vt. 700; 40 Am. Dec. 701; *Barton v. Burton*, 27 Vt. 93. And see *Dain v. Cowing*, 22 Me. 347; 39 Am. Dec. 585; *Symonds v. Harris*, 51 Me. 14; 81 Am.

Dec. 553; *Gilbert v. Dickerson*, 7 Wend. 449; 22 Am. Dec. 592.

<sup>5</sup> *Pitt v. Petway*, 12 Ired. 69; *Shearin v. Riggsbee*, 97 N. C. 216.

<sup>6</sup> *Fiquet v. Allison*, 12 Mich. 328; 86 Am. Dec. 54; *Cowan v. Buyers*, Cooke (Tenn.), 53; 5 Am. Dec. 668.

<sup>7</sup> *Grove v. Wise*, 39 Mich. 161; *Channon v. Lusk*, 2 Lans. 211; *Lobdell v. Stowell*, 51 N. Y. 70.

property by a stranger in partnership with one of the co-tenants is not a conversion; nor is such stranger or his partner liable for a conversion because the property is levied upon and sold under process against them.<sup>1</sup> Where two persons are jointly interested in a promissory note, and one of them deposits it with the other for collection, and the latter, without authority, surrenders it to the drawer to be canceled or destroyed, such surrender is a conversion, and trover will lie therefor by the other joint owner of the note.<sup>2</sup> But one tenant in common cannot maintain trover for conversion against a co-tenant for a mere attempted sale of a larger share of a vessel than belonged to him,—no title or possession passing thereby.<sup>3</sup> One tenant in common cannot maintain trover against his co-tenant for a sale of the common property which he is authorized by contract to make; nor will it lie against the person to whom the co-tenant sold the property.<sup>4</sup>

§ 3672. **Bailees.**—It is not conversion for a bailee of any kind, or a common carrier, to deliver property received from a wrong-doer, in accordance with the terms of the bailment,<sup>5</sup> except after notice of the rightful owner's rights.<sup>6</sup> But trover will lie against a party to whom property has been delivered, with power to sell it to pay for its keep, if he convert it to his own use.<sup>7</sup> A bailee is liable in trover where he refuses to deliver the property to one whom he knows to be the owner thereof, and from whom his bailor obtained the property wrongfully.<sup>8</sup> The

<sup>1</sup> *Bell v. Layman*, 1 T. B. Mon. 39; 15 Am. Dec. 83.

<sup>2</sup> *Winner v. Penniman*, 35 Md. 163.

<sup>3</sup> *Estey v. Boardman*, 61 Me. 595; 6 Am. Rep. 385.

<sup>4</sup> *Hewlett v. Owens*, 51 Cal. 570.

<sup>5</sup> *Nelson v. Iverson*, 17 Ala. 216; *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289; *Nanson v. Jacob*, 93 Mo. 331;

<sup>6</sup> *Am. St. Rep.* 531.

<sup>7</sup> *Sheridan v. R. R. Co.*, 4 Com. B.,

N. S., 619; *Ogle v. Atkinson*, 5 Taunt. 759; *Biddle v. Bond*, 6 Best & S. 225;

*Hardman v. Willcock*, 9 Bing. 382; *Bliven v. R. R. Co.*, 36 N. Y. 403;

*Bates v. Stanton*, 1 Duer, 79; *King v. Richards*, 6 Whart. 418; 37 Am. Dec. 420.

<sup>8</sup> *Whitlock v. Heard*, 13 Ala. 776;

48 Am. Dec. 73.

<sup>9</sup> *Doty v. Hawkins*, 6 N. H. 247; 25 Am. Dec. 459; *Dusky v. Rudder*, 80 Mo. 400.

sale of property by the hirer of it is a conversion.<sup>1</sup> So a deviation from the regular route, and the loss of the goods, constitutes conversion in the carrier, and trover is a proper remedy.<sup>2</sup> A bailee is guilty of conversion if he uses property bailed to him in a different manner or for other purposes than those designated in the contract of bailment, and trover is maintainable therefor.<sup>3</sup> One to whom a note had been delivered as bailee, with power to dispose of it only in a particular manner, and upon a certain condition, having disposed of it when the condition had not been performed, and in a manner not authorized by the agreement upon which he received it, is liable for a conversion without demand.<sup>4</sup> An adulteration of liquor by a carrier or his servant will be a conversion of it.<sup>5</sup> A bailee may have trover against the bailor or his vendee where the possession of the property has been fraudulently taken from the bailee in contravention of his rights.<sup>6</sup> The wearer of a borrowed scarf-pin may maintain an action against an innkeeper, the scarf-pin having been stolen from the room occupied by the wearer.<sup>7</sup> The vendee of a pawnor's interest can maintain trover against the pawnee, if the latter refuses to deliver the goods on tender of the amount of the debt.<sup>8</sup>

**ILLUSTRATIONS.**—The consignee of goods not perishable, refusing to receive them, the carrier, being unable to find a warehouseman who would store them and advance the freight and charges, sold them at private sale. *Held*, that the carrier was liable for conversion: *Rankin v. Memphis etc. Packet Co.*, 9 Heisk. 564; 24 Am. Rep. 339. Where the hirer of plaintiff's mule exchanged it for another during the term of bailment, *held*, a conversion authorizing immediate suit: *Allen v. Jones*, 72

<sup>1</sup> *Sanborn v. Colman*, 6 N. H. 14; 23 Am. Dec. 703.

<sup>2</sup> *Phillips v. Brigham*, 26 Ga. 617; 71 Am. Dec. 227.

<sup>3</sup> *Crocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 118. The unauthorized use by an agister of cattle in his custody is a conversion: *Gove v. Watson*, 61 N. H. 136.

<sup>4</sup> *Badger v. Hatch*, 71 Me. 562; 242.

*Hynes v. Patterson*, 95 N. Y. 1; *Picks v. Lyle*, 46 Mich. 483; *St. John v. Connel*, 7 Port. 466.

<sup>5</sup> *Dench v. Waiker*, 14 Mass. 499. See *Young v. Mason*, 8 Pick. 551.

<sup>6</sup> *McConnell v. Maxwell*, 3 Blackf. 419; 26 Am. Dec. 428.

<sup>7</sup> *Chamberlain v. West*, 37 Minn. 54.

<sup>8</sup> *Southworth Co. v. Lamb*, 82 Mo.

Ala. 248. Plaintiff sent to defendant, who was cashier of a bank, and then at the bank, a sum of money for a special purpose. The defendant received the money, knowing the purpose for which it was sent, and immediately misapplied it. *Held*, that the defendant was personally liable for the money, and interest from the time it was received: *Norton v. Kidder*, 54 Me. 189. A undertook to carry certain flour for B to a certain place, and having deposited it by the way, a part of the flour was taken by mistake by C. B refusing to receive the residue, C received it and paid for the whole. *Held*, that this was a conversion by A sufficient to support trover by B: *Bullard v. Young*, 3 Stew. 46.

§ 3673. **Who Liable.**—One assisting in a wrongful taking of goods is liable; that he acted only as an agent is no defense.<sup>1</sup> But in an action by A against B for forcibly carrying away a chattel and converting it to his own use, B may show as a valid defense that at the time of the taking, C owned and was entitled to the possession of the chattel, and that B took it as C's agent and by C's direction.<sup>2</sup> Merely receiving property from the wrongful possessor, and returning it before notice of his want of title, is not a conversion.<sup>3</sup> Assisting a mortgagor in possession to remove his goods is not a conversion.<sup>4</sup> A commission merchant who, supposing certain wheat to belong to A, pays over to him the proceeds of its sale is liable to B, its real owner, for its conversion.<sup>5</sup> To maintain trover, defendant must have had possession of and converted the goods. Where defendant found a purchaser for goods in the charge of owner's agent, and the agent sold them, and transferred one of purchaser's notes given for the price to the defendant, but defendant at no time had any possession or control of the goods, it was held that trover would not lie.<sup>6</sup> Where the proof fails to show that the defendant ever had the actual possession of a chattel, or in any way prevented the plaintiff from using the same, but shows that, while it was leased by the plaintiff, the

<sup>1</sup> *McPartland v. Read*, 11 Allen, 231; *Edgerly v. Whalen*, 106 Mass. 307.

<sup>2</sup> *Huffman v. Parsons*, 21 Kan. 467.

<sup>3</sup> *Hill v. Hayes*, 38 Conn. 532.

<sup>4</sup> *Strickland v. Barrett*, 20 Pick. 415.

<sup>5</sup> *Cerkel v. Waterman*, 63 Cal. 34.

<sup>6</sup> *Presley v. Powers*, 82 Ill. 125.



defendant purchased the same at a sale for taxes, and before the lease had expired, the defendant refused to part with his claim, this will not establish a conversion.<sup>1</sup> One who, having received a wagon innocently from one not the owner, with a view to buying it, returns it to the one from whom he received it, upon being informed by the owner that it is his, but before demand or suit, is not liable for the conversion thereof; but otherwise, if he so returns it after the owner claims it.<sup>2</sup>

ILLUSTRATIONS.—DEFENDANT HELD LIABLE.—An agent, acting under instructions from his principal, refused to deliver to the owner a chattel received from a fellow-employee until certain storage should have been paid, the claim for which was untenable. *Held*, that the agent was liable in trover to the owner: *Singer Mfg. Co. v. King*, 14 R. I. 511. Cartmen, in disregard of a wife's rights, assisted her husband in removing her chattels from rooms occupied by them in common. *Held*, that they were liable to her for a conversion: *Meud v. Jack*, 12 Daly, 65. Plaintiff had title to an undivided one third of grain in defendant's possession, and there was evidence that on his applying, through an agent, for a division of the grain, and a surrender to such agent of his one third, both defendants refused to permit any division, or to give the agent any part of the grain, and afterwards sold it and appropriated the proceeds to their joint use. *Held*, that the evidence warranted a verdict against both defendants for the value of one third of the grain: *Dahl v. Fuller*, 50 Wis. 501. A falsely represented himself to be a member of the firm of B & Co., and induced C to take a forged check purporting to be signed by B & Co., for cattle which C supposed himself to be selling to B & Co. A sold the cattle to B & Co., and B & Co. sold them to D. *Held*, that C could maintain against D an action for a conversion, although B & Co. and D acted in good faith: *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180. M. directed an agent of S. to order certain cotton bagging from Boston to be delivered at Charlotte, with the understanding that M. should accept and pay for the bagging if of suitable quality. R. attached the bagging in transit at Norfolk, on a claim against the agent. M. intervened, and R. settled the controversy by paying M. a certain sum for his interest. *Held*, that S. was entitled to recover of M. as for a conversion of the bagging: *Sever v. McLaughlin*, 79 N. C. 153. W. being in possession of an engine and boiler

<sup>1</sup> *Forth v. Pursley*, 82 Ill. 152.

<sup>2</sup> *Rembaugh v. Phipps*, 75 Mo. 422.

under a lease from plaintiff, by the terms of which, plaintiff, at the expiration of the term, and upon full payment of the rent, was to execute to W. a bill of sale of the property, permanently attached the same to land leased by him from another, and gave to C. a bill of sale of engine and boiler, which were afterwards sold without the land, under a decree of foreclosure of an alleged mechanic's lien for repairs upon them. *Held*, that plaintiff might maintain an action against C's agents for the recovery of possession of engine and boiler as personal property: *March v. McKoy*, 56 Cal. 85.

ILLUSTRATIONS (CONTINUED).—DEFENDANT HELD NOT LIABLE.—A married woman bought goods on credit, and died before paying for them. The creditor called on the husband for payment, finding him in possession. The husband offered to sell back the goods, but the creditor declined to purchase, offering, however, to find a purchaser, which he did. The husband sold to the purchaser, handing the proceeds over to the creditor. Suit was subsequently brought by the administrator of the wife against the creditor. *Held*, no conversion by him: *Presley v. Powers*, 82 Ill. 125. A paving company that had forfeited its contract left a quantity of sand in the street which it had agreed to pave, and another contractor used the sand in finishing the job. The company sued the city in *assumpsit*, alleging a conversion of the sand. *Held*, that the company should have removed the sand, and as it neither did so nor made any demand for it, neither the city nor the later contractor committed any tort in removing it; that it was not, therefore, converted unless the city sold it; and if it did not sell it, it was not answerable for the use made of it by the contractor, as he was not a municipal agent: *Detroit v. Michigan Paving Co.*, 38 Mich. 358. The plaintiff sued the defendant in trover for selling on a tax-warrant a quantity of hay which she claimed as her own, to satisfy a tax assessed against her husband. The defendant took no possession of the hay, but advertised and sold it in the mow, and left it there. *Held*, no conversion: *Mills v. Van Camp*, 41 Mich. 645. The owner of a county order, on presenting it for payment, was told by the treasurer to take it to his bank, which he did, delivering it without indorsement, and taking credit for the amount thereof as a deposit on his account, subject to his check in two or three days. The next day the bank presented the order to the treasurer for redemption, and it was satisfied by crediting the bank on its checks then held by the treasurer. On the second day thereafter, and before the owner had checked on the order deposit, the bank failed. *Held*, that, in the absence of bad faith, an action could not be maintained against the treasurer for conversion of the order: *Miles v. Reiniger*, 39 Ohio

St. 499. An attorney, having collected money for his client, deposited it in her bank, then of good standing, in his own name, he never having had funds there, and gave her immediate notice, and fourteen days later the bank failed, she not having made demand in the mean time. *Held*, that there was no conversion by him: *Rogers v. Hopkins*, 70 Ga. 454. A borrowed B's plow from C, who had possession, but no right to lend it, and after using it a few days returned it to C, believing all the time that it belonged to C. *Held*, that A was not guilty of a conversion, and that A's failure to comply with B's demand, made after the return, was no evidence of a conversion: *Frome v. Dennis*, 45 N. J. L. 515. A warehouseman shipped wheat deposited with him for storage, without the consent of its owners, took bills of lading, drew on the consignee, and procured the drafts to be discounted by a bank, delivering the bills of lading as security. *Held*, that the bank was not liable for a conversion: *Leuthold v. Fairchild*, 35 Minn. 99. A field-driver merely detained an estray in his yard in order to notify the owner before impounding. *Held*, not liable for a conversion: *Dean v. Lindsey*, 82 Mass. 264.

§ 3674. Demand — When Necessary — Mode. — Demand of possession is essential where the defendant came into possession of the property lawfully and without fault.<sup>1</sup> "What is meant by one coming lawfully into possession of the property is, where he finds it and retains it for the true owner, or where he obtains the possession of the property by the permission or consent of the plaintiff, as where the relation of bailor and bailee exists. In this latter class of cases a demand and refusal would be necessary, unless it could be shown the defendant had appropriated the article so found to his own use, or had disposed of the property bailed, contrary to the terms and stipulations of the contract of bailment."<sup>2</sup>

<sup>1</sup> *Liptrot v. Jones*, 1 Ga. 381; *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 258; *Tripp v. Pulver*, 2 Hun, 511; *Gillet v. Roberts*, 57 N. Y. 28. One who, *bona fide*, purchases chattels at an invalid tax sale apparently regular is entitled to a demand before suit is brought: *Kellogg v. Olson*, 34 Minn. 103. It was held in *Gilmor v. Newton*, 9 Allen, 171, 85 Am. Dec. 749, that one who receives possession from

another who had no right, and treats the property as his own, is not entitled to a demand. See also *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795; *Prime v. Cobb*, 63 Me. 200.

<sup>2</sup> *Liptrot v. Jones*, 1 Ga. 381. "It is objected that no demand for the machine was proved. None was required, as defendant testified she sold it. A demand and refusal are only evidence of a conversion, and are

Where there is an actual conversion, no demand is necessary.<sup>1</sup> Thus no demand is necessary where the conversion consists of an unauthorized disposition, waste, or destruction of the property;<sup>2</sup> or where a pledgee unlawfully sells the property pledged otherwise than at public auction;<sup>3</sup> or where goods are sold without the owner's authority or ratification;<sup>4</sup> or where one in possession of a chattel, but without title, sells it, and receives the proceeds for his own use;<sup>5</sup> or where a bank treats a special deposit as a part of its general funds, transferring it and putting it among them;<sup>6</sup> or where the evidence shows that it would have been unavailing;<sup>7</sup> or that the taking was illegal;<sup>8</sup> or where property is parted with by duress of imprisonment, or duress by threats;<sup>9</sup> or a servant takes away his master's goods upon leaving his service.<sup>10</sup> A demand and refusal are never necessary as evidence of conversion, unless the other acts of the defendant are not sufficient to prove it;<sup>11</sup> or if the defendant, before the taking, had notice that the title was in the plaintiff.<sup>12</sup> Demand may be by acts as well as words. An attempt to remove one's property, and a resistance by the defendant, is a demand.<sup>13</sup> One need not exhibit his title to the prop-

not required when an actual conversion is proved. A wrongful taking or a wrongful sale constitutes an actual conversion, and when shown, dispenses with a demand. But when a party comes lawfully into possession and retains the property, to put him in the wrong a demand and refusal are necessary": *Howitt v. Estelle*, 92 Ill. 218.

<sup>1</sup> *Newsom v. Newsom*, 1 Leigh, 86; 19 Am. Dec. 739; *Everett v. Cotton*, 6 Wend. 603; 22 Am. Dec. 551; *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 258; *Pierce v. Benjamin*, 14 Pick. 356; 25 Am. Dec. 396; *Houston v. Dyche*, Meigs, 76; 33 Am. Dec. 130; *Porter v. Foster*, 20 Me. 391; 37 Am. Dec. 59; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670; *Buel v. Pumphrey*, 2 Md. 261; 56 Am. Dec. 714; *Webber v. Davis*, 44 Me. 177; 69 Am. Dec. 87;

*Kronschnable v. Knoblauch*, 21 Minn. 56; *Pease v. Smith*, 61 N. Y. 477; *Kenrick v. Rogers*, 26 Minn. 344; *Snyder v. Baber*, 74 Ind. 47; *Cox v. Albert*, 78 Ind. 241.

<sup>2</sup> *Haas v. Taylor*, 80 Ala. 459.

<sup>3</sup> *Rosenzweig v. Frazer*, 82 Ind. 342.

<sup>4</sup> *Hake v. Buell*, 50 Mich. 69.

<sup>5</sup> *Branch v. Planters' Loan and Savings Bank*, 75 Ga. 342.

<sup>6</sup> *Monmouth Bank v. Dunbar*, 19 Ill. App. 558.

<sup>7</sup> *Gottlieb v. Hartman*, 3 Col. 53.

<sup>8</sup> *Rhoades v. Drummond*, 3 Col. 374.

<sup>9</sup> *Foshay v. Ferguson*, 5 Hill, 154.

<sup>10</sup> *Pilsbury v. Webb*, 33 Barb. 213.

<sup>11</sup> *Gilmore v. Newton*, 9 Allen, 171; 85 Am. Dec. 749.

<sup>12</sup> *Hallett v. Carter*, 19 Hun, 629.

<sup>13</sup> *Badger v. Balavia Paper Co.*, 70 Ill. 302.

erty, where he makes a demand of the property for which he brings his action of trover.<sup>1</sup> To constitute a valid demand by the purchaser of a building standing on land, but not a fixture, it is not necessary that he have at the time the implements with him necessary for its removal.<sup>2</sup> A demand by letter upon another to restore goods belonging to the writer is not sufficient to constitute a conversion, if no notice is taken of it; but if an answer is sent, falsely denying the possession of such goods, the demand becomes sufficient to charge the latter with a conversion.<sup>3</sup> The demand must be made upon the defendant or his agent.<sup>4</sup> A failure to make demand, where demand was essential at common law, can be shown in defense only where it is set up in the answer and is accompanied by a tender.<sup>5</sup>

ILLUSTRATIONS.—A lets B have a sum of money to pay a certain note, and B converts it to his own use. *Held*, that A need not make a demand on B before bringing suit to recover the money: *Bunger v. Roddy*, 70 Ind. 26. An agent, to whom a watch was delivered to sell, gave it to his own creditor in payment of the debt. *Held*, that the principal might maintain trover against the creditor therefor, without a previous demand: *Rodick v. Coburn*, 68 Me. 170. A party turns his horse into the inclosure of another, and refuses to take him away, and the other party uses the horse as an equivalent for feeding him. *Held*, that the owner cannot maintain trover without proving a demand and refusal: *Kennet v. Robinson*, 2 J. J. Marsh. 84. Defendant receipted to plaintiff for three shares of stock, "to sell for him on commission," which defendant exchanged for other property. *Held*, that the exchange so far established a conversion as to render proof of demand on the part of the plaintiff, before suit for recovery, unnecessary: *Haas v. Damon*, 9 Iowa, 589. L. brought an action of trover against O. to recover for goods in his possession, fraudulently purchased of the plaintiff on credit by W., and by W. sold to O., claiming that W., O., and one T. had conspired to defraud him in the purchase of the goods. *Held*, that if O. had participated in the fraud by which the goods were procured, no demand on him

<sup>1</sup> *Ratcliff v. Vance*, 2 Mill Const. 239.

<sup>2</sup> *Edmundson v. Bric*, 136 Mass. 189.

<sup>3</sup> *Pattee v. Gilmore*, 18 N. H. 460;

45 Am. Dec. 385.

<sup>4</sup> *Goodwin v. Wertheimer*, 99 N. Y.

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<sup>5</sup> *Engel v. Dressel*, 26 Mo. App.

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for the goods, before bringing the suit, was necessary: *Luckey v. Roberts*, 25 Conn. 486. Part of a raft of logs which C. had sold to F., and was running to market, came into J.'s boom, and were then resold by F. to C., and were afterwards disposed of by J. Held, that no demand was necessary to enable C. to maintain his action against J. as for a conversion: *Couillard v. Johnson*, 24 Wis. 533.

§ 3675. **Effect of Refusal to Deliver — When a Conversion.**—Refusal to deliver on demand is not a conversion; it is evidence of conversion which may be explained by parol,<sup>1</sup> and a qualified, conditional, and reasonable refusal to deliver chattels to the owner on demand is not evidence of a conversion.<sup>2</sup> The defendant may show that he does not deliver the thing because it is impossible, having been lost or taken from him without his fault;<sup>3</sup> or that he had neither actual nor constructive possession of the property, no right to it nor control over it, and therefore could not comply;<sup>4</sup> or that he is ready to give it to the true owner, whoever he is, on being indemnified from other claims.<sup>5</sup> Refusal to comply with a premature demand is no evidence of conversion.<sup>6</sup> Where a refusal to deliver property may be considered only as the result

<sup>1</sup> *Thompson v. Rose*, 16 Conn. 71; 41 Am. Dec. 121; *Beckman v. McKay*, 14 Cal. 250; *Deetus v. Fuss*, 8 Md. 148; *Coffin v. Anderson*, 4 Blackf. 395; *Daggett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91; *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350; *Houston v. Dyche*, Meigs, 76; 33 Am. Dec. 130; *Sturges v. Keith*, 57 Ill. 451; 11 Am. Rep. 28; *Packard v. Gilman*, 6 Cow. 757; 16 Am. Dec. 475; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Davis v. Buffum*, 51 Me. 160; *Farrar v. Rollins*, 37 Vt. 295; *Huxley v. Hartzell*, 44 Mo. 370; *Lander v. Bechtel*, 55 Wis. 593; *Lockwood v. Bull*, 1 Cow. 322; 13 Am. Dec. 539; *Irish v. Cloyes*, 8 Vt. 30; 30 Am. Dec. 447; *Dezell v. Odell*, 3 Hill, 215; 38 Am. Dec. 628; *Bradley v. Spofford*, 23 N. H. 444; 55 Am. Dec. 205; *Webber v. Davis*, 44 Me. 177; 69 Am. Dec. 87; *Winston v. Taylor*, 28 Mo. 82; 75 Am. Dec. 112; *Weston v. Carr*, 71 Me. 356;

*Boothe v. Estes*, 16 Ark. 104; *Ingersoll v. Barnes*, 47 Mich. 104; *Hallenbake v. Fish*, 8 Wend. 547; 24 Am. Dec. 88. But it becomes conclusive if the refusal is not explained: *Magee v. Scott*, 9 Cush. 148; 55 Am. Dec. 49; *Nauman v. Caldwell*, 2 Sweeny, 212.

<sup>2</sup> *Butler v. Jones*, 80 Ala. 436; *Carroll v. Mix*, 51 Barb. 212.

<sup>3</sup> *Abraham v. Nurn*, 42 Ala. 51; *Dearborn v. Bank*, 58 Me. 273; *Jefferson v. Hale*, 31 Ark. 286; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Hill v. Belasco*, 17 Ill. App. 194.

<sup>4</sup> *Davis v. Buffum*, 51 Me. 160; *Yale v. Saunders*, 16 Vt. 243.

<sup>5</sup> *Dowd v. Wadsworth*, 2 Dev. 130; 18 Am. Dec. 567; *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350; *Zachary v. Pace*, 9 Ark. 212; 47 Am. Dec. 744.

<sup>6</sup> *Hagar v. Randall*, 62 Me. 439.

of a reasonable hesitation in a doubtful matter, it is not sufficient evidence to prove a conversion.<sup>1</sup> If demand is made by an agent, and is not complied with because the agent gives no evidence of authority, this does not make out a conversion.<sup>2</sup> So if demand is made on an agent for property held by him for his principal, his refusal to deliver does not render him liable in trover.<sup>3</sup> An administrator who takes possession of personal property claimed by the decedent, with knowledge of an adverse claim by a third party to its ownership, has a reasonable time in which to take counsel and ascertain his legal rights in the premises, without subjecting himself to a suit for its conversion.<sup>4</sup> But the refusal must have been distinctly placed on these grounds.<sup>5</sup> If at the time of demand the property is present, and no objection is made to its being taken, and the only refusal is a refusal to carry and deliver it to the owner at his home, this is no conversion, even though the defendant ought to have carried it.<sup>6</sup> But a refusal to deliver on false or insufficient grounds, is conclusive evidence of a conversion.<sup>7</sup> A general refusal to deliver over a number of articles upon the demand of their owner is evidence of a conversion, although the party making the refusal has only a portion of the articles demanded under his control.<sup>8</sup> A refusal from misapprehension of the law may be reasonable, and so prevent its having the effect of a conversion; therefore, where one intrusted with notes for collection was summoned by trustee process in an action instituted against his principal, and because of such process refused to deliver the notes upon order from his principal, there was no conversion, though such notes were not within the meaning

<sup>1</sup> Robinson v. Burleigh, 5 N. H. 225.

<sup>2</sup> Watt v. Potter, 2 Mass. 77; Taylor v. Spears, 6 Ark. 381; 44 Am. Dec. 519.

<sup>3</sup> Carey v. Bright, 53 Pa. St. 70.

<sup>4</sup> Flannery v. Brewer, 66 Mich. 509.

<sup>5</sup> Ingalls v. Bulkley, 15 Ill. 224.

<sup>6</sup> Farrar v. Rollins, 37 Vt. 295.

<sup>7</sup> Holbrook v. Wright, 24 Wend. 169; 35 Am. Dec. 607; Whitlock v. Heard, 13 Ala. 776; 48 Am. Dec. 73; Huxley v. Hartzell, 44 Mo. 370.

<sup>8</sup> Ray v. Light, 34 Ark. 421.

of the act authorizing trustee process.<sup>1</sup> If upon demand the defendant said he would retain the goods demanded, and that he knew a suit would be brought, this is evidence of a conversion.<sup>2</sup>

ILLUSTRATIONS. — One, finding it difficult to prevent the heifer of another from going home with a herd which he was assisting to drive, let her remain a while therewith, and promised the drover to negotiate her purchase, and when asked by the owner where she was, answered that he did not know. *Held*, not to establish a conversion: *Brown v. Boyce*, 68 Ill. 294. An agent for the owner to negotiate a note pledged it for a loan to himself at unlawful interest. The pledgee, the loan not being paid, sold the note, and the owner subsequently demanded the note of him, without effect. *Held*, sufficient evidence of a conversion: *Keutgen v. Parks*, 2 Sand. 60. A died, leaving a watch in defendant's house. Plaintiff demanded the watch, and defendant declined to deliver it until an executor should be appointed. *Held*, that no evidence of a conversion was shown, such as would support trover: *Buffington v. Clarke*, 15 R. I. 437. A left B's tools on C's premises. C refused to deliver them up to B on demand, telling him that he must prove property. *Held*, that on these facts B could maintain trover against C: *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31. A cow, going at large in the highway, without a keeper, joined a drove of cattle, without the knowledge of the driver, and was driven to a distant place, and there pastured with the other cattle; the owner of the cow called on the driver, after his return, made inquiries, and demanded the cow. On the return of the drove, a few months afterwards, the driver delivered the cow to the owner, who received her. *Held*, in an action of trover against the driver, that his omission to deliver the cow on demand was not evidence of conversion: *Wellington v. Wentworth*, 8 Met. 548. The holder of a mortgage of everything in a certain organ manufactory, including "parts of organs finished and unfinished," and conditioned that the property should not be removed therefrom without his written consent, exhibited his mortgage to a church committee, stated that it "included their organ, or parts of it, and demanded the property," and that they answered that they "knew nothing about it," and refused to do anything. *Held*, not to prove any definite demand or refusal or conversion: *Ware v. Georgetown Congregational Society*, 125 Mass. 584. Where the plaintiff demanded of the defendant the goods sued for, and he answered that he had no claim to them himself, but

<sup>1</sup> *Fletcher v. Fletcher*, 7 N. H. 452;  
28 Am. Dec. 359.

<sup>2</sup> *Allen v. Ogden*, 1 Wash. C. C.  
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would not give them up until he ascertained to whom they belonged, and the proof showed that the property was in dispute, and that the defendant had reasonable grounds to doubt the title of the plaintiff, *held*, that such qualified refusal, under the circumstances, did not amount to a conversion: *Zachary v. Pace*, 9 Ark. 212. Plaintiff, before bringing trover for a machine, went to defendant's place of business, paid the amount due, and asked where the machine was, to which defendant replied, "In our warehouse." Plaintiff then made a formal demand for it, and defendant made no reply. *Held*, that his silence was equivalent to a refusal: *Richards v. Pitts Agricultural Works*, 37 Hun, 1.

§ 3676. **Measure of Damages.** — The measure of damages, where the conversion is complete, is not agreed upon by the authorities. In some cases it is held that the plaintiff is entitled to recover the highest market price of the article between the time of the conversion and the time of the trial.<sup>1</sup> In California, it is held that the plaintiff, if he recovers, may elect to take judgment either for the value of the property at the time of the conversion, with interest from that time, or, where he has prosecuted the action with reasonable diligence, for the highest market value of the property at any time between the conversion and the verdict, without interest, and if he fails to elect, the court may award the damages under either rule.<sup>2</sup> Other cases take the market value at the time of the conversion, with any advance thereon that may have taken place within a reasonable time thereafter

<sup>1</sup> *Markham v. Jaudon*, 41 N. Y. 235; *Burt v. Dutcher*, 34 N. Y. 493; *Morgan v. Gregg*, 46 Barb. 183; *Romaine v. Van Allen*, 26 N. Y. 309; *Ewing v. Blount*, 20 Ala. 694; *Jenkins v. McConico*, 26 Ala. 213; *Douglass v. Kraft*, 9 Cal. 562; *Hamer v. Hathaway*, 33 Cal. 117; *Carter v. Du Pre*, 18 S. C. 179; *Linan v. Reeves*, 68 Ala. 89; *Street v. Nelson*, 67 Ala. 504; *Burks v. Hubbard*, 69 Ala. 379; *Loeb v. Flash*, 65 Ala. 526. In trover the allegation of value is a material averment; the allegation of the time of conversion is not: *Hixon v. Pixley*, 15 Nev. 475. But a complaint in trover

which does not allege the conversion is defective: *Edwards v. Sonoma Valley Bank*, 59 Cal. 136. The value of the property must be proved, whether denied in the answer or not: *Starr v. Cragin*, 24 Hun, 177.

<sup>2</sup> *Barranto v. Garratt*, 50 Cal. 112. Where the action is brought within two months from the time of the conversion, this is such "reasonable diligence" as to entitle plaintiff to the highest market value of the property between the time of the conversion and of the verdict, under the California code: *Fromm v. Sierra Nevada Silver Mining Co.*, 61 Cal. 629.

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for replacing it.<sup>1</sup> Other cases, again, where exemplary damages are not warranted, consider the proper measure of damages to be the value of the property at the time of the conversion, with interest thereon to the time of trial,<sup>2</sup> or the value of the property and compensation for its loss from the time of demand.<sup>3</sup>

In Michigan it is laid down that the measure of damages in trover for conversion by an involuntary trespasser is the market value of the property at the point where it is sold by the trespasser, less the amount expended in bringing it to market. Where, however, it is not sold, or the market value does not cover the expense, the measure of damages is its value when first taken, together with any profits that might be derived from its value in the ordinary market, with interest.<sup>4</sup> In a very recent case it is said that damages for conversion of property, in good faith,

<sup>1</sup> *Baker v. Drake*, 53 N. Y. 211; 13 Am. Rep. 507; 66 N. Y. 518; 23 Am. Rep. 80; *Mathews v. Coe*, 49 N. Y. 57; *Devlin v. Pike*, 5 Daly, 85; *Page v. Fowler*, 39 Cal. 412; 2 Am. Rep. 462.

<sup>2</sup> *Hayden v. Bartlett*, 35 Me. 203; *Sturges v. Keith*, 57 Ill. 451; *Tenney v. State Bank*, 20 Wis. 152; *Neiler v. Kelley*, 69 Pa. St. 403; *Newton etc. Co. v. White*, 53 Ga. 395; *Carlyon v. Lannan*, 4 Nev. 156; *Greeley v. Stillson*, 27 Mich. 153; *Winchester v. Craig*, 33 Mich. 205; *Ripley v. Davis*, 15 Mich. 75; 90 Am. Dec. 262; *Dalton v. Laudahn*, 27 Mich. 529; *Yater v. Mullen*, 24 Ind. 277; *Keaggy v. Hite*, 12 Ill. 99; *Otter v. Wilhams*, 21 Ill. 118; *Turner v. Retter*, 58 Ill. 264; *Jefferson v. Hale*, 31 Ark. 286; *Ryburn v. Pryor*, 14 Ark. 505; *Sledge v. Reid*, 73 N. C. 440; *Thomas v. Sternheimer*, 29 Md. 268; *Herzberg v. Adams*, 39 Md. 309; *Polk's Adm'r v. Allen*, 19 Mo. 467; *Kennedy v. Whitwell*, 4 Pick. 466; *Fowler v. Gilman*, 13 Met. 267; *Greenfield Bank v. Leavitt*, 17 Pick. 1; 28 Am. Dec. 268; *Pierce v. Benjamin*, 14 Pick. 356; 25 Am. Dec. 396; *Sargeant v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *Johnson v. Sumner*, 1 Met. 172; *Barry v. Ben-*

*nett*, 7 Met. 354; *Hurd v. Hubbell*, 26 Conn. 389; *Cook v. Loomis*, 26 Conn. 483; *Robinson v. Hartridge*, 13 Fla. 501; *Vaughan v. Webster*, 5 Harr. (Del.) 256; *Lillard v. Whittaker*, 3 Bibb, 92; *Thrall v. Lathrop*, 30 Vt. 307; 73 Am. Dec. 306; *Hepburn v. Sewall*, 5 Har. & J. 211; 9 Am. Dec. 512; *Ellis v. Wire*, 33 Ind. 127; 5 Am. Rep. 189; *White v. Martin*, 1 Port. 215; 26 Am. Dec. 305; *Lee v. Matthews*, 10 Ala. 682; 44 Am. Dec. 498; *Clark v. Whitaker*, 19 Conn. 319; 48 Am. Dec. 160; see note in 24 Am. Dec. 70-88; *Moody v. Whitney*, 38 Me. 174; 61 Am. Dec. 239; *Ripley v. Miller*, 1 Jones, 479; 62 Am. Dec. 177; *Pribble v. Kent*, 10 Ind. 325; 71 Am. Dec. 327; *Backenstoss v. Stahler*, 33 Pa. St. 251; 75 Am. Dec. 592; *Simpson v. Alexander*, 35 Kan. 225; *Blum v. Merchant*, 58 Tex. 400. This rule is held not applicable in Texas; *Pridgin v. Strickland*, 8 Tex. 427; 58 Am. Dec. 124. Interest on money converted begins to run from the date of the conversion; *Bradley v. Harden*, 73 Ala. 70.

<sup>3</sup> *Buford v. Fannen*, 1 Bay, 273; 1 Am. Dec. 615.

<sup>4</sup> *Winchester v. Craig*, 33 Mich. 205.

and under a mistake as to its owner's rights, are not measured by the highest market price up to the day of the trial. In such a case, the duty of the injured party is to repurchase the property in a reasonable time; and whether he does so or not, his damages cannot exceed the highest price reached within a reasonable time after he has learned of such conversion. What is a reasonable time in which a person whose stock has been converted by one acting in good faith should repurchase stock of like amount to fix the measure of damages is, when the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, a question of law.<sup>1</sup> Where the value of the property is enhanced by the labor of the trespasser, the owner is entitled to recover to the full extent of that enhanced value.<sup>2</sup> In an action for the conversion of wheat, the defendant is not entitled to prove the value of his own labor in harvesting and thrashing the crop, for the purpose of reducing the damages.<sup>3</sup> But this statement of the law is restricted to the case of a willful trespasser. An innocent wrong-doer, a trespasser by mistake, is not liable to the owner for the enhanced value.<sup>4</sup> Thus in trover for timber cut from the plaintiff's lands and hauled to a steamer three and a half miles distant, the cutting having been done by mistake, the measure of recovery is

<sup>1</sup> *Wright v. Metropolis Bank*, 110 N. Y. 237; 6 Am. St. Rep. 356.

<sup>2</sup> *Heard v. James*, 49 Miss. 236; *Silbury v. McCoon*, 3 N. Y. 379; 53 Am. Dec. 307; *Wetherbee v. Green*, 22 Mich. 311; 7 Am. Rep. 653; *Betts v. Lee*, 5 Johns. 348; 4 Am. Dec. 368; *Curtis v. Groot*, 6 Johns. 168; 5 Am. Dec. 204; *Chandler v. Edson*, 9 Johns. 362; *Hyde v. Cookson*, 21 Barb. 104; *Baker v. Wheeler*, 8 Wend. 508; 24 Am. Dec. 66; *Snyder v. Veaux*, 2 Rawle, 427; 21 Am. Dec. 466; *Riddle v. Driver*, 12 Ala. 590; *Ryder v. Hathaway*, 21 Pick. 305; *Brown v. Sax*, 7 Cow. 95; *Wingate v. Smith*, 20 Me. 287; *Ellis v. Wire*, 33 Ind. 127; 5 Am. Rep. 189; *Benjamin v. Benjamin*, 15 Conn. 347; 39 Am. Dec. 384; *Fir-*

*min v. Firmin*, 16 N. Y. Sup. Ct. 521; *Everson v. Seller*, 105 Ind. 266. See *ante*, Title Personal Property—Accession; and see note in 24 Am. Dec. 73. *Contra*, *Moody v. Whitney*, 38 Me. 174; 61 Am. Dec. 239; *Cushing v. Longfellow*, 26 Me. 306; *Single v. Schneider*, 30 Wis. 570.

<sup>3</sup> *Ellis v. Wire*, 33 Ind. 127; 5 Am. Rep. 189.

<sup>4</sup> See *ante*, Title Personal Property—Accession; *Herman v. Heydenfeldt*, 32 Minn. 250; *Weatherbee v. Green*, 22 Mich. 311; *Forsyth v. Wells*, 41 Pa. St. 291; 80 Am. Dec. 617; *United States v. Magoon*, 3 McLean, 171; *Skinner v. Pinney*, 19 Fla. 42; 45 Am. Rep. 1; *Lake Shore etc. R. R. Co. v. Hutchins*, 37 Ohio St. 252.

58 A  
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2 F  
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Coal  
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Co. v.  
Rep.  
Md. 1  
Blaen  
Md. 4  
3 Ill  
Ill. 62

the value at the time and place of cutting.<sup>1</sup> So where coal has been mined beneath another man's land, under an honest mistake, the trespasser is only liable for the value of the coal before mining.<sup>2</sup> In some Illinois cases it is laid down that the measure of damages is the value of the coal at the mouth of the pit, allowing the defendant nothing for digging.<sup>3</sup> In Missouri it is said that it is the value at the mouth of the shaft, less the cost of severing and raising.<sup>4</sup> In Tennessee it is said to be the value of the coal in the bed, plus the injury to the land.<sup>5</sup> Where gold-bearing earth is taken from a mine by mistake, the measure of damages is the value of the earth at the time it was taken, and the expense of separating the gold must be deducted from the value of the gold which the earth yielded.<sup>6</sup> The lessor of a mine may recover as damages, from one who has taken ore from his mine, the value of the ore, estimated as the ore lay in the bed, and not as it was after its value had been increased by the trespasser's raising it to the surface.<sup>7</sup> An innocent purchaser from a willful wrong-doer is only liable for the value of the chattel at the time of the conversion, and not for its enhanced value caused by the labor of the trespasser.<sup>8</sup>

<sup>1</sup> *Ayres v. Hubbard*, 57 Mich. 322; 58 Am. Rep. 361; *Tuttle v. White*, 46 Mich. 485; 41 Am. Rep. 175; *Tilden v. Johnson*, 52 Vt. 628; 36 Am. Rep. 769.

<sup>2</sup> *Hilton v. Woods*, L. R. 4 Eq. 440; *Morgan v. Powell*, 3 Ad. & E., N. S., 278; *Wood v. Nurenrod*, 3 Ad. & E., N. S., 441; *Martin v. Porter*, 5 Mees. & W. 351; *Forsyth v. Wells*, 41 Pa. St. 291; 80 Am. Dec. 617; *McLean Coal Co. v. Lennon*, 91 Ill. 561; 33 Am. Rep. 64; *Robertson v. Jones*, 71 Ill. 405; *Waters v. Stevenson*, 13 Nev. 157; 29 Am. Rep. 293; *Franklin Coal Co. v. McMillan*, 49 Md. 549; 33 Am. Rep. 280; *Barton Coal Co. v. Cox*, 39 Md. 1; 17 Am. Rep. 525. But see *Blaen Avon Coal Co. v. McCulloch*, 59 Md. 403; 43 Am. Rep. 560.

<sup>3</sup> *Illinois etc. R. R. Co. v. Ogle*, 82 Ill. 627; 25 Am. Rep. 342; *McLean*

*Coal Co. v. Lennon*, 91 Ill. 561; 33 Am. Rep. 64.

<sup>4</sup> *Austin v. Coal Co.*, 72 Mo. 535; 37 Am. Rep. 446.

<sup>5</sup> *Coal Creek Co. v. Moses*, 15 Lea, 300; 54 Am. Rep. 415.

<sup>6</sup> *Goller v. Felt*, 30 Cal. 485; *Maye v. Tappen*, 23 Cal. 306.

<sup>7</sup> *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.

<sup>8</sup> *Lake Shore etc. R. R. Co. v. Hutchins*, 32 Ohio St. 571; *Lee v. Matthews*, 10 Ala. 682; 44 Am. Dec. 498; *Whitney v. Beckford*, 105 Mass. 267; *Tuttle v. White*, 46 Mich. 485; 41 Am. Rep. 175. In the Ohio case, *supra*, timber was taken and converted into railroad ties, and these sold to an innocent purchaser. The court said: "It may be if these owners had found their wood in the hands of the trespassers, it might have been retaken, or its value

The "value" of the goods means their value in the exact condition that they were at the time of seizure, and not what might be obtained for them if retailed in small quantities at different times, and in a different shape from that in which they were found by the party converting them. The value of liquors seized, if sold by the drink, is not a proper inquiry.<sup>1</sup> The price realized at auction for the property is not conclusive upon either party.<sup>2</sup> In an action for the conversion of a promissory note, the recovery cannot exceed the amount due thereon at the time of the verdict.<sup>3</sup> The measure of damages *prima facie* is the amount due upon it; but it may be shown in mitigation of damages to be of little or no value by reason of the insolvency of the parties.<sup>4</sup> For the conversion of municipal bonds, the measure of damage is their market value established by public or ordinary business sales, and not by sales under anomalous circumstances or the sale of one overdue coupon.<sup>5</sup> The measure of damages

as cord-wood recovered; but if so, it would be upon the principle, *in odium spoliatoris*, the thief could gain nothing by his own wrong, and therefore the results of his labor go to the owners of the property. But this principle cannot apply where an innocent purchaser comes into the case, for the simple reason that he has done no wrong. It is very true, the willful trespasser or thief can convey no title to one to whom he sells, however innocent the purchaser may be. But the question right here is, What does "title," in this connection, mean? The original owner has a title to his lumber, and, as against the thief, the title to the results of that thief's labor; the wrong-doer, as it were, being estopped from setting up any claim by virtue of the wrong he has done. Against the innocent purchaser from the thief, the original owner still has the "title" to his timber; but by virtue of what does he now have title to the results of the thief's labor? The estoppel, so to call it, being created by fraud or wrong, exists only against the one guilty of that fraud or wrong, which the pur-

chaser is not; and while it is effectual against the wrong-doer, the reason of it does not exist against the innocent man, as to whom it therefore fails. As Judge Cooley says, it does not comport with justice and equity that against those who have done no wrong those owners should recover three times the value of what they have lost. They have never spent one cent of money nor one hour of labor in changing this timber, worth one dollar, into cord-wood worth three. All this was done by some one else, and why should the owner recover it? If they are compensated for what they have lost and all they have lost, they are certainly fully paid, and this is all they should be allowed to recover."

<sup>1</sup> Tucker v. Hamlin, 60 Tex. 171.

<sup>2</sup> Philbrook v. Kellogg, 18 Hun, 399.

<sup>3</sup> Carriage Co. v. Bank, 63 Wis. 470.

<sup>4</sup> Cothran v. Bank, 40 N. Y. Sup. Ct. 401. But see Robbins v. Packard, 31 Vt. 570; 76 Am. Dec. 134; Stephenson v. Thayer, 63 Me. 143.

<sup>5</sup> Meixell v. Kirkpatrick, 33 Kan. 282.

for the conversion of stock is the value of the stock at the time of the conversion, with interest from that time until the trial.<sup>1</sup> The measure of damages for the conversion of a certificate of stock is not what it would be on a conversion of the stock, and is not the value of the shares it represents. Such a conversion would justify only nominal damages.<sup>2</sup> The failure of a creditor to redeliver

<sup>1</sup> *Sturges v. Keith*, 57 Ill. 451; 11 Am. Rep. 28.

<sup>2</sup> *Daggett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91; the court saying: "The court erred in holding that if a conversion was made out the plaintiff was entitled to recover the market value of the shares. As the plaintiff has all the while remained and still is the owner of the shares, and the defendant will not by the recovery become owner, the error seems very plain. There are some cases in which trover has been brought for instruments which were rather the representatives of property than property itself, in which a recovery has been allowed to the full value of the property; but nearly every case has stood upon its own facts, and is easily distinguishable from the present. In *Parry v. Frame*, 2 Bos. & P. 451, which was trover for a lease, the plaintiff recovered the full value of the term; but it appeared that he had made arrangements with the landlord which amounted to an appropriation of the term, and the recovery was therefore plainly just. *Clowes v. Hawley*, 12 Johns. 484, was trover for a title bond executed by the defendant himself, and when the plaintiff recovered the value of the land, to which he was entitled under the bond, the defendant remained the owner. *Coombe v. Sansom*, 1 Dowl. & R. 201, was trover for title deeds, and the plaintiff had a verdict for the large sum of two thousand five hundred pounds. But the recovery of such damages appears to have been allowed only as a means of compelling the wrongful possessor of the deeds to surrender them to the owner, and an order was entered for a reduction of the judgment to a sum which would indemnify the plaintiff for his actual damages, on the deeds being restored. In *Mowry v. Wood*,

12 Wis. 413, the owner of a certificate issued by the state, and which entitled the holder to receive from the state a deed of certain lands when specified payments were made, was held entitled to recover, in an action for its conversion, not the value of his interest in the land under the certificate, but such sum as would recompense him for any actual loss he had sustained, and for the trouble and expense of establishing and perpetuating the evidence of his title. In other words, he was held entitled to recover only his actual damages. The case of *Connor v. Hillier*, 11 Rich. 193, 73 Am. Dec. 105, apparently favors the rule of damages given to the jury in this case. The action was for the conversion of a certificate of shares in bank stock, and the court, in a very short opinion, citing *Parry v. Frame*, 2 Bos. & P. 451, and *Clowes v. Hawley*, 12 Johns. 484, as authority, decided that the plaintiff was entitled to recover the market value of the shares. The defendant had suffered a default, and thereby, as the court say, had admitted the plaintiff's title and the conversion. Perhaps in that state of the case the recovery of the market value was proper. It certainly was proper if the certificate in the defendant's hands could be used and transferred by him; and the report does not show whether that was or was not the case. Another case having some apparent bearing is *Nelson v. King*, 25 Tex. 655. The action was for the conversion of land scrip. The defendant was bailee of the scrip, and it was shown that he had put it out of his hands by delivery to another person, who refused to recognize the plaintiff's rights. The court held that the scrip was to be regarded as a chattel, and that the plaintiff was not bound to follow it

property pledged to him to secure the payment of a debt, upon a tender of the amount due, renders him liable in trover for the full value of the property pledged, without any deduction for his debt.<sup>1</sup> In an action by the mortgagor of chattels for a levy thereon, while in the rightful possession of the mortgagee, the damages are limited to the value of plaintiff's interest therein.<sup>2</sup> Where a portion of a wagon is converted, and the portion not taken is of some value, though of no value for use as a wagon, the measure of damages is what it would cost to replace the portion taken.<sup>3</sup> If one converts property upon which another has a lien, the lienor is entitled in trover to actual damages; otherwise if the lienor takes possession of the property,—in that case he can recover nominal damages only.<sup>4</sup> If a pledgee unlawfully sells commercial paper pledged to him for an amount greater than the amount of the paper, the pledgor can recover nominal damages only in his suit for a conversion.<sup>5</sup> In trover against a receiptor who has given the receipt as the debtor's friend, and by his procurement, and to enable him to remain in actual possession, the sheriff cannot recover to exceed the amount due on his execution, nor to exceed the value of the property.<sup>6</sup> Where the master of a vessel, which has drifted upon a beach in a damaged condition, sells her without right, the measure of damages, in a suit against the vendee for the conversion, is the value of the vessel on the beach, to be determined by her value at a market, less the expense of repairing her and getting her there.<sup>7</sup> In an action against a common carrier for the conversion of goods delivered to a person unauthorized to receive

into the hands of third persons and contest with them the title, but might sue for the value, treating the conversion as total. The case is manifestly quite different from the one before us." But see *Payne v. Elliott*, 54 Cal. 339; 35 Am. Rep. 80.

<sup>1</sup> *Ball v. Stanley*, 5 Yerg. 199; 26 Am. Dec. 263.

<sup>2</sup> *Becker v. Dunham*, 27 Minn. 32.

<sup>3</sup> *Walker v. Johnson*, 28 Minn. 147.

<sup>4</sup> *Hill v. Larro*, 53 Vt. 629.

<sup>5</sup> *Cole v. Dalziel*, 13 Ill. App. 23.

<sup>6</sup> *Burk v. Webb*, 32 Mich. 173.

<sup>7</sup> *Glaspy v. Cabot*, 135 Mass. 435.

them, who pays the freight upon them, the measure of damages is the market value of the goods, less the freight, with interest from the date of the conversion.<sup>1</sup> Where one, having the special property in a chattel, sues the general owner for conversion, the measure of damages is not necessarily the value of the chattel, but the value of the plaintiff's interest.<sup>2</sup> The measure of damages for the destruction of immature property, such as a field of forming ice, is the value of so much as would have probably been saved for market, less the expense of storing it.<sup>3</sup>

<sup>1</sup> *Forbes v. R. R. Co.*, 133 Mass. 154.

<sup>2</sup> *White v. Allen*, 133 Mass. 423.

<sup>3</sup> *People's Ice Co. v. The Excelsior*, 44 Mich. 229; 38 Am. Rep. 246; the court saying: "Suppose a person goes upon the lands of his neighbor and willfully destroys his growing crops while immature, what should be the measure of damages, — the value of the crop in its then condition? If so, what would be the value of a crop of potatoes when the tubers were just forming; of a crop of apples where the tree was destroyed while in full blossom; of a crop of corn when commencing to tassel; or of wheat where the heads were forming? In the first two there would be no value whatever, and in the second, for fodder only. Would the value in each case at the time of the injury be the measure of damages? or would the injured party be permitted to show what the matured crop in all probability would have been, for the purpose of recovering the damages he had sustained? If the value at the time of the injury only could be recovered, a way would thus be pointed out for parties to be avenged of their adversaries with impunity. In the opinion of some of the witnesses, six-inch ice was but of little, if any, value, owing to the difficulty of cutting and storing ice of that thickness; and some were of opinion that ice less than six inches had no present market value. If so, and the then value would be the measure of damages, then an ice company could, with safety, destroy the ice of its rivals, if only done at a time when the ice was not of sufficient thickness to cut and store. A daily break-

ing up of the ice would accomplish the desired result, without danger of excessive damages or of any considerable liability. Such a rule would simply be one of gross injustice, and it is only necessary to thus carry out the position taken by counsel to show the injustice thereof. The owner of the growing crops would not be limited in his recovery to the value thereof at the time of their destruction, nor to the fair rental value of the lands. If the action were brought at once, and a trial had, the prospective yield and value of the crop when matured might be shown. The proof might be unsatisfactory and uncertain, and largely a matter of opinion. Such consideration should not, however, absolve the wrong-doer, and the dangers, if any, from such a rule, he should incur. If such an action were not commenced or tried until after the time when such crops would have matured, the same elements of uncertainty would not exist. It would then be known whether the season had been a favorable or an unfavorable one, the yield per acre in that vicinity, the market price of the crop, the expense, — all could be ascertained with tolerable certainty; and why should the law exclude such proofs? The law affords abundant instances of cases analogous to the present, where the extent of the injury cannot be ascertained immediately thereafter, and where evidence is permitted to be given to show the probable extent thereof, or if sufficient time has intervened before the trial, to show the actual result. In all such cases the extent of the injury can be ascertained with reasonable certainty."



While one entitled to the present possession of chattels is entitled to recover against a stranger their full value, yet as against the general owner of the property, or those claiming under him, he can recover only the value of his interest.<sup>1</sup> The same is the rule where the mortgagee sues for the conversion of the mortgaged chattels.<sup>2</sup> In trover, it is error to render final judgment by default, without the intervention of a jury to assess the damages.<sup>3</sup>

ILLUSTRATIONS. — Action for the wrongful seizure and sale of a tradesman's stock under color of legal process. *Held*, that the profits he was making could not be recovered as such, but might be considered in estimating the magnitude of the injury: *Juchter v. Boehm*, 67 Ga. 534. Trover for a horse stolen from plaintiff in Georgia, and sold to defendant, who knew nothing of the theft, in Alabama. *Held*, that plaintiff's traveling expenses, from his home in Georgia to the place where he found the horse, were no part of the damages: *Renfro v. Hughes*, 69 Ala. 581. A converted B's cotton. B, by the loss of cotton, was compelled, in order to fulfill a contract, to purchase more at the then higher market rate. *Held*, in a suit in equity to adjust the accounts between the parties, that A must settle with B at that rate, and not at the rate at which B originally bought the cotton: *Beall v. Rust*, 68 Ga. 774. A piano was sold conditionally upon the payment of a certain price, and the proof was, in an action of trover, that only a part of the price had been paid. *Held*, that plaintiff might recover the balance as damages, unless defendant showed that he had paid all the instrument was worth, as not being a good merchantable article as warranted: *Guilford v. McKinley*, 61 Ga. 230. A mortgagee of chattels, on default in an installment due, seized and sold the whole property mortgaged in good faith for the extinguishment of the entire debt, part of which was not yet due. The property was divisible, and only enough should have been sold

<sup>1</sup> *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670; *Russell v. Butterfield*, 21 Wend. 300; *Lyle v. Barker*, 5 Binn. 457; *Frost v. Willard*, 9 Barb. 441; *Ingersoll v. Van Bokkelen*, 7 Cow. 670; *Chamberlin v. Shaw*, 18 Pic. 278; 29 Am. Dec. 586; *Warner v. Valledy*, 13 R. I. 483; *Hurst v. Coley*, 15 Fed. Rep. 645; *Case v. Hart*, 11 Ohio, 354; 38 Am. Dec. 735; *Strong v. Strong*, 6 Ala. 345; *Compton v. Martin*, 5 Rich. 14; *Schley v. Lyon*, 6 Ga. 530; *Clark*

*v. Bell*, 61 Ga. 147; *Burke v. Webb*, 32 Mich. 173; *Treadwell v. Davis*, 34 Cal. 601; 94 Am. Dec. 770.

<sup>2</sup> *Manning v. Monaghan*, 28 N. Y. 385; *Ward v. Henry*, 15 Wis. 239; *Becker v. Dunham*, 27 Minn. 32; *White v. Webb*, 15 Conn. 302; *Bailey v. Godfrey*, 54 Ill. 507; 5 Am. Rep. 157; *Roberts v. Kain*, 6 Rob. (N. Y.) 354; *Russell v. Butterfield*, 21 Wend. 300.

<sup>3</sup> *Abraham v. Alford*, 64 Ala. 281.

<sup>1</sup> *Hig-*  
*Otis v.*  
*v. Wils-*  
*Sillima-*  
*Carter-*  
*520; L-*  
*107; R-*  
*Keely*  
*Walker*  
<sup>2</sup> *Nor-*  
*Murphy*

to make good the installment due and costs. *Held*, the measure of damages for the wrongful conversion should be the value of the property, less the amount of the debt secured by it, and any special damages: *Brink v. Freoff*, 40 Mich. 610.

§ 3677. **Effect of Return or Offer to Return Goods—Mitigation of Damages.**—Where an actual conversion has taken place, but the property still exists, and the wrongdoer offers to return it, the owner is under no obligation to take it back.<sup>1</sup> The right of action is complete when a conversion is shown; and no tender of the property after conversion, or the agreement of the owner, without consideration to receive it, will defeat the action or mitigate the damages; but if the owner accepts the property when tendered it may be shown in mitigation, though not to defeat the action.<sup>2</sup> The application of converted property in discharge of the original owner's liabilities with respect to it will go in mitigation of damages, in trover brought for the conversion.<sup>3</sup> But the abuse by a bailee of the thing loaned or hired is willful conversion, rendering him liable in trover, and precluding a return of the property in mitigation of damages, especially where it is essentially injured; as where an omnibus hired for use only in a particular place is driven with a heavy load to a different place and damaged so as to require repairs.<sup>4</sup>

In an action by the grantee to recover the value of certain crops alleged to have been converted to the use of the grantor, the latter may show, at least in mitigation of damages, that the crops for the value of which plaintiff sues were the produce of defendant's labor and toil,

<sup>1</sup> *Higgins v. Whitney*, 24 Wend. 379; *Otis v. Jones*, 21 Wend. 394; *Hammer v. Wilsey*, 17 Wend. 91; *Brewster v. Silliman*, 38 N. Y. 423; *Wooley v. Carter*, 7 N. J. L. 85; 11 Am. Dec. 520; *Levermore v. Northrup*, 44 N. Y. 107; *Reynolds v. Shular*, 5 Cow. 323; *Keely v. McDonald*, 39 Ark. 387; *Walker v. Fuller*, 29 Ark. 448.

<sup>2</sup> *Norman v. Rogers*, 29 Ark. 365; *Murphy v. Hobbs*, 8 Cal. 17; *Whitaker*

*v. Houghton*, 86 Pa. St. 48; *Gibbs v. Chase*, 10 Mass. 125; *Brewster v. Silliman*, 38 N. Y. 423; *Hepburn v. Sewell*, 5 Har. & J. 211; 9 Am. Dec. 512; *Reynolds v. Shular*, 5 Cow. 323; *Banellet v. Bellgard*, 71 Ill. 280; *Walker v. Fuller*, 29 Ark. 448.

<sup>3</sup> *Irish v. Cloyes*, 8 Vt. 30; 30 Am. Dec. 446.

<sup>4</sup> *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500.

whereby they had been brought to a mature condition, and that this labor had been performed with the knowledge and consent of the plaintiff.<sup>1</sup> So where goods were first seized on a void attachment, and afterwards on a valid one, by the same party, and sold in due process of law, the proceeds being applied to the payment of the debt of the owner, it was held that the application of the proceeds of the sale to his debt might be shown in mitigation.<sup>2</sup> A party who has tortiously obtained possession of personal property cannot, in trover for the conversion, show in mitigation of damages that he sold it and applied the proceeds to a just debt of the plaintiff;<sup>3</sup> nor that he has himself applied the property to the owner's own use, without his consent.<sup>4</sup> The fact that defendant, after levy and sale of the property, paid the surplus over the amount of the execution to the justice will not go in mitigation of damages, plaintiff not having received the money.<sup>5</sup>

§ 3678. **Title Vests in Defendant when.**—While it is held in some cases that judgment for the plaintiff for the value of the property vests the title to it in the defendant,<sup>6</sup> the true rule seems to be that judgment and satisfaction thereof are necessary to pass the title to the defendant.<sup>7</sup> And upon such satisfaction the defendant is entitled to the increase of the property between the time of conversion and satisfaction, and must bear the loss that has

<sup>1</sup> Johnson v. Tanglinger, 31 Iowa, 500. See previous section.

<sup>2</sup> Morrison v. Crawford, 7 Or. 472.

<sup>3</sup> East v. Pace, 57 Ala. 521.

<sup>4</sup> Sprague v. McKinzie, 63 Barb. 61.

<sup>5</sup> Allen v. Coates, 29 Minn. 46.

<sup>6</sup> Adams v. Broughton, 2 Strange, 1078; Carlisle v. Burley, 3 Me. 250; Rogers v. Moore, Rice, 60; Bogan v. Wilburn, 1 Speers, 179; Floyd v. Browne, 1 Rawle, 121; 18 Am. Dec. 602; Marsh v. Pier, 4 Rawle, 273; 26 Am. Dec. 131; Fox v. Northern Liberties, 3 Watts & S. 103; Merrick's Estate, 5 Watts & S. 9; Curtis v. Groat, 6

Johns. 168; 5 Am. Dec. 204; Fox v. Prickett, 34 N. J. L. 13.

<sup>7</sup> Brinsmead v. Harrison, L.R. 6 Com. P. 584; Lovejoy v. Murray, 3 Wall. 1; Elliott v. Hayden, 104 Mass. 180; United Society v. Underwood, 11 Bush, 265; 21 Am. Rep. 214; Smith v. Smith, 51 N. H. 571; Hyde v. Noble, 13 N. H. 494; 38 Am. Dec. 508; Bell v. Perry, 43 Iowa, 368; Bacon v. Kimmell, 14 Mich. 201; Atwater v. Tupper, 45 Conn. 144; 29 Am. Rep. 674; Hepburn v. Sewell, 5 Har. & J. 211; 9 Am. Dec. 612; White v. Martin, 1 Port. 215; 26 Am. Dec. 365.

occurred.<sup>1</sup> The title relates back to the time of the conversion.<sup>2</sup> If, after the conversion, the plaintiff sells his interest in the property, the purchaser will not be affected by the suit, and the plaintiff will be entitled to nominal damages only, since the sale prevents his passing title to the defendant.<sup>3</sup> But it will not render a third party a trespasser upon the rights of the defendant for anything done by him between the date of the conversion and the judgment.<sup>4</sup> A judgment for the conversion of chattels bars an action for that of other chattels taken by the same act; and this, although the plaintiff was prevented from including them in such judgment by the fraudulent doings of the defendant.<sup>5</sup>

§ 3679. Officer Protected by Process "Fair on its Face."

—Except in cases where an officer is entitled to arrest without process,<sup>6</sup> he must, in order to justify the seizure of property, show that he was authorized to do so by legal process.<sup>7</sup> An officer is protected by process which is fair on its face. "By this is not meant that it shall appear to be perfectly regular and in all respects in accord with proper practice, and after the most approved form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair

<sup>1</sup> *Hepburn v. Sewell*, 5 Har. & J. 211; 9 Am. Dec. 512.

<sup>2</sup> *Cooley on Torts*, 458; *White v. Martin*, 1 Port. 215; 26 Am. Dec. 365.

<sup>3</sup> *Brady v. Whitney*, 24 Mich. 154.

<sup>4</sup> *Bacon v. Kimmell*, 14 Mich. 201.

<sup>5</sup> *McCaffrey v. Carter*, 125 Mass. 330.

<sup>6</sup> See *ante*, Title Assault. "There may be a few special cases in which this would not be necessary to his justification. Such a case would be that of a thief caught *flagrante delicto* with the stolen property in his possession. No doubt the officer might take the thief without warrant, and he might also take the stolen property,

and retain it for identification and evidence of ownership. So in making arrest for a supposed felony, the officer might take from the person arrested whatever was supposed to have been the instrument in committing the crime, or whatever would probably be important to be used in evidence on the trial. So, doubtless, under proper statute or municipal by-law, implements of gaming found in actual use in violation of law might be seized. These cases suggest others, but they cannot be numerous. In general, the officer must seek protection behind process": *Cooley on Torts*, 459.

<sup>7</sup> *Cooley on Torts*, 459.

on its face, which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it."<sup>1</sup> Trespass is not maintainable for the seizure of goods on an execution regular upon its face, issued by a court having the requisite jurisdiction, although the judgment was reversed for error after the seizure.<sup>2</sup> And the process is a protection, whether it issue from a court of limited or general jurisdiction.<sup>3</sup> When a court of general jurisdiction assumes authority to act, there is a presumption of law that the authority exists, and the officer need not inquire further; but the inferior court must not only have authority in fact, but upon the face of its records and of its process enough should appear to show it.<sup>4</sup> In Vermont, in tax cases, it is held that the tax bill and warrant in due form do not consti-

<sup>1</sup> Cooley on Torts, 459; Parsons v. Lloyd, 3 Wils. 341; Ives v. Lucas, 1 Car. & P. 7; Erskine v. Hohnbach, 14 Wall. 613; Allen v. Scott, 13 Ill. 80; Hill v. Figley, 25 Ill. 156; Noland v. Busby, 28 Ind. 154; Judkins v. Reed, 48 Me. 386; Nowell v. Tripp, 61 Me. 426; 14 Am. Rep. 572; Lincoln v. Worcester, 8 Cush. 55; Hayes v. Drake, 6 Gray, 387; Howard v. Proctor, 7 Gray, 128; Williamston v. Willis, 15 Gray, 427; Cheever v. Merritt, 5 Allen, 563; Underwood v. Robinson, 106 Mass. 296; Le Roy v. R. R. Co., 18 Mich. 233; 100 Am. Dec. 162; Bird v. Perkins, 33 Mich. 28; Wood v. Thomas, 38 Mich. 686; Turner v. Franklin, 29 Mo. 285; Glasgow v. Rowse, 43 Mo. 479; St. Louis Building etc. Ass'n v. Lightner, 47 Mo. 393; State v. Dulle, 48 Mo. 282; Walden v. Dudley, 49 Mo. 419; Blanchard v. Goss, 2 N. H. 491; Henry v. Sargeant, 13 N. H. 321; 40 Am. Dec. 146; State v. Weed, 21 N. H. 262; 53 Am. Dec. 188; Grumon v. Raymond, 1 Conn.

40; 6 Am. Dec. 200; Thames Mfg. Co. v. Lathrop, 7 Conn. 550; Watson v. Watson, 9 Conn. 140; 23 Am. Dec. 324; Neth v. Crofut, 30 Conn. 580; Brother v. Cannon, 2 Ill. 200; Shaw v. Dennis, 10 Ill. 405; Chegaray v. Jenkins, 5 N. Y. 376; State v. Lutz, 65 N. C. 503; Gore v. Martin, 66 N. C. 371; Loomis v. Spencer, 1 Ohio, N. S., 153; Moore v. Alleghany City, 18 Pa. St. 55; Billings v. Russell, 23 Pa. St. 189; 62 Am. Dec. 330; Burton v. Fulton, 49 Pa. St. 151; Cunningham v. Mitchell, 67 Pa. St. 78; Orr v. Box, 22 Minn. 485; McLean v. Cook, 23 Wis. 364; State v. Jervey, 4 Strob. 304; Kelley v. Noyes, 43 N. H. 209; Beach v. Furnam, 9 Johns. 228; Warner v. Shed, 10 Johns. 138; Alexander v. Hoyt, 7 Wend. 89; Dunlap v. Hunting, 2 Denio, 643; 43 Am. Dec. 763; Sheldon v. Van Buskirk, 2 N. Y. 473.

<sup>2</sup> Field v. Anderson, 103 Ill. 403.

<sup>3</sup> Savacool v. Boughton, 5 Wend. 171; 21 Am. Dec. 181.

<sup>4</sup> Cooley on Torts, 464.

tute protection to the collector without a showing that the antecedent proceedings were legal.<sup>1</sup> If the process is fair on its face, the officer is protected, though he has personal knowledge of facts outside of it which would render it void.<sup>2</sup>

§ 3680. What is "Process."—The word "process," in this connection, includes any writ, warrant, order, or other authority which purports to empower a ministerial officer to arrest the person, or to seize or enter upon the property of an individual, or to do any act in respect to

<sup>1</sup> *Hathaway v. Goodrich*, 5 Vt. 65; *Collamer v. Drury*, 16 Vt. 574; *Downing v. Roberts*, 21 Vt. 441; *Spear v. Tilson*, 24 Vt. 420; *Shaw v. Peckett*, 25 Vt. 423; *Wheelock v. Archer*, 26 Vt. 380.

<sup>2</sup> *Webber v. Gray*, 24 Wend. 485; *Wilmarth v. Burt*, 7 Met. 257; *Wall v. Trumbull*, 16 Mich. 228; *Bird v. Perkins*, 33 Mich. 28; *Brainard v. Head*, 15 La. Ann. 489; *Watson v. Watson*, 9 Conn. 140; 23 Am. Dec. 324; the court saying: "The writ was put in his hand, as an officer, to serve, and he accordingly served the same by replevying the before-mentioned horse. The first objection to this act of his is founded on a fact proved at the trial of the cause, to wit, that he knew the said horse had not been distrained or impounded. From this the plaintiff infers that he ought not to have served the replevin, and that in thus doing he became a trespasser. I reply to this objection, that the defendant, Phelps, being a legal officer, it became his duty, regardless of any knowledge, or supposed knowledge, of his own, that there existed no cause of action to serve the writ committed to him promptly, unhesitatingly, and without restraint from the above-mentioned cause. This I consider so firmly established as to render the proposition self-evident. The facts on the face of the writ constitute his justification, because he was obliged to obey its mandate; nor was it any part of his duty to determine whether the allegations contained in the replevin were true. The proof of these positions results, incontrovertibly, from his

relative condition. He was an executive officer, whose sole duty is was to execute, and not to decide on the truth or sufficiency of, the process committed to him for service. He has no portion of judicial authority, nor the means of inquiry into the causes of action contained in the writs and declarations put into his hands for service. Obedience to all precepts committed to him to be served is the first, second, and third part of his duty; and hence, if they issue from competent authority, and with legal regularity, and so appear on their face, he is justified for every action of his within the scope of their command. . . . The ground of these principles is simply this: that to the magistrate is confided the issuing of writs, and to the sheriff and other executive officers is confided the duty of serving them. It is easy to see what widespread mischief might result from permitting an executive officer to decide, on his own knowledge, that he ought not to serve a precept or warrant put into his hands for service, and to consider what justly must follow from such doctrine; that is, that his return of the fact would be a justification for his omission. In short, the executive officer must do his duty, which is to obey all legal writs, and must not arrogate to himself the right of disobeying the paramount commands of those to whose mandates he by law is subjected." *Contra*, *Leachman v. Dougherty*, 81 Ill. 324; *Sprague v. Birchard*, 1 Wis. 457; 60 Am. Dec. 393; *Grace v. Mitchell*, 31 Wis. 533; 11 Am. Rep. 613.

such person or property which, if not justified, would constitute a trespass.<sup>1</sup> Thus the following are included: A *capias ad respondendum*, or any warrant of arrest;<sup>2</sup> a writ of possession;<sup>3</sup> any execution which authorizes a levy upon property;<sup>4</sup> any authority which is issued to a collector of taxes, and which purports to empower him to collect the tax by distress of goods;<sup>5</sup> a writ of right.<sup>6</sup>

§ 3681. **Process not Fair on its Face.**—The following are examples of "process" not fair on its face: A warrant of arrest issued by a justice in a case of which its recitals showed he had no jurisdiction;<sup>7</sup> a writ of *habeas corpus* issued by and returnable before an officer not by law having authority over that writ;<sup>8</sup> a tax-warrant, the verification to which was made prematurely;<sup>9</sup> a warrant for the collection of a personal tax, where one on real estate only could be levied;<sup>10</sup> an order made by a commissioner in bankruptcy to detain a debtor until he should pay certain costs, the law giving him no authority to make such an order;<sup>11</sup> a conviction which showed on its face that the party had been convicted on default in responding to a summons returnable less than ten days from date, the statute requiring ten days "at least";<sup>12</sup> process of contempt issued to a judge of a court when only the court as a body had authority to issue it;<sup>13</sup> process issued under

<sup>1</sup> Cooley on Torts, 461; McGuinty v. Henrich, 5 Wend. 240; Loomis v. Spencer, 1 Ohio St. 153.

<sup>2</sup> Parsons v. Lloyd, 3 Wils. 341; Brother v. Cannon, 2 Ill. 200; State v. McNally, 34 Me. 210; 56 Am. Dec. 650; State v. Weed, 21 N. H. 262; 53 Am. Dec. 188; Warner v. Shed, 10 Johns. 138; Underwood v. Robinson, 106 Mass. 296; Neth v. Crofut, 30 Conn. 580.

<sup>3</sup> Lombard v. Atwater, 43 Iowa, 599.  
<sup>4</sup> Thames Mfg. Co. v. Lathrop, 7 Conn. 550; Hill v. Figley, 25 Ill. 156; Watkins v. Wallace, 19 Mich. 57; Gott v. Mitchell, 7 Blackf. 270.

<sup>5</sup> Erskine v. Hohnbach, 14 Wall. 613; Noland v. Busby, 28 Ind. 154;

Caldwell v. Hawkins, 40 Me. 526; Clark v. Axford, 5 Mich. 182; Kelley v. Savage, 20 Me. 199; Shaw v. Dennis, 10 Ill. 405.

<sup>6</sup> Colman v. Anderson, 10 Mass. 105.  
<sup>7</sup> Shergold v. Holloway, Strange, 1002; Rosen v. Fischel, 44 Conn. 371.

<sup>8</sup> Cable v. Cooper, 15 Johns. 152.  
See Chalker v. Ives, 55 Pa. St. 81; Hilbish v. Hower, 58 Pa. St. 93.

<sup>9</sup> Westfall v. Preston, 49 N. Y. 349.  
<sup>10</sup> American Bank v. Mumford, 4 R. I. 478.

<sup>11</sup> Watson v. Bodell, 14 Mees. & W. 58.

<sup>12</sup> Mitchell v. Foster, 12 Ad. & E. 472.

<sup>13</sup> Van Sandau v. Turner, 6 Q. B. 773.

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an unconstitutional law;<sup>1</sup> a warrant directing the collec-  
tion of costs also, when the law did not allow costs;<sup>2</sup> an  
order of a military officer for the seizure of the property  
of a citizen;<sup>3</sup> a conviction by a military tribunal of an  
offense triable only in the civil courts.<sup>4</sup>

§ 3682. **Extent of Protection.**—The process appar-  
ently valid because fair on the face gives only a personal  
protection to the officer and those acting under him.<sup>5</sup> It  
will not give him any special right of property in the  
thing seized.<sup>6</sup> Thus if he is sued by a third person, who  
claims it as his property, or if he is forced to bring re-  
plevin for the chattel, he will be required to go back of  
the writ and show that it was lawfully issued.<sup>7</sup>

§ 3683. **Officer must Follow Directions of Writ.**—  
The officer can proceed only according to the directions  
of the writ.<sup>8</sup> But directions in the writ which do not  
affect or have in view the interests of parties are merely  
directory, and a failure to comply with them is only an  
irregularity.<sup>9</sup> On the other hand, provisions or directions  
in the writ for the protection of the party or of individ-  
ual interests cannot be disregarded by the officer.<sup>10</sup> Thus,  
for example, where an appraisement of damages is re-  
quired before cattle seized as trespassers are impounded,  
or goods are sold in process, a failure to comply with this  
requisite will render the officer liable.<sup>11</sup> So where an offi-  
cer fails to give previous notice of the time of sale of

<sup>1</sup> Ely v. Thompson, 3 A. K. Marsh. Am. Dec. 124; Spafford v. Beach, 2  
70; Kelly v. Bemis, 4 Gray, 83; 64  
Am. Dec. 50. See *post*, title Consti-  
tutional Law.

<sup>2</sup> Clark v. Woods, 2 Ex. 395.

<sup>3</sup> Mitchell v. Harmony, 13 How.  
115.

<sup>4</sup> Milligan v. Hovey, 3 Biss. 13.

<sup>5</sup> Cooley on Torts, 463.

<sup>6</sup> Cooley on Torts, 463.

<sup>7</sup> Earl v. Camp, 16 Wend. 562; Parker v. Walrod, 16 Wend. 514; 30

Am. Dec. 124; Spafford v. Beach, 2  
Doug. (Mich.) 199; Leroy v. East  
Saginaw, 18 Mich. 233; 100 Am. Dec.  
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<sup>8</sup> Cooley on Torts, 461.

<sup>9</sup> Cooley on Torts, 462.

<sup>10</sup> Cooley on Torts, 462.

<sup>11</sup> Pratt v. Petrie, 2 Johns. 191; Hop-  
kins v. Hopkins, 10 Johns. 367; Mer-  
ritt v. O'Neal, 13 Johns. 477; Smith  
v. Gates, 21 Pick. 55; Tupp v. Gronner,  
60 Ill. 474.



chattels under execution.<sup>1</sup> So the officer is liable if he sells on his process more property than is necessary to satisfy the demand;<sup>2</sup> or if he proceeds to sell before the time when under the statute he is at liberty to do so;<sup>3</sup> or if he makes a levy on household goods by handling them in a rough and improper manner, and then carries them away exposed to a severe rain;<sup>4</sup> or if, having levied on the interest of one tenant in common, he proceeds to sell the whole title,<sup>5</sup> or in any manner misuses or misappropriates the property attached by him.<sup>6</sup>

ILLUSTRATIONS. — A collector of taxes, having seized more chattels than sufficient to pay the tax and expenses of sale, after selling enough for that purpose, proceeded further, and sold all the balance of the distress, consisting of distinct and separate articles. *Held*, that he was a trespasser only as to the goods in excess of the tax and expenses: *Seekins v. Goodale*, 61 Me. 400; 14 Am. Rep. 568.

§ 3684. **Officer not a Trespasser by Non-feasance.** — An officer does not become a trespasser *ab initio* by mere non-feasance;<sup>7</sup> as where he fails to keep safely property taken in execution by him;<sup>8</sup> or to proceed to a sale, as in duty bound to do;<sup>9</sup> or to restore property attached after the debt has been satisfied.<sup>10</sup> An abuse of legal authority makes the guilty person liable as a trespasser *ab initio*.<sup>11</sup>

§ 3685. **Liability of Party.** — The party is liable where he sets the process in motion in a case where the court has no jurisdiction.<sup>12</sup> So a person who aids in the con-

<sup>1</sup> *Blake v. Johnson*, 1 N. H. 91; *Purinton v. Loring*, 7 Mass. 388; *Wright v. Spencer*, 1 Stew. 576; 18 Am. Dec. 76.

<sup>2</sup> *Williamson v. Dow*, 32 Me. 559; *Jewell v. Swain*, 57 N. H. 506.

<sup>3</sup> *Wallis v. Truesdell*, 6 Pick. 455; *Smith v. Gates*, 21 Pick. 55; *Knight v. Herrin*, 48 Me. 533; *Camp v. Ganley*, 6 Ill. App. 499.

<sup>4</sup> *Snydacker v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551.

<sup>5</sup> *Melville v. Brown*, 15 Mass. 81.

<sup>6</sup> *Brackett v. Vining*, 49 Me. 356.

<sup>7</sup> *Cooley on Torts*, 463. But he

would be liable on the case for neglect: *Id.*

<sup>8</sup> *Waterbury v. Lockwood*, 4 Day, 257; 4 Am. Dec. 215; *Stoughton v. Mott*, 25 Vt. 668; *Abbott v. Kimball*, 19 Vt. 551; 47 Am. Dec. 708; *Nutt v. Wheeler*, 30 Vt. 436; 73 Am. Dec. 316.

<sup>9</sup> *Bell v. North*, 4 Litt. 133.

<sup>10</sup> *Gardner v. Campbell*, 15 Johns.

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<sup>11</sup> *Barrett v. Lightfoot*, 1 T. B. Mon. 241; 15 Am. Dec. 110.

<sup>12</sup> *Stetson v. Goldsmith*, 30 Ala. 602; 31 Ala. 649.

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<sup>2</sup> Me.  
<sup>3</sup> Sta.  
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version of property is responsible to the owner for its value.<sup>1</sup> A private person who, assuming to act as constable, seizes the property of another cannot escape liability for trespass by the fact that he then had in his possession an execution against such person, lawfully issued.<sup>2</sup> One who authorizes and empowers the commission of a trespass is liable equally with him who commits it.<sup>3</sup> Where, in executing a writ of attachment under instructions from the plaintiffs to attach particular property, the sheriff has become a trespasser, the plaintiffs are not relieved from liability for the action of the sheriff by reason of any private instructions given to the sheriff as to how the property was to be treated or disposed of. The question is not what the sheriff was privately instructed to do after the seizure, but what he was authorized to do by the command of the process placed in his hands, and what was actually done under that process.<sup>4</sup> Where the jurisdiction depends upon the facts, and these are presented to a court having general jurisdiction of that class of cases, and the court decides that it has authority to act, and proceeds to do so, this decision protects not the officer merely, but the party also.<sup>5</sup> Every party has a right to assume that the officer will proceed to execute lawful process in a lawful manner; and if, instead of doing so, the officer proceeds illegally, the party is not responsible, unless he participated in or advised the abuse.<sup>6</sup> A judgment creditor is not liable for a wrongful seizure or sale by the sheriff on the execution which he did not direct or assent to.<sup>7</sup> In the absence of any showing of fraud, a creditor who has caused a levy to be made under a valid judgment entered on default, and on the opening

<sup>1</sup> McCormick v. Stevenson, 13 Neb. 70.

<sup>2</sup> McMillan v. Rowe, 15 Neb. 520.

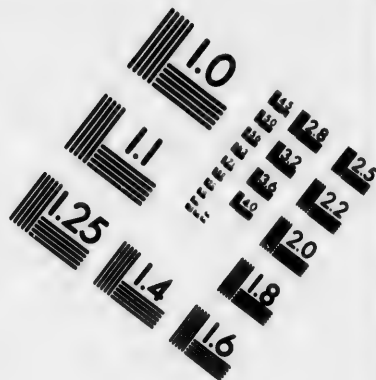
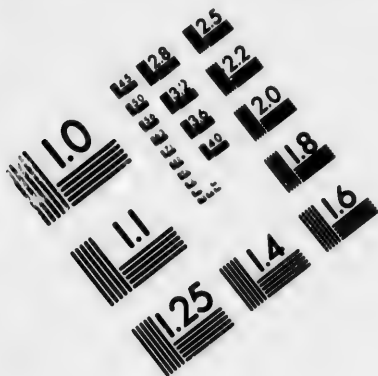
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<sup>4</sup> Corner v. Mackintosh, 48 Md. 374.

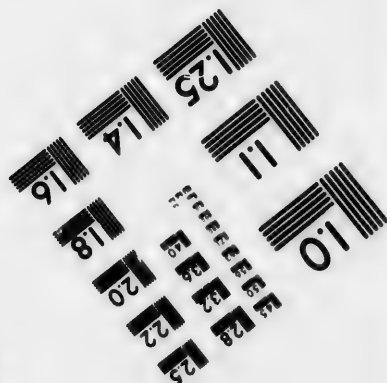
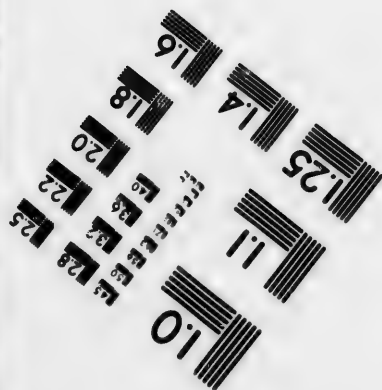
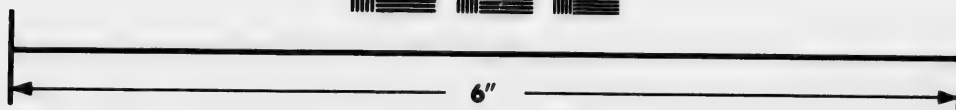
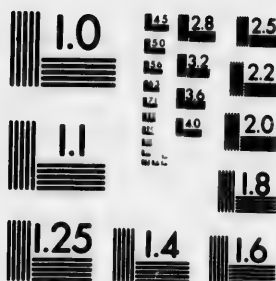
<sup>5</sup> West v. Smallwood, 3 Mees. & W. 418.

<sup>6</sup> Perrin v. Claflin, 11 Mo. 203; Welch v. Cochran, 63 N. Y. 181; 20 Am. Rep. 519; Calkins v. Lockwood, 17 Conn. 154; 42 Am. Dec. 730.

<sup>7</sup> Averill v. Williams, 1 Denio, 501.



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and setting aside has returned the property to the defendant, is not liable for the seizure and detention.<sup>1</sup> It is to be presumed that an execution in an attachment suit was issued by plaintiff's direction; and this presumption he must disprove to avoid liability for selling thereunder property not belonging to the defendant.<sup>2</sup> One who procures and has served a replevin writ by which property of a third person is taken is liable in trespass to the owner; and the fact that he acted as the servant of the officer in making the service would not protect him, even though the officer himself might have had a valid defense.<sup>3</sup>

<sup>1</sup> *White v. Adams*, 52 Cal. 435.

<sup>2</sup> *Petersen v. Foli*, 67 Iowa, 402.

<sup>3</sup> *Williams v. Bunker*, 78 Me. 373.

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## PART VII.—ACCOUNT STATED.

## CHAPTER CLXXXIII.

## ACCOUNT STATED.

§ 3686. Account stated — What is an.

§ 3687. Who may make admission — And to whom — And at what time.

§ 3688. When account will be reopened.

§ 3686. **Account Stated — What is an.** — “An account stated is nothing more than the admission of a balance due from one party to another; and that balance being due, there is a debt. The statement of the account and admission of the balance implies a promise in law to pay it.”<sup>1</sup> To make an account stated, there must be a mutual

<sup>1</sup> *Irving v. Leitch*, 3 Mees. & W. 106, per Abinger, C. B.; *Union Bank v. Knapp*, 3 Pick. 96; 15 Am. Dec. 181; *Tassey v. Church*, 4 Watts & S. 141; 39 Am. Dec. 65; *Langdon v. Roane*, 6 Ala. 518; 41 Am. Dec. 60; *Zacario v. Pallotti*, 49 Conn. 36; *Davis v. Tiernan*, 2 How. (Miss.) 786; *Stebbins v. Niles*, 25 Miss. 267; *Rhinehart v. Hines*, 51 Miss. 344; *Claire v. Claire*, 10 Neb. 54; *Hawkins v. Long*, 74 N. C. 781. In the late case of *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435, the law is reviewed at length, George, C. J., saying: “A stated account is defined to be an agreement, after an examination of the accounts between the parties, that all the items are true, and the balance struck a just and true balance: *Stebbins v. Niles*, 25 Miss. 267, 348; *Davis v. Tiernan*, 2 How. 786, 804. But it is said that this agreement need not be express, but it may be implied from circumstances, and among these circumstances are the rendition of an account by one of the parties, and its retention without objection by the other. This rule, which presumes the acquiescence of the party to whom an account was rendered from his mere

failure to object to it, needs some explanation in the state in which we find the authorities. The earliest mention we have been able to find of this rule is in *Sherman v. Sherman*, 2 Vern. 276, decided in the year 1692, where the rule is stated by Lord Hutchins thus: That, ‘among merchants, it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or a third post.’ Lord Hardwicke, in *Willis v. Jernegan*, 2 Atk. 251, spoke of the rule thus: ‘Even where there are transactions, suppose between a merchant in England and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterwards.’ Chancellor Kent, in *Murray v. Toland*, 3 Johns. Ch. 969, mentioned the rule in these words: ‘It has been often held that if a party receives a stated account from abroad, and keeps it by him for any length of time (one

agreement between the parties as to the allowance or disallowance of their respective claims; and to establish such

case says two years) without objection, he shall be bound by it'; citing *Willis v. Jernegan*, 2 Atk. 251, and *Tickel v. Short*, 2 Ves. 239, in which last case Lord Hardwicke said: 'If one merchant sends an account current to another in a different country, on which a balance is made due to himself; the other keeps it by about two years without objection: the rule of this court and of merchants is, that it is considered as a stated account.' The supreme court of the United States, in *Freeland v. Heron*, 7 Cranch, 147, spoke of the rule as 'a rule of the chancery court and of merchants,' and defined it to be thus: 'When one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him.' It is thus seen that in its inception the rule that the reception of an account rendered, and the keeping of it for any considerable time without objection, made it an account stated, — that is, an account so admitted to be just and correct, that it relieved the party rendering it from the necessity of proving it, and cast the burden on the party receiving it to show by affirmative evidence that it was unjust, — was a rule of the chancery court applied only in controversies between merchants. The rule has been extended further in some states, so as to embrace transactions between other parties. In this state there has as yet been no recognition of it except in cases between merchant and merchant, and when it has been referred to it has been in that way. Thus in *McCall v. Nave*, 52 Miss. 494, 498, it was said that 'assent [to a stated account] might be implied from circumstances, such as the receipt of one merchant of an account from another without making objections.' And in *Stebbins v. Niles*, 25 Miss. 348, Smith, C. J., spoke of it as a rule in transactions between merchant and merchant. Greenleaf, in section 126,

volume 2, of his work on evidence, says an admission sufficient to create an account stated may be inferred, 'if the account be sent to the debtor in a letter which is received, but not replied to in a reasonable time'; but he refers as authority for this to section 197 of volume 1 of his work. This last-named section states the rule thus: 'Among merchants it is regarded as the allowance of an account rendered, if it is not objected to without unnecessary delay.' In Virginia, in *Townes v. Birchett*, 12 Leigh, 173, the opinion of the majority of the court applying the rule proceeds on the assumption that both parties were merchants, though Judge Allen dissented, upon the ground that this character of the parties was not shown. He said that he had not been able to find a single case, not between merchant and merchant, in which the rule had been applied. And this view was sustained by the court of appeals of Virginia in *Robertson v. Wright*, 17 Gratt. 534, 541. It is stated in Cowen and Hill's notes to Phillips on Evidence, note 191, that the rule is inapplicable except as to transactions between merchant and merchant. In some of the late authorities, the rule that the rendition of an account, and its retention without objection, makes it a stated account, is applied to transactions between other parties than merchants. It has been so recognized in the following cases, among others: *Lockwood v. Thorne*, 11 N. Y. 170; 62 Am. Dec. 81; *Stenton v. Jerome*, 54 N. Y. 480; *Case v. Hotchkiss*, 1 Abb. App. 324; *Lowsley v. Denison*, 45 Barb. 490; *Terry v. Sickles*, 13 Cal. 427; *White v. Hampton*, 10 Iowa, 238; *Tharp v. Tharp*, 15 Vt. 105; *White v. Campbell*, 25 Miss. 463; *Philips v. Belden*, 2 Edw. Ch. 1. On consideration of the authorities, we have concluded not to extend the rule making the rendition of an account, and its retention without objection, a stated account, beyond its original limits, viz., controversies between merchant and merchant. On the other hand, we do not follow some of the authorities which hold that such ren-

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an account so as to preclude a party from impeaching it, save for fraud or mistake, there must be proof of assent to the account as rendered, either express, or implied from failure to object within a reasonable time after presentation.<sup>1</sup> An open account is one in which some item of the contract is not settled by the parties, whether the account consists of one item or many.<sup>2</sup> It is not necessary that the account should be signed by the parties.<sup>3</sup> It is sufficient if it has been examined and accepted by both; and an account rendered will be presumed an account stated, unless some objection is made to it within a reasonable time.<sup>4</sup> It is essential to an account stated that the admission of liability should be of an amount certain.<sup>5</sup> To

dering and retention is no evidence of the correctness of the account. The rendering of an account, and its retention without objection, as between other parties than merchants, is admissible to show an implied admission and acquiescence in its correctness. What weight should be given to it is for the consideration of the jury, under all the circumstances of the case. They may consider the character, as a business man, of the party to whom the account was rendered, — whether careful, accurate, and prompt in business matters, or the contrary; his intelligence, or the want of it; his opportunities of examining the account, and of ascertaining whether it is correct; his dependence on his creditor, or the contrary; his confidence in the honesty and accuracy of the party who rendered the account; the length of time of the retention; the opportunities of making objections; the course of previous dealings between the parties; and all other circumstances attending the rendering and retention of the account, — and from these determine the weight to be given to the evidence in establishing its correctness."

<sup>1</sup> Stenton v. Jerome, 54 N. Y. 480.

<sup>2</sup> Sheppard v. Wilkins, 1 Ala. 62.

<sup>3</sup> Brown v. Vandyke, 8 N. J. Eq. 795; 55 Am. Dec. 250; Lockwood v. Thorne, 11 N. Y. 170; 62 Am. Dec. 81.

<sup>4</sup> Freeman v. Howell, 4 La. Ann. 196; 50 Am. Dec. 561; Brown v. Vandyke, 8 N. J. Eq. 795; 55 Am. Dec. 250; Lockwood v. Thorne, 11 N. Y. 170; 62 Am. Dec. 81; Darby v. Lastrapes, 28 La. Ann. 605; Gilchrist v. Brooklyn etc. Ass'n, 66 Barb. 390; Lockwood v. Slevin, 26 Ind. 134; Stenton v. Jerome, 54 N. Y. 480. Where an account rendered is not objected to within a reasonable time, the failure to object will be regarded as an admission of its correctness by the party charged: Wiggins v. Burkham, 10 Wall. 129; Freeland v. Heron, 7 Cranch, 147; Langdon v. Roane, 6 Ala. 518; 41 Am. Dec. 60; Terry v. Sickles, 13 Cal. 427; White v. Hampton, 10 Iowa, 238; Mansell v. Payne, 18 La. Ann. 124; Wood v. Gault, 2 Md. Ch. 433; Brown v. Vandyke, 8 N. J. Eq. 795; 55 Am. Dec. 250; Coopwood v. Bolton, 26 Miss. 212; Murray v. Toland, 3 Johns. Ch. 569; Consequa v. Fanning, 3 Johns. Ch. 587; Atwater v. Fowler, 1 Edw. Ch. 417; Philips v. Bellden, 2 Edw. Ch. 1; Lockwood v. Thorne, 11 N. Y. 170; 62 Am. Dec. 81; Bruen v. Hone, 2 Barb. 586; Dows v. Durfee, 10 Barb. 213; Beers v. Reynolds, 12 Barb. 288; Towsley v. Denison, 45 Barb. 490; Pratt v. Weyman, 1 McCord Ch. 156; Tharp v. Tharp, 15 Vt. 105.

<sup>5</sup> Leake on Contracts, 119; Evans v. Verity, Ryan & M. 230; Rutledge v. Moore, 9 Mo. 533.



charge a defendant, as upon an account stated, by his receipt of and payment on a bill, rendered without objection, it must be shown that the bill was unambiguous, and clearly indicated the nature and extent of the plaintiff's demand.<sup>1</sup> It is not necessary that there should be mutual demands; the charges may all be on one side, and need only relate to a single debt or transaction.<sup>2</sup>

The effect of an account stated is to raise a *prima facie* debt; therefore, in an action upon it, it may be shown that the debt did not exist, or was invalid. So it may be shown that a debt stated in the account was void for want of consideration, or by reason of failure of the consideration, or because founded upon an illegal consideration;<sup>3</sup> or it may be shown that the acknowledgment was founded on a mistake, and that its account is not correct.<sup>4</sup> The presumption is, that all items properly chargeable at the time were included. This presumption is not conclusive; but clear and convincing proof that such items were unintentionally omitted is necessary to sustain a subsequent claim to recover them.<sup>5</sup> The account is an entire demand, and cannot be split into several causes of action.<sup>6</sup>

**§ 3687. Who may Make Admission—And to Whom—And at What Time.**—The admission of debt, in order to constitute an account stated, must be made to the creditor himself or to his agent, and is not sufficient if made to a stranger.<sup>7</sup> An administrator may rely upon an ad-

<sup>1</sup> Manion Blacksmith and Wrecking Co. v. Carreras, 26 Mo. App. 229.

<sup>2</sup> Knowles v. Michel, 13 East, 249; Highmore v. Primrose, 5 Maule & S. 65; Cobb v. Arundel, 26 Wis. 553; Koch v. Borritz, 4 Daly, 117; Rutledge v. Moore, 9 Mo. 533; Ware v. Dudley, 16 Ala. 742.

<sup>3</sup> Leake on Contracts, 120.

<sup>4</sup> Dickerson v. Nabb, Sneed, 320; 2 Am. Dec. 725; Brown v. Vandyke, 8 N. J. Eq. 795; 55 Am. Dec. 250.

<sup>5</sup> Bull v. Harris, 31 Ill. 487; Lee v. Reed, 4 Dana, 109; Kennedy v. Williamson, 5 Jones, 284.

<sup>6</sup> Guernsey v. Carver, 8 Wend. 492; 24 Am. Dec. 60; Stevens v. Lockwood, 13 Wend. 644; 28 Am. Dec. 43; Field v. Mayor, 6 N. Y. 188; 57 Am. Dec. 435; Secor v. Sturges, 16 N. Y. 556; Bendoragle v. Cocks, 19 Wend. 207; 32 Am. Dec. 448; Oliver v. Holt, 11 Ala. 574; 46 Am. Dec. 228.

<sup>7</sup> Tucker v. Barrow, 7 Barn. & C. 623; Jardine v. Payne, 1 Barn. & Adol. 663; Breckon v. Smith, 1 Ad. & E. 488; Hoffar v. Dement, 5 Gill, 122; 46 Am. Dec. 623; Thurmond v. Sanders, 21 Ark. 255.

<sup>1</sup> In re T. L. R. 14 E. 679.

<sup>2</sup> Bates v. Rehill v.

<sup>3</sup> 60 Am. Rep.

<sup>4</sup> Bullock

<sup>5</sup> 2 Green

mission of debt made in favor of the deceased's estate before his appointment.<sup>1</sup> The admission must be made by the debtor himself or his agent. The award of an arbitrator awarding a sum to be paid will not operate as an account stated, because an arbitrator is not an agent for that purpose.<sup>2</sup> A statement of partnership accounts, prepared by clerks to aid in a settlement between the partners, is *prima facie* evidence, binding as to items mutually assented to at the time, but not as to disputed items.<sup>3</sup> An account stated is as conclusive against a person who has assumed the indebtedness of the party against whom the balance is struck as it is against the original debtor.<sup>4</sup> The admission may be made either before or after action brought, if the debt existed before suit.<sup>5</sup>

**§ 3688. When Account will be Reopened.**—The right to impeach an account stated does not exist in the absence of fraud or mistake, and may be lost by acquiescence.<sup>6</sup> But if there has been any mistake, omission, accident, fraud, or undue advantage, by which an account stated is in truth vitiated, and the balance incorrectly stated, equity will permit it to be opened and re-examined *in toto*, or as to particular items, as the allegations may warrant.<sup>7</sup> A court of equity will not open accounts and sustain claims which are barred by the statute of limitations, without exercising great caution; and the complainant, in order to obtain such relief, must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment which is complained of; must specify how, when, and in what manner it was perpe-

<sup>1</sup> In re Teignmouth Shipping Ass'n, L. R. 14 Eq. 148; 41 L. J. Com. P. 679.

<sup>2</sup> Bates v. Townley, 2 Ex. 152.

<sup>3</sup> Rehill v. McTague, 114 Pa. St. 82; 60 Am. Rep. 341.

<sup>4</sup> Bullock v. Boyd, 2 Edw. Ch. 293.

<sup>5</sup> 2 Greenl. Ev. 128; Allen v. Cook,

2 Dowl. Pr. 546; Powell v. R. R. Co., 65 Mo. 658.

<sup>6</sup> Cross v. Sacramento Savings Bank, 66 Cal. 462.

<sup>7</sup> Roberts v. Totten, 13 Ark. 609; Goodwin v. United States Ins. Co., 24 Conn. 591; Farnam v. Brooks, 9 Pick. 212.

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trated; and if mistake is alleged, it must be stated with precision; and especially the time when the discovery was made of the fraud, concealment, misrepresentation, or mistake must be distinctly averred, and the charges must be capable of proof and clearly proved.<sup>1</sup>

<sup>1</sup> *Stearns v. Page*, 7 How. 819; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Wilde v. Jenkins*, 4 Paige Ch. 481; *Lockwood v. Thorne*, 11 N. Y. 170; 62 Am. Dec. 81.

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## PART VIII.—ASSUMPSIT.

## CHAPTER CLXXXIV.

## ASSUMPSIT.

- § 3689. Definition and nature.
- § 3690. General or special.
- § 3691. When the action will lie.
- § 3692. When it will not lie.
- § 3693. Parties.
- § 3694. Right to elect between *assumpsit* and *tort*.
- § 3695. Pleading.
- § 3696. Evidence.

§ 3689. **Definition and Nature.**—An action of *assumpsit* is an action *ex contractu*, and, as the word implies, is brought to recover damages for the breach of an undertaking to perform an agreement, express or implied, but not under seal.<sup>1</sup> *Assumpsit* is divided into two heads,—express and implied. Express *assumpsit* arises where an undertaking is given verbally or in writing, under hand only, to do or abstain from doing some act; as to pay a sum of money. Implied *assumpsit* is where the law raises a presumption, from the conduct of a party, that he undertook to do or refrain from doing some act, in the absence of any express promise on his part in the premises.<sup>2</sup> Under the former practice, the action of *assumpsit* was the mode prescribed for the recovery of damages for the breach or non-performance of a simple contract;<sup>3</sup> but where the distinction between sealed and unsealed instruments has been abolished, it is held that the action may be brought

<sup>1</sup> Chit. Pl. 98; Wharton's Law Lex. True, 53 N. H. 627, 632, 633; Ogden v. Saunders, 12 Wheat. 341; United States v. Russell, 13 Wall. 623, 630.

<sup>2</sup> Ward v. Warner, 8 Mich. 508; Ballard v. Walker, 3 Johns. Cas. 60.

<sup>3</sup> 1 Bouvier's Law Dict. 159; Seeva v.

on an instrument under seal.<sup>1</sup> A promise either express or implied, on the part of the defendant, is an essential ingredient in this action; for, as it is said, a promise or contract is the very gist of the action.<sup>2</sup> It differed from an action of debt in the important particular that it was brought to recover unliquidated damages, and never for an ascertained amount.<sup>3</sup> It was also distinguished from an action of covenant in respect that it did not require a contract under seal to support it.<sup>4</sup> Technically, it is an action on the case, and was formerly described as "an action upon the case upon *assumpsit*."<sup>5</sup> It was of extended application, and almost equitable in its nature, and could be availed of in nearly every case where money had been received, and which in equity ought to be returned.<sup>6</sup> It is necessary, as in other cases, that the promise, whether express or implied, upon which an action of *assumpsit* is brought, should be supported by a sufficient consideration, and the general rules of the law of contracts relating to the sufficiency of a consideration apply equally to consideration in *assumpsit*.<sup>7</sup> What were known as the common counts in *assumpsit* was the form of the declaration, which, at common law, was applicable to the action of *assumpsit*. Those counts were as follows: 1. *Indebitatus assumpsit*, which lay on a promise express or implied, to pay a precedent debt,—for moneys paid to the use of or lent to the defendant;<sup>8</sup> for money had and received by the defendant

<sup>1</sup> Protection Life Ins. Co. v. Palmer, 81 Ill. 88.

<sup>2</sup> Candler v. Rossiter, 10 Wend. 487; Wings v. Brown, 12 Rich. 279; Winston v. Francisco, 2 Wash. (Va.) 187.

<sup>3</sup> Moses v. Macferlan, 2 Burr. 1008.

<sup>4</sup> North v. Nichols, 37 Conn. 375.

<sup>5</sup> Com. Dig.; 1 Chit. Pl. 111.

<sup>6</sup> Thompson v. Thompson, 5 W. Va. 190.

<sup>7</sup> Exchange Bank of St. Louis v. Rice, 107 Mass. 37; 9 Am. Rep. 1; Barker v. Bradley, 42 N. Y. 316; 1 Am. Rep. 521; Bohanan v. Pope, 42 Me. 93; Barringer v. Warden, 12 Cal.

311; Brown v. O'Brien, 1 Rich. 268; 44 Am. Dec. 254; Barker v. Bucklin, 2 Denio, 45; 43 Am. Dec. 726; Brewer v. Dyer, 7 Cush. 337; Beers v. Robinson, 9 Pa. St. 229; Crocker v. Higgins, 7 Conn. 347; Draughan v. Bunting, 9 Ired. 10; Sergeant v. Currier, 49 N. H. 310; 6 Am. Rep. 524. See ante, Title Contracts.

<sup>8</sup> White v. Miners' Bank, 102 U. S. 658; Atkins v. Nichols, 51 Conn. 513; Curtis v. R. R. Co., 32 Mich. 291; Lee v. Stone, 57 Tex. 444; Soule v. Frost, 76 Me. 119; Fleischer v. Klumb, 56 Wis. 439.

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to the use of the plaintiff;<sup>1</sup> for the sale and assignment and use and occupation of houses and lands; for goods bargained, sold, and delivered;<sup>2</sup> and for work, services, labor, and materials.<sup>3</sup> 2. *Quantum meruit* or *valebant*, on a promise to pay the plaintiff for the like consideration as much money as he deserved to have, or for goods, etc., as much as they were reasonably worth.<sup>4</sup> 3. *Insimul computassent*, on a promise to pay the sum due on an account stated between the parties.<sup>5</sup>

§ 3690. **General or Special.**—Where the action is brought on the promise raised by implication of law, it is said to be one of general *assumpsit*, and in such an action the defendant may plead in mitigation of damages anything which directly affects the value of the work done, and goes to show the inadequacy of the consideration, as the implied *assumpsit* is always based upon the actual value of the thing done or of the forbearance by the plaintiff.<sup>6</sup> And where the action is brought in general *assumpsit*, when there has been a special contract, the defendant may show a fraudulent misrepresentation or a breach of warranty, without a return of the article, in reduction of damages.<sup>7</sup> Where the action is brought upon an express

<sup>1</sup> Butler v. Frank, 128 Mass. 29; Keane v. Beard, 11 Mo. App. 10; McFadden v. Wilson, 96 Ind. 253; Colt v. Clapp, 127 Mass. 476; Zacharias v. Zacharias, 23 Pa. St. 452; Hobbs v. Hobbs, 58 N. H. 81; Harper v. Claxton, 62 Ala. 46; Brand v. Williams, 29 Minn. 238; Keene v. Sage, 75 Me. 138; Donkersley v. Levy, 38 Mich. 54; Risdon v. De la Rua, 51 N. Y. Sup. Ct. 63.

<sup>2</sup> Hanna v. Mills, 21 Wend. 90; Manton v. Gammon, 7 Ill. App. 201; Bickham v. Irwin, 3 Yeates, 66; Man. & Mech. Bank v. Gore, 15 Mass. 75.

<sup>3</sup> Haynes v. St. Louis Baptist Church, 12 Mo. App. 536; Blakeslee v. Holt, 42 Conn. 226; Whelan v. Ansonia Clock Co., 97 N. Y. 293; Willington v. West Boylston, 4 Pick. 101; Janes v. Buzzard, Hemp. 240; Selby v. Hutchinson, 9 Ill. 319.

<sup>4</sup> Thompson v. Purcell, 10 Allen,

426; Houston etc. R. R. Co. v. Snelling, 59 Tex. 116; Aiken v. Bloodgood, 12 Ala. 221; Young v. Preston, 4 Cranch. 239; Porter v. Beltzhoover, 2 Harr. (Del.) 484; Brown v. Snow, 14 La. Ann. 848.

<sup>5</sup> N. H. Mut. Fire Ins. Co. v. Hunt, 30 N. H. 219; Tassey v. Church, 4 Watts & S. 141; State v. Jennings, 10 Ark. 428.

<sup>6</sup> Heck v. Shener, 4 Serg. & R. 249; 8 Am. Dec. 700; King v. Paddock, 18 Johns. 141; Grant v. Button, 14 Johns. 377; Backus v. Coyne, 35 Mich. 5.

<sup>7</sup> McAllister v. Reab, 8 Wend. 109; Mixer v. Coburn, 11 Met. 559; 45 Am. Dec. 280; Batterman v. Pierce, 3 Hill, 172; Culver v. Blake, 6 B. Mon. 528; Henning v. Van Hook, 8 Humph. 678; Draper v. Randolph, 4 Harr. (Del.) 454; Steigleman v. Jeffries, 1 Serg. & R. 477; 7 Am. Dec. 626.

promise or undertaking, it is said to be in special *assumpsit*. In an action of this kind, it is incumbent upon the plaintiff to show that he has fully complied with all the terms of the contract on his part before he is entitled to recover.<sup>1</sup> But if the plaintiff has performed the contract in accordance with its terms, and such performance has resulted in an available and practical work of the kind contracted for, he was entitled, at common law, to recover the entire compensation agreed on in the contract, and the defendant was compelled to have recourse to a cross-action to recover damages for breach of warranty, or for defects in the mode of performance.<sup>2</sup> But inasmuch as the defendant is not at liberty to plead fraud, unless he has returned the article, or given due notice of the defect, it follows that a sale on special *assumpsit* can be defeated on the ground of fraud only where the article has been returned or is proved to be wholly worthless.<sup>3</sup>

§ 3691. **When the Action will Lie.**—The general rule is, that *assumpsit*, either general or special, will lie for the value of goods bargained and sold;<sup>4</sup> for work and labor done, services rendered, and materials provided;<sup>5</sup> for use

<sup>1</sup> Dermott v. Jones, 23 How. 231; Catholic Bishop of Chicago v. Bauer, 62 Ill. 188; Russell v. Gilmore, 54 Ill. 147; Mirford v. Mastin, 6 T. B. Mon. 609; Cutter v. Powell, 2 Smith's Lead. Cas., 7th Am. ed., 61; Robertson v. Lynch, 14 Johns. 451; Gregory v. Mack, 2 Hill, 380; Taft v. Inhabitants of Montague, 14 Mass. 282; 7 Am. Dec. 215.

<sup>2</sup> Everett v. Gray, 1 Mass. 101; Cutter v. Powell, 2 Smith's Lead. Cas., 7th Am. ed., 61; Dermott v. Jones, 2 Wall. 1, 9.

<sup>3</sup> Thornton v. Winn, 12 Wheat. 183; Burton v. Stewart, 3 Wend. 236; 20 Am. Dec. 692; Kase v. John, 10 Watts, 107; 36 Am. Dec. 143; Van Epps v. Harrison, 5 Hill, 63.

<sup>4</sup> Richards v. Burroughs, 62 Mich. 117; Terwiliger v. Murphy, 104 Ind. 32; Frazier v. Simmons, 139 Mass. 531; Taft v. Travis, 136 Mass. 95; Benjamin

v. Dockham, 134 Mass. 418; Hunter v. Wetsell, 84 N. Y. 449; McCormick v. Kelly, 28 Minn. 135; Stone v. Nichols, 43 Mich. 16; Upton v. Holmes, 51 Conn. 500; Croninger v. Paige, 48 Wis. 229; Armstrong v. Turner, 49 Md. 589; Schmidt v. Wambacker, 62 Ga. 321.

<sup>5</sup> Pinches v. Swedish Lutheran Church, 55 Conn. 183; Brown v. R. R. Co., 36 Minn. 236; Lewis v. R. R. Co., 95 N. C. 179; Todd v. Huntington, 13 Or. 9; Jordan v. Fitz, 63 N. H. 227; Blood v. Wilson, 141 Mass. 25; Farrell v. Dooley, 17 Ill. App. 66; Donovan v. Halsey etc. Co., 58 Mich. 38; Salb v. Campbell, 65 Wis. 405; McKee v. Vincent, 33 Minn. 508; Mills v. Joiner, 20 Fla. 479; Flora v. Cline, 89 Ind. 208; Howe v. Day, 58 N. H. 516; Cook v. McCabe, 53 Wis. 250; 40 Am. Rep. 765; Chicago v. Tilley, 103 U. S. 146; Fitzgerald v. Allen, 128 Mass. 232;

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and occupation;<sup>1</sup> for money had and received;<sup>2</sup> for money paid under duress or compulsion, or under legal process, or on erroneous judgment;<sup>3</sup> for money paid on a consideration which has wholly failed;<sup>4</sup> for money paid on a void or illegal contract, where the parties are not *in pari delicto*, or on a contract which has been rescinded;<sup>5</sup> for money lent and for money due upon an account stated;<sup>6</sup>

Barnwell v. Kempton, 22 Kan. 314; Castagnino v. Balletta, 82 Cal. 250; Boardman v. Ward, 40 Minn. 399; 12 Am. St. Rep. 749.

<sup>1</sup> Walker v. Shackelford, 49 Ark. 503; Kites v. Church, 142 Mass. 586; Barron v. Marsh, 63 N. H. 107; Hoagland v. Crum, 113 Ill. 365; 53 Am. Rep. 424; Grove v. Barclay, 106 Pa. St. 155; Newberg v. Cowan, 62 Miss. 570; Horton v. Cooley, 135 Mass. 589; Lucier v. Marsales, 133 Mass. 454; Dickson v. Moffat, 5 Col. 114; Mozart Building Ass'n v. Frieljen, 12 Phila. 515; Doty v. Gillett, 43 Mich. 203; Nat. Oil Refining Co. v. Bush, 85 Pa. St. 335; Goshorn v. Steward, 15 W. Va. 657.

<sup>2</sup> Scott v. Montells, 109 N. Y. 1; Levinston v. Edwards, 79 Ala. 293; Cory v. Somerset County Freeholders, 47 N. J. L. 181; Seals v. Halloway, 77 Ala. 344; Risdon v. Angarica De la Rua, 51 N. Y. Sup. Ct. 53; Nolan v. Manton, 46 N. J. L. 231; 50 Am. Rep. 403; Loring v. St. Louis, 80 Mo. 461; Metropolitan Bank v. Jersey City Bank, 19 Fed. Rep. 301; Harris v. Howes, 75 Me. 436; Wann v. Kelly, 2 McCrary, 628; Billings v. Monmouth, 72 Me. 174; Ramsay v. Clinton County, 92 Ill. 225; Warren v. Caryl, 61 Vt. 331; Smith v. Jennigan, 83 Ala. 256; Campbell v. Pence, 113 Ind. 313; Schmidt v. Glade, 126 Ill. 485; Glencee v. McCleod County, 40 Minn. 44; Roberts v. Ely, 113 N. Y. 128; Carll v. Emery, 148 Mass. 32; Smith v. Barringer, 37 Minn. 94.

<sup>3</sup> Fergusson v. Winslow, 34 Minn. 384; Crane v. Runey, 26 Fed. Rep. 15; Heckman v. Swartz, 64 Wis. 48; Metzner v. Bauer, 98 Ind. 425; Swift Co. v. United States, 111 U. S. 22; Westlake v. St. Louis, 77 Mo. 47; 46 Am. Rep. 4; Hollingsworth v. Stone, 90 Ind. 244; Lehigh etc. Co. v. Brown, 100 Pa. St. 333; Logan v. Talbot, 59 Cal.

652; Travelers' Ins. Co. v. Heath, 93 Pa. St. 333; Schultz v. Culbertson, 49 Wis. 122; Mobile etc. R. R. Co. v. Steiner, 61 Ala. 550. But not for money voluntarily paid under an illegal license tax; O'Brien v. Colusa County, 67 Cal. 503; Long v. Rhoads, 126 Pa. St. 378; Cleveland v. Tutts, 69 Tex. 580; Lyman v. Lauderbaugh, 75 Iowa, 481.

<sup>4</sup> Laffin v. Howe, 112 Ill. 253; Houghton v. Owen, 6 N. H. 125; Lambert v. Short, 36 La. Ann. 477; Walsh v. Rogers, 15 Neb. 309; Davis v. Doherty, 69 Ind. 11; Garber v. Armentrout, 32 Gratt. 235; Wisner v. Chicago, 6 Ill. App. 254; Johnson v. Krassin, 25 Minn. 117; Thomas v. Hartshorn, 45 N. J. L. 215; Winters v. Armstrong, 37 Fed. Rep. 508.

<sup>5</sup> Evans v. Givens, 22 Fla. 476; McGrew v. City Produce Exchange, 85 Tenn. 572; 4 Am. St. Rep. 771; Haynes v. Rudd, 102 N. Y. 372; 55 Am. Rep. 815; Mannen v. Bradberry, 81 Ky. 153; English v. Rumsey, 22 Hun, 486; Clarke v. Lincoln Lumber Co., 59 Wis. 655; Haigh v. U. S. Building etc. Ass'n, 18 W. Va. 792; Gist v. Smith, 78 Ky. 367; Congress etc. Co. v. Knowlton, 103 U. S. 49; O'Reilly v. Cleary, 8 Mo. App. 186; Sullivan v. Boley, 24 Fla. 501; Wonselder v. Lee, 40 Kan. 367.

<sup>6</sup> Austin v. Ricker, 61 N. H. 97; Nothe v. Nomer, 54 Conn. 326; Jerome v. Morgan, 13 Daly, 225; Mannion etc. Co. v. Carrevas, 26 Mo. App. 229; Talcott v. Chew, 27 Fed. Rep. 273; Cross v. Sacramento Savings Bank, 66 Cal. 462; Lawrence v. Ellsworth, 41 Ark. 502; Houston etc. R. R. Co. v. Snelling, 59 Tex. 116; Dickerson v. Merriman, 100 Ill. 342; Chicago etc. R. R. Co. v. Peters, 45 Mich. 636; Butler v. American Toy Co., 46 Conn. 136; Volkening v. De Graaf, 81 N. Y. 268; Trumick v. Gilchrist, 81 Pa. St. 160; Manning v. Dallas, 73 Cal. 420.



for money paid for the use of another at his request, express or implied;<sup>1</sup> for money paid under mistake of fact or procured by fraud.<sup>2</sup>

Wherever money has been received tortiously, or by duress under color of office, *assumpsit* will lie, as in such cases the law implies a promise to repay.<sup>3</sup> If the contract fail by accident or consent, or through the vendee's fault, *assumpsit* will lie;<sup>4</sup> but in such a case the plaintiff must restore any benefits he may have received under the contract, before he will be entitled to recover.<sup>5</sup> Where the plaintiff has been prevented by the act of the other party to the contract, or by accident, from fully performing the same on his part, he may recover in *assumpsit* for the value of the labor actually performed.<sup>6</sup> And where work has been accepted, though not done in accordance with a

<sup>1</sup> Meriden Britannia Co. v. Rogers, 55 Conn. 486; Morley v. Carlson, 27 Mo. App. 5; Abraham v. Mitchell, 112 Pa. St. 230; 56 Am. Rep. 312; Soule v. Frost, 76 Me. 119; Atkins v. Nichols, 51 Conn. 513; Stewart v. Ohy, 11 Or. 335; Goodnow v. Stryker, 61 Iowa, 261; Lee v. Stowe, 57 Tex. 444; Blythe v. Luning, 7 Saw. 504; York v. Jones, 43 N. J. L. 332; Beck v. Trumbull, 12 Neb. 133; White v. Miners' Bank, 102 U. S. 658; Eoff v. Clay, 9 Mo. App. 176; Fowler v. Hall, 7 Ill. App. 332; Crain v. Hutchinson, 8 Ill. App. 179; Gray v. Krah, 6 Mo. App. 594; Perin v. Parker, 126 Ill. 201; 9 Am. St. Rep. 571; Wright v. Dickinson, 67 Mich. 590; 11 Am. St. Rep. 602.

<sup>2</sup> Massengill v. Chattanooga Bank, 76 Ga. 341; McMartry v. R. R. Co., 84 Ky. 462; Lane v. Pere Marquette Boom Co., 62 Mich. 63; Baldwin v. Foss, 71 Iowa, 389; Perry v. Hale, 143 Mass. 540; Olive v. Olive, 95 N. C. 435; Yeater v. Hines, 24 Mo. App. 619; Lyle v. Shinnebarger, 17 Mo. App. 66; Hanson v. Jones, 20 Mo. App. 595; Moore v. Marshall, 76 Me. 353; Beard v. Beard, 25 W. Va. 486; 52 Am. Rep. 219; Needles v. Burk, 81 Mo. 509; 51 Am. Rep. 251; Buffalo v. O'Malley, 61 Wis. 255; 50 Am. Rep. 137; Kinney v. Dodge, 101 Ind. 573; Davis v. Krum, 12 Mo. App. 279; Grant v. Mellen, 134 Mass. 335; Sharkey

v. Mansfield, 90 N. Y. 227; 43 Am. Rep. 161; Mauzy v. Hardy, 13 Neb. 36; Northwestern Mut. Life Ins. Co. v. Elliott, 7 Saw. 13; United States v. Union Bank, 10 Ben. 408; Talbot v. Commonwealth Bank, 129 Mass. 67; 37 Am. Rep. 302; McArthur v. Luce, 43 Mich. 435; 38 Am. Rep. 204; Alston v. Richardson, 51 Tex. 1; Barnard v. Colwell, 39 Mich. 215; Higgins v. Mendenhall, 51 Iowa, 135; Hindmarch v. Hoffman, 127 Pa. St. 284; Fecheimer v. Louisville, 84 Ky. 306; Beard v. Horton, 86 Ala. 202; Wiley v. Carter, 77 Iowa, 751; Lyle v. Siler, 103 N. C. 261; McMurtry v. R. R. Co., 84 Ky. 462; Leather Manufacturers' Nat. Bank v. Merchants' Nat. Bank, 128 U. S. 26.

<sup>3</sup> Dana v. Kemble, 17 Pick. 545; Sturtevant v. Waterbury, 2 Hall, 453; Metropolis Bank v. Jersey City Bank, 19 Fed. Rep. 301; Ripley v. Gelston, 9 Johns. 201; 6 Am. Dec. 271; Dumond v. Carpenter, 3 Johns. 183; Morrow v. Surber, 97 Mo. 155; Com. v. Field, 84 Va. 882; Glencoe v. McCleod County, 40 Minn. 44; Weeds v. Dexarkana, 50 Ark. 81.

<sup>4</sup> Davidson v. Ernest, 7 Ala. 817; Gould v. Thompson, 4 Met. 224; Johnson v. Beauchamp, 9 Dana, 124.

<sup>5</sup> Spiller v. Cass, 58 N. H. 489.

<sup>6</sup> Whelan v. Ansonia Clock Co., 97 N. Y. 293; Selby v. Hutchinson, 9 Ill. 319; Blakeslee v. Holt, 42 Conn. 226.

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<sup>3</sup> Gora  
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22 Kan.  
62 Mich.  
<sup>4</sup> Dyer  
divant v.  
hoff v. W  
v. Larson  
15 Johns  
ser v. Dr  
<sup>5</sup> King  
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contract, *assumpsit* will lie.<sup>1</sup> But where the contract is valid, a *quantum meruit* will not lie when the compensation for the services has been fixed by the contract.<sup>2</sup> Where the contract has been completely performed by the plaintiff, or the defendant has accepted part performance in satisfaction, *indebitatus assumpsit* lies.<sup>3</sup> Where a tenant in common has received more than his share of the rents or profits of the common property, or has credited the tenancy in common with moneys belonging to the plaintiff separately, *assumpsit* will lie for money had and received.<sup>4</sup> Where a contract under seal has been varied or modified by a new agreement without seal which supersedes the specialty contract or covenant, *assumpsit* will lie on the substituted contract.<sup>5</sup> Where a specialty contract has been rescinded or is invalid, *assumpsit* will lie, if there is evidence of an implied contract between the parties.<sup>6</sup> Where money has been paid on a consideration which has wholly failed, *indebitatus assumpsit* will lie for its recovery;<sup>7</sup> and so where money has been paid under a mistake of fact;<sup>8</sup> also, where money has been paid on an erroneous

43 Am.  
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Conn. 226.

<sup>1</sup> Andre v. Hardin, 32 Mich. 324; Pinches v. Swedish Lutheran Church, 55 Conn. 183.

<sup>2</sup> Ladue v. Seymour, 24 Wend. 60; Mansur v. Botts, 80 Md. 651; Anderson v. Rice, 20 Ala. 239; Campbell v. District of Columbia, 2 McAr. 533; Cohen v. Stein, 61 Wis. 508; Frazer v. Howe, 106 Ill. 563; Buckingham v. Ludlum, 37 N. J. Eq. 137; Mills v. Joiner, 20 Fla. 479.

<sup>3</sup> Gormon v. Bellamy, 82 N. C. 496; McMillan v. Malloy, 10 Neb. 228; Bozart v. Dudley, 44 N. J. L. 304; 43 Am. Rep. 373; Barnewell v. Kempton, 22 Kan. 314; Richards v. Burroughs, 62 Mich. 117.

<sup>4</sup> Dyer v. Wilbur, 48 Me. 287; Sturdivant v. Smith, 20 Me. 387; Brinckerhoff v. Wemple, 1 Wend. 470; Sargent v. Parsons, 12 Mass. 148; Coles v. Coles, 15 Johns. 159; 8 Am. Dec. 231; Dresser v. Dresser, 40 Barb. 300.

<sup>5</sup> King v. R. R. Co., 51 Vt. 369; Smith v. Smith, 45 Vt. 433; Munroe v. Perkins, 9 Pick. 298; 20 Am. Dec.

475; Lawall v. Rader, 24 Pa. St. 283; Lattimore v. Hansen, 14 Johns. 230; McVoy v. Wheeler, 6 Port. 201.

<sup>6</sup> Little v. Morgan, 31 N. H. 499; Foundry v. Hovey, 21 Pick. 417; Hill v. Green, 4 Pick. 114; Pierce v. Lacy, 23 Miss. 193; Hitchcock v. Lukens, 8 Port. 333; Brown v. Gauss, 10 Mo. 265.

<sup>7</sup> Houghton v. Owen, 60 N. H. 125; Garber v. Armentrout, 32 Gratt. 235; Lambert v. Short, 36 La. Ann. 477; Johnson v. Krassin, 25 Minn. 117; Barton v. Faherty, 3 Iowa, 327; Walsh v. Rogers, 15 Neb. 309; Wisner v. Chicago, 6 Ill. App. 254.

<sup>8</sup> Sharkey v. Mansfield, 90 N. Y. 227; 43 Am. Rep. 161; Talbot v. Com. Bank, 129 Mass. 67; International Bank v. Bartalott, 11 Ill. App. 662; Holmes v. Lucas City, 53 Iowa, 211; Worley v. Moore, 97 Ind. 15; Neitzky v. District of Columbia, 17 Ct. of Cl. 111; Glenn v. Shannon, 12 S. C. 570. But see Mauzy v. Hardy, 13 Neb. 30; Moore v. Moore, 127 Mass. 22.

judgment or execution afterwards reversed on appeal or quashed, *assumpsit* lies to recover it back.<sup>1</sup>

As a foreign judgment does not cause a merger of a simple contract debt on which it is recorded, *assumpsit* will lie in the home country on the original debt.<sup>2</sup> Money paid under protest under circumstances of duress can be recovered back in this form of action.<sup>3</sup> And also, in many cases, where money or goods have been obtained by fraudulent misrepresentations, *assumpsit* will lie for the recovery of the money or the value of the goods.<sup>4</sup> And where a new consideration is imported into a simple contract, such as an agreement not to sue for a specified time, it is sufficient to support an action of this kind.<sup>5</sup> Where a higher security is taken, not in satisfaction, but as collateral security, for a simple contract debt, the latter is not merged, and *assumpsit* will lie on it.<sup>6</sup> And unless a special remedy is provided, money accruing, due under the provisions of a statute, may be recovered in an action of *assumpsit*.<sup>7</sup> It will also lie against a common carrier for the value of goods obtained by his wrongful act, and destroyed while in his possession;<sup>8</sup> also against a corporation for profit for refusing to enter the transfer of stock upon its books when such entry is necessary to complete the transfer;<sup>9</sup> also against an assignor who by false repre-

<sup>1</sup> *Hiler v. Hiler*, 35 Ohio St. 645; *Wright v. Aldrich*, 60 N. H. 161; *Scholey v. Halsey*, 72 N. Y. 578; *Metzner v. Bauer*, 98 Ind. 425; *Conn. Mut. Life Ins. Co. v. Stewart*, 95 Ind. 588; *Hollingsworth v. Stone*, 90 Ind. 244; *Booth v. Comm'rs*, 84 Ind. 428; *Hoxton v. Poppleton*, 9 Or. 481.

<sup>2</sup> *Taylor v. Bryden*, 8 Johns. 173; *Crain v. Bangor House*, 12 Me. 354; *Lyman v. Brown*, 2 Curt. 559.

<sup>3</sup> *Heckman v. Swartz*, 50 Wis. 267; *Schultz v. Culbertson*, 49 Wis. 122; 46 Wis. 313; *Swift v. U. S.*, 111 U. S. 22; *Mobile etc. R. R. Co. v. Steiner*, 61 Ala. 559; *Lehigh Co. v. Brown*, 100 Pa. St. 338; *Westlake v. St. Louis*, 77 Mo. 47.

<sup>4</sup> *Grant v. Mellen*, 134 Mass. 335; *Tappan v. Warren Sav. Bank*, 127

Mass. 107; *Van Santen v. Standard Oil Co.*, 81 N. Y. 171; *Young v. Lehman*, 63 Ala. 519; *Johnson v. Continental Ins. Co.*, 39 Mich. 33; *Kewert v. Rindskopf*, 46 Wis. 481; *Moore v. Marshall*, 76 Me. 353; *Lobby v. Ahrens*, 26 S. C. 275.

<sup>5</sup> *Duncan v. Kirkpatrick*, 13 Serg. & R. 298; *Landis v. Urie*, 10 Serg. & R. 321; *Andrews v. Montgomery*, 19 Johns. 162; 10 Am. Dec. 213.

<sup>6</sup> *Snow v. Thomaston Bank*, 19 Me. 269; *Willoughby v. Spear*, 4 Bibb, 397.

<sup>7</sup> *Hillsborough v. Londonderry*, 43 N. H. 451; *Pawlet v. Sandgate*, 19 Vt. 621; *Watson v. Cambridge*, 15 Mass. 286.

<sup>8</sup> *Cooper v. Berry*, 21 Ga. 526.

<sup>9</sup> *Buff. Com. Bank v. Kortright*, 22 Wend. 348; 34 Am. Dec. 317.

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sentations induced the plaintiff to pay money for an assignment of an invalid claim;<sup>1</sup> also against a father or husband for necessities supplied to his child or wife, whom he was under legal liability to support;<sup>2</sup> also against an administrator for a share in the residue of an estate ordered to be distributed;<sup>3</sup> also against the vendor of stolen goods when they have been reclaimed from the purchaser by the true owner;<sup>4</sup> also against an attorney for negligence in transacting professional business;<sup>5</sup> also against a tax-collector for taxes he has collected;<sup>6</sup> also against the subscriber to stock of an incorporated company to recover the amount of his subscription or installments;<sup>7</sup> also against one partner by his copartner for money paid in excess of his share of profits on a dissolution and settlement of the partnership affairs;<sup>8</sup> also against a municipal corporation upon bonds issued by it in aid of a railroad;<sup>9</sup> also against a suitor for the fees of a justice of the peace after judgment has been recovered;<sup>10</sup> also against a devisee on an express promise to pay a specified sum charged on the land devised;<sup>11</sup> also against a bank for the wrongful refusal to issue to an assignee of shares a certificate thereof;<sup>12</sup> also against an innkeeper for the loss of baggage through the negligence of his employees;<sup>13</sup> also against the purchaser of land for unpaid purchase-money after conveyance executed;<sup>14</sup> also against an administrator to recover the value of a gift *causa*

<sup>1</sup> *Burton v. Driggs*, 20 Wall. 125.

<sup>2</sup> *Hunt v. Thompson*, 3 Scam. 179; 36 Am. Dec. 538; *Van Valkinburgh v. Watson*, 13 Johns. 480; 7 Am. Dec. 195.

<sup>3</sup> *Holloback v. Van Buskirk*, 4 Dall. 147.

<sup>4</sup> *Parton v. Faherty*, 3 G. Greene, 327; 54 Am. Dec. 503.

<sup>5</sup> *Ellis v. Henry*, 5 J. J. Marsh. 249; *Church v. Munford*, 11 Johns. 479.

<sup>6</sup> *Comm'rs v. Harrington*, 1 Blackf. 260.

<sup>7</sup> *Bavington v. R. R. Co.*, 34 Pa. St. 358.

<sup>8</sup> *Williams v. Henshaw*, 11 Pick. 79; 22 Am. Dec. 366.

<sup>9</sup> *Town of Queensbury v. Culver*, 19 Wall. 83.

<sup>10</sup> *Harris v. Christian*, 10 Pa. St. 233.

<sup>11</sup> *Kelsey v. Deyo*, 3 Cow. 133.

<sup>12</sup> *Hill v. Pine River Bank*, 45 N. H. 300.

<sup>13</sup> *Bradish v. Henderson*, 1 Dane Abr. 310.

<sup>14</sup> *Goodwin v. Gilbert*, 9 Mass. 510; *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 230; *Sheppard v. Little*, 14 Johns. 210; *Gordon v. Phillips*, 13 Ala. 665.

*mortis*, when the gift has been converted by the defendant.<sup>1</sup>

And where a trustee has promised to pay to his *cestui que trust* the amount ascertained to be due on the accounts between them, the latter may bring *assumpsit* for such ascertained amount.<sup>2</sup> Where several agree in writing to contribute money to purchase land and erect mills thereon, and some of them carry out the agreement, they may sue the others in *assumpsit* for the amount of their subscriptions.<sup>3</sup> And a creditor may bring *assumpsit* against two partners who have agreed with a third to pay the creditor's debt in consideration of such third partner assigning to them his interest in the business and retiring from the firm.<sup>4</sup> And *assumpsit* will lie for the stipulated price of shares which the defendant has agreed to take and file in an incorporated company.<sup>5</sup> It also lies against one whose debt has been paid by another to save his own property from being sold on execution.<sup>6</sup> And where a municipal corporation is legally bound to perform a certain duty, its performance may be enforced by an action of *assumpsit*.<sup>7</sup> Where the defendant has consented to work being completed after the time specified in the contract, *indebitatus assumpsit* lies for the value of the work so done; and if the delay were not attributable to either party, the rate of compensation fixed upon by the contract may be recovered.<sup>8</sup> It is the duty of the legal representatives of a deceased party to a contract to carry it out if it be one which is not terminated by the death of the party, and the other party may treat it as rescinded, and sue in *assumpsit*, if such representative refuses to complete the contract.<sup>9</sup>

<sup>1</sup> Michener v. Dale, 23 Pa. St. 59.

<sup>2</sup> Nelson v. Howard, 5 Md. 327.

<sup>3</sup> Pillsbury v. Pillsbury, 20 N. H. 90.

<sup>4</sup> Bellas v. Fagely, 19 Pa. St. 273.

<sup>5</sup> Ogdensburgh etc. R. R. Co. v. Frost, 21 Barb. 541; Penobscot v. Dunn, 39 Me. 587; Bangor Bridge Co. v. McMahon, 10 Me. 478.

<sup>6</sup> Nichols v. Bucknam, 117 Mass. 488.

<sup>7</sup> Farwell v. Rockland, 62 Me. 296.

<sup>8</sup> Dillon v. Masterton, 7 Jones & S.

133; Merrill v. R. R. Co., 16 Wend. 586; 30 Am. Dec. 130.

<sup>9</sup> Miller v. Thompson, 22 Ark. 258.

*Assumpsit* will lie for the recovery of the wages of a seaman, who, having signed shipping articles, afterwards became incapacitated and was unable to join his ship.<sup>1</sup> Where accounts have been settled, and certain items have been omitted by mistake, *assumpsit* will lie for their recovery.<sup>2</sup> It also lies against a sheriff for the proceeds of an execution received by him or his deputy.<sup>3</sup> And a creditor who has taken collateral security for payment of a bill of goods is not bound to sue on the special agreement under which the security was given, but may bring *indebitatus assumpsit* for the value of the goods.<sup>4</sup> So where, on a contract for the sale of a livery-stable, the vendor falsely represented that he had the exclusive privilege of furnishing carriages to the guests of a certain hotel, and that such privilege was worth a certain specified sum, it was held that the contract was severable, and that *indebitatus assumpsit* could be maintained for such sum.<sup>5</sup> Where there is a special agreement unperformed, special *assumpsit* must be brought on it;<sup>6</sup> and where it is stipulated that payment is to be made in specific articles, there must be a special count for damages for the failure to deliver them.<sup>7</sup> Where the plaintiff has performed part of an entire executory contract, and then improperly refuses to perform the remainder, he cannot recover either in general or special *assumpsit*.<sup>8</sup>

And where damages are claimed for the non-performance of an executory agreement, and the damages are purely unliquidated, a special count is necessary to support an action in *assumpsit*.<sup>9</sup> Where there is a written contract, but if all that remains for the defendant to do is to pay

<sup>1</sup> *Sykes v. Summerel*, 2 Browne 239; *Butterfield v. Seligman*, 17 Mich. 95; *Weis v. R. R. Co.*, 58 Pa. St. 295.

<sup>2</sup> *Sage v. Hawley*, 16 Conn. 106; 41 Am. Dec. 128.

<sup>3</sup> *Overton v. Hudson*, 2 Wash. (Va.) 172.

<sup>4</sup> *Leas v. James*, 10 Serg. & R. 307.

<sup>5</sup> *Reybold v. Henry*, 3 Houst. 279.

<sup>6</sup> *Sherman v. R. R. Co.*, 22 Barb.

239; *Butterfield v. Seligman*, 17 Mich. 95; *Weis v. R. R. Co.*, 58 Pa. St. 295.

<sup>7</sup> *Barnard v. Dickins*, 22 Ark. 351.

<sup>8</sup> *Angle v. Hanna*, 22 Ill. 431; 74 Am. Dec. 161; *Pullman v. Corning*, 9 N. Y. 174; *Mallon v. Birney*, 11 Wis. 111.

<sup>9</sup> *Outwater v. Dodge*, 7 Cow. 85; *Vincent v. Rogers*, 30 Ala. 471.

money, the plaintiff having fully performed, *indebitatus assumpsit* will lie, and the contract is evidence of the debt.<sup>1</sup> Where a manufacturer put in an apparatus for defendant, warranting the quality, and defendant falsely represented that a fire had been caused by defects in the apparatus, whereupon the manufacturer duplicated it, intending to make no charge, it was held that he could sue on the common counts in *assumpsit* for the materials so furnished and money expended.<sup>2</sup> A landlord may maintain *assumpsit* against one who knowingly buys from the tenant a crop to which the landlord's lien has attached.<sup>3</sup> One who accepts a bequest of the income of a testator's estate, subject to a condition that he pay the interest on encumbrances on the land, may be sued in *assumpsit* for the interest.<sup>4</sup> When two persons, having a joint option for the purchase of real estate, contract to complete the purchase and share the profits of a sale by them, the one may maintain *assumpsit* on the common counts against the other for his share of profits afterwards so made.<sup>5</sup> And one who has received an order for the payment of money to himself may maintain *assumpsit* against the drawee of the order.<sup>6</sup> *Assumpsit*, as for money had and received, lies to recover money collected by a receiver acting under a void appointment.<sup>7</sup>

§ 3692. **When It will not Lie.**—The general rule is, that implied *assumpsit* will not lie where there is an express promise, nor against the express declaration of the party, made at the time of the supposed implied *assumpsit*,<sup>8</sup> except where an obligation imposed by law supersedes

<sup>1</sup> *Devecmon v. Shaw*, 69 Md. 199; *Dobbins v. Pyrolusite M. Co.*, 75 Ga. 450; *Scott v. Congdon*, 106 Ind. 268; *Spencer v. Dougherty*, 23 Ill. App. 399.

<sup>2</sup> *Citizens' Gas Light etc. Co. v. Granger*, 118 Ill. 266.

<sup>3</sup> *Thornton v. Strauss*, 79 Ala. 164.  
<sup>4</sup> *Dreer v. Pennsylvania Co.*, 108 Pa. St. 226.

<sup>5</sup> *Jackson v. Emmens*, 18 Pa. St. 356.

<sup>6</sup> *White Pine Coal Bank v. Sadler*, 19 Nev. 98.

<sup>7</sup> *Johnson v. Powers*, 21 Neb. 292.

<sup>8</sup> *Whiting v. Sullivan*, 7 Mass. 107; *Worthen v. Stevens*, 4 Mass. 449; *Jewett v. Somerset*, 1 Me. 125; *Reed v. Lammel*, 40 Minn. 397; *North Haverhill Water Co. v. Metcalf*, 63 N. H. 427.

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any expression of will by the party.<sup>1</sup> And where the plaintiff's rights are of a nature higher than those under simple contract, as, for instance, where the obligation is of record or under seal, he must adopt the remedies appropriate to the enforcement thereof, and cannot sue in *assumpsit*.<sup>2</sup> Privity of contract between plaintiff and defendant is also generally necessary to the maintenance of this action;<sup>3</sup> but the rule is subject to the exceptions, that where property has come to the promisor's hands, or is under his control, which in equity belongs to a third person, or where the plaintiff is solely entitled to the benefit of a promise made by one to another in a contract to which the plaintiff is not a party.<sup>4</sup> Where the contract is not for the payment of money, but the performance of some other act, the action must be special, and *assumpsit* will not lie.<sup>5</sup> So where by the terms of the contract it is stipulated that the performance is to be at some future date, the action cannot be maintained.<sup>6</sup> *Assumpsit* will not lie where the amount to which the plaintiff is entitled cannot be definitely ascertained without recourse to a court of equity.<sup>7</sup> And where there is no promise, express or implied, to repay money paid to the use of another, *assumpsit* will not lie; but where the money was paid under legal process, a promise will be implied.<sup>8</sup> *Assumpsit*

<sup>1</sup> *Proprietors v. Taylor*, 6 N. H. 499; *United States v. Wolff*, Addis. 312.

<sup>2</sup> *McManis v. Cassidy*, 66 Pa. St. 260; *Hinkley v. Fowler*, 15 Me. 285; *Miller v. Watson*, 5 Cow. 195; *Young v. Preston*, 4 Cranch, 239; *Andrews v. Callender*, 13 Pick. 484; *Hammond v. Hopping*, 13 Wend. 505; *Dubois v. Doubleday*, 9 Wend. 317.

<sup>3</sup> *People v. Stelle*, 103 Ill. 467; *Troy Academy v. Nelson*, 24 Vt. 189; *North Providence v. Dyerville Mfg. Co.*, 13 R. I. 45; *Curry v. Rogers*, 21 N. H. 247. But see *Levinshon v. Edwards*, 79 Ala. 293, where it was held not necessary in *assumpsit* for money had and received.

<sup>4</sup> *Second National Bank of St. Louis v. Grand Lodge*, 98 U. S. 123; *Petersen v. Foss*, 12 Or. 81.

<sup>5</sup> *Cochran v. Tatum*, 3 T. B. Mon. 405; *Spratt v. McKinney*, 1 Bibb, 595; *Brookes v. Scott*, 2 Munt. 344.

<sup>6</sup> *Phelps v. Hubbard*, 59 Ill. 79; *Felton v. Dickinson*, 10 Mass. 287; *Moore v. Nason*, 48 Mich. 300; *Clark v. Smith*, 14 Johns. 326; *Shepard v. Palmer*, 6 Conn. 100; *O'Brien v. Mayer*, 23 Mo. App. 648.

<sup>7</sup> *Chaffee v. Franklin*, 11 R. I. 578; *Douglass v. Skinner*, 44 Conn. 338; *Jackson v. King*, 82 Ala. 432; *Lamson v. Worcester*, 58 Vt. 381.

<sup>8</sup> *Briscoe v. Power*, 64 Ill. 72; *Logan v. Talbot*, 59 Cal. 652.



for use and occupation will not lie where the relation of landlord and tenant has never existed between the parties, or where the defendant's possession is adverse;<sup>1</sup> and it cannot be maintained for the amount of a promised loan after the time within which such loan was to have been paid back has expired.<sup>2</sup> Where rent is reserved in a lease under seal, *assumpsit* for use and occupation does not lie.<sup>3</sup> And where the contract fixes the price to be paid for services, *assumpsit* will not lie on *quantum meruit*, as for work and labor done.<sup>4</sup> And *assumpsit* will not lie by one partner against another unless the accounts between them have been adjusted, and a definite sum ascertained and admitted to be due by defendant to plaintiff;<sup>5</sup> nor to recover money paid under duress, where the defendant justly owed the money he was coerced into paying.<sup>6</sup>

*Assumpsit* will not generally lie to recover the amount of a pecuniary legacy, or for a share of an intestate's estate ordered to be distributed.<sup>7</sup> And where there is a contract for the payment of plaintiff at a fixed salary, an action on an implied *assumpsit* cannot be maintained.<sup>8</sup> *Assumpsit* will not lie against executors on their promise to perform their testator's covenant;<sup>9</sup> nor against contractors for the

<sup>1</sup> Stringfellow v. Curry, 76 Ala. 394; Fielder v. Childs, 73 Ala. 567; Central Mills Co. v. Hart, 124 Mass. 123; Aull Savings Bank v. Aull, 80 Mo. 199; Wiggin v. Wiggin, 6 N. H. 298; Dixon v. Ahern, 19 Nev. 422; Inman v. Morris, 63 Miss. 347; Rose v. Day, 21 Ill. App. 139; Barron v. Marsh, 63 N. H. 124; Denver Transfer etc. Co. v. Swem, 8 Col. 111.

<sup>2</sup> Stanley v. Nye, 51 Mich. 232; Conway v. Log Cabin etc. Building Ass'n, 52 Md. 136.

<sup>3</sup> Smiley v. McLauthlin, 138 Mass. 363; Horton v. Cooley, 135 Mass. 589; Boston v. Binney, 11 Pick. 1; 60 Am. Dec. 717; Prial v. Entwistle, 10 Daly, 398; Smith v. Stewart, 6 Johns. 46; 5 Am. Dec. 186; Featherstonhaugh v. Bradshaw, 1 Wend. 134; Grove v.

Barclay, 106 Pa. St. 155; Seabrook v. Moyer, 88 Pa. St. 417.

<sup>4</sup> Mansur v. Botts, 80 Md. 651; Ladue v. Seymour, 24 Wend. 60; Anderson v. Rice, 20 Ala. 239; Campbell v. District of Columbia, 2 McAr. 533; Hawk v. Walworth, 4 Ark. 577.

<sup>5</sup> Halsted v. Schmelzel, 17 Johns. 80; Williams v. Henshaw, 11 Pick. 82; 22 Am. Dec. 366.

<sup>6</sup> McVane v. Williams, 50 Conn. 548.

<sup>7</sup> Prescott v. Morse, 62 Me. 447; Cowdin v. Perry, 11 Pick. 503; Cowell v. Oxford, 6 N. J. L. 432; Kelsey v. Deyo, 3 Cow. 133; Knapp v. Hanford, 6 Conn. 176; Vanlear v. Haslett, Wright, 457.

<sup>8</sup> Chandler v. State, 5 Har. & J. 284.

<sup>9</sup> Landis v. Urie, 10 Serg. & R. 316.

<sup>1</sup> Hutel  
252; 53 A  
<sup>2</sup> Porter  
<sup>3</sup> Bailey  
Charleston  
born v. B  
Dec. 275;  
Mass. 378.  
<sup>4</sup> Charles  
Camp v. B  
v. Jones, 23  
10 Miss. 58  
<sup>4</sup> Speake  
Felton v. D  
<sup>5</sup> Holmes

transportation of the public mail for money inclosed in a way-letter and lost by their agent;<sup>1</sup> nor against a corporation on a contract under seal for work done and materials supplied;<sup>2</sup> nor against a public officer for neglect of duty or misconduct in office.<sup>3</sup> And *assumpsit* cannot be maintained on an express simple contract which is unperformed;<sup>4</sup> nor on an award, where the submission to arbitration is under seal;<sup>5</sup> nor on an instrument purporting to be sealed by both parties, but which actually bears the seal of one only;<sup>6</sup> nor by one part owner of a vessel against his co-owner for money paid out by the plaintiff on their joint account, unless the accounts of the voyage have been settled and balance struck;<sup>7</sup> nor can *assumpsit* be maintained by a residuary legatee against the widow of an executor for money of the estate appropriated by her.<sup>8</sup> From a contract for the sale and purchase of real estate, a part of the land intended to be included was omitted. The purchaser brought *assumpsit* for the value of such land or a return of a proportionate part of the purchase-money, but it was held that the action would not lie.<sup>9</sup> Unless there is an express promise to pay assessments on shares of the capital stock in a corporation, *assumpsit* will not lie for their recovery.<sup>10</sup> Where services have been voluntarily rendered, there must be a contract, express or implied, for their payment, or *assumpsit* will not lie; and a verbal promise after their performance will not suffice.<sup>11</sup> Where,

<sup>1</sup> *Hutchins v. Brackett*, 22 N. H. 252; 53 Am. Dec. 248.

<sup>2</sup> *Porter v. R. R. Co.*, 37 Me. 349.

<sup>3</sup> *Bailey v. Butterfield*, 14 Me. 112; *Charleston v. Stacy*, 10 Vt. 562; *Osborn v. Bell*, 5 Denio, 370; 49 Am. Dec. 275; *McMillan v. Eastman*, 4 Mass. 378.

<sup>4</sup> *Charles v. Dana*, 14 Me. 383; *Camp v. Barker*, 21 Vt. 469; *Dermott v. Jones*, 23 How. 233; *Wooten v. Read*, 10 Miss. 585; *Kelly v. Foster*, 2 Binn. 4; *Speake v. Sheppard*, 6 Har. & J. 81; *Felton v. Dickinson*, 10 Mass. 287.

<sup>5</sup> *Holmes v. Smith*, 49 Me. 242;

*McCargo v. Crutcher*, 23 Ala. 575; *Horton v. Ronalds*, 2 Port. 79; *Tullis v. Sewell*, 3 Ohio, 10.

<sup>6</sup> *Hatch v. Crawford*, 2 Port. 54.

<sup>7</sup> *Maguire v. Pingree*, 30 Me. 508.

<sup>8</sup> *Smith v. Jewett*, 40 N. H. 513.

<sup>9</sup> *Rand v. Webber*, 64 Me. 191.

<sup>10</sup> *Dutchess Cotton Mfg. Co. v. Davis*, 14 Johns. 238; 7 Am. Dec. 459; *Franklin Glass Co. v. White*, 14 Mass. 286; *Worcester etc. Corp. v. Willard*, 5 Mass. 80; 4 Am. Dec. 39.

<sup>11</sup> *Sanderson v. Brown*, 57 Me. 308; *Watkins v. Trustees etc.*, 41 Mo. 302; *Force v. Haines*, 17 N. J. L. 385.

however, the act done by the plaintiff was one of necessity, or one which it may be assumed the defendant would have done had he known of the circumstances, the law will imply a promise to pay, and *assumpsit* will lie.<sup>1</sup> Where the defendant has given a collateral undertaking to pay the debt of a third person, *assumpsit* will not lie, but a special action must be brought.<sup>2</sup>

The price of growing grain cannot be recovered in this form of action;<sup>3</sup> and it will not lie on a judgment, either of a court of the state in which the action is brought or of another state.<sup>4</sup> Even though the contract is not under seal, and has been performed, *assumpsit* will not lie if the consideration is payable otherwise than in money.<sup>5</sup> And *assumpsit* on a *quantum meruit* cannot be maintained where there is no express abandonment of the written contract by the parties.<sup>6</sup> No recovery can be had for goods delivered in payment of an invalid subscription, although in ignorance of the law affecting the contract.<sup>7</sup> And where goods are furnished upon an executed consideration, *assumpsit* cannot be maintained for their price, although the original agreement was void under the statute of frauds.<sup>8</sup> A recovery cannot be had upon a *quantum meruit* for literary services, under a contract which provides that compensation therefor is to be derived solely from a division of profits from sales after publication.<sup>9</sup> And where water runs into one quarry from an adjoining quarry, the owner of the former, who pumps the water out of it, and thereby out of both, cannot maintain *assumpsit* against the owner of the latter quarry,

<sup>1</sup> Hewett v. Bronson, 5 Daly, 1.

<sup>2</sup> Elder v. Warfield, 7 Har. & J. 391; Johnson v. Clark, 5 Blackf. 564.

<sup>3</sup> Lewis v. Culbertson, 11 Serg. & R. 48; 14 Am. Dec. 607.

<sup>4</sup> Vail v. Mumford, 1 Root, 142; McKim v. Odorn, 12 Me. 94; India Rubber Co. v. Hoit, 14 Vt. 92; Garland v. Tucker, 1 Bibb, 361; Andrews v. Montgomery, 19 Johns. 162; 10 Am. Dec. 213.

<sup>5</sup> Brookes v. Scott, 2 Munf. 344;

Spratt v. McKinneys, 1 Bibb, 595; Nesbit v. Ware, 30 Ala. 68; Duncan v. Littell, 2 Bibb, 424; Bradley v. Levy, 5 Wis. 400.

<sup>6</sup> McGrann v. R. R. Co., 29 Pa. St. 82.

<sup>7</sup> Valley R. R. Co. v. Lake Erie Iron Co., 46 Ohio St. 44.

<sup>8</sup> Starratt v. Mullen, 148 Mass. 570; Deyo v. Ferris, 22 Ill. App. 154.

<sup>9</sup> Keyser's Appeal, 124 Pa. St. 80.

<sup>1</sup> Ulme  
<sup>2</sup> Coope  
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<sup>3</sup> Morle  
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<sup>4</sup> McBrie  
<sup>5</sup> Wheel  
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in the absence of any promise to pay for such service.<sup>1</sup> Where a man and a woman live together as husband and wife, but the man has a former wife living, implied *assumpsit* for work and labor as housekeeper will not lie against him at the suit of the woman;<sup>2</sup> and where money has been paid voluntarily with a full knowledge of the facts and circumstances, *assumpsit* will not lie to recover it back;<sup>3</sup> and even where money is paid under protest to the clerk of the court, under a judgment, it cannot be recovered back on the ground that the judgment was invalid.<sup>4</sup> And where the transaction is unaffected by any fraud, trust, confidence, or the like, and both parties knew all the facts, money paid under a mistake of law cannot be recovered back.<sup>5</sup> Where the assessment on property was obviously invalid, a threat to sell it for a tax delinquent under such assessment does not amount to such duress as will entitle one paying the tax to recover it back in *assumpsit* for money paid;<sup>6</sup> and money paid in the discharge of an execution issued on a dormant voidable judgment of a justice of the peace, either with or without protest, is a voluntary payment, and cannot be recovered back.<sup>7</sup> Where one volunteers to pay a debt of another, the latter is under no obligation to repay it.<sup>8</sup> And if a corporation has practically paid a debt due to a bank from another corporation, it cannot recover the money so paid simply on the ground that it was not under any legal obligation to make the payment.<sup>9</sup> Where money is lent with an express understanding that it is to be used for gambling,

<sup>1</sup> Ulmer v. Farnsworth, 80 Me. 500.

<sup>2</sup> Cooper v. Cooper, 147 Mass. 370; 9 Am. St. Rep. 721.

<sup>3</sup> Morley v. Carlson, 27 Mo. App. 5; Schwarzenbach v. Odorless Excavating Co., 65 Md. 34; 57 Am. Rep. 301; Gilliam v. Alford, 69 Tex. 267; Harvey v. Girard, 119 Pa. St. 212; Devereux v. Rochester German Ins. Co., 98 N. C. 6.

<sup>4</sup> McBride v. Lathrop, 24 Neb. 93.

<sup>5</sup> Wheeler v. Hathaway, 58 Mich. 77; Rector v. Collins, 46 Ark. 167; 55

Am. Rep. 571; Erkens v. Nicolin, 39 Minn. 461; Phelps v. New York, 112 N. Y. 216; Shriver v. Garrison, 30 W. Va. 456; Hurst v. Morgan, 31 W. Va. 521.

<sup>6</sup> Cooper v. Chamberlain, 78 Cal. 450. And see Bailey v. Paullina, 69 Iowa, 463.

<sup>7</sup> Gerecke v. Campbell, 24 Neb. 306.

<sup>8</sup> Breneman's Appeal, 121 Pa. St. 641.

<sup>9</sup> Central Texas etc. Co. v. Weems, 73 Tex. 252.

*assumpsit* will not lie to recover it back;<sup>1</sup> and where a person was induced by the fraudulent representations of the promoter of a corporation to subscribe for stock, and paid his subscription to the person holding the office of treasurer, he cannot, by rescinding the contract, maintain an action for money had and received against the other share-holders, even if the corporation is invalid and the share-holders are partners.<sup>2</sup> *Assumpsit* for money had and received cannot be maintained by minors for rents of a building which their father has agreed shall go to reimburse one who, in pursuance of a contract with the father, has erected it on the minors' land.<sup>3</sup>

§ 3693. **Parties.**—The general rule is, that the action of *assumpsit* may be maintained by the person from whom the consideration for the promise moved, or for whose benefit it was paid.<sup>4</sup> And though the rule is not applicable in the case of a covenant under seal for the benefit of a third person, a sealed instrument may be used as evidence in *assumpsit*, where there is no provision in it for payment to or for the use of the party to be benefited.<sup>5</sup> And where a promise is made to one person for the benefit of another, this action may be maintained thereon, either by the promisee or the person for whose benefit the promise was made.<sup>6</sup> Where the defendant had bought the business and store of a third person, and agreed to pay certain debts specified on the bill of sale, including one owing to the plaintiff, it was held that *assumpsit* could be maintained by plaintiff against the defendant on such

<sup>1</sup> Tyler v. Carlisle, 79 Me. 210; 1 Am. St. Rep. 301.

<sup>2</sup> Perry v. Hale, 143 Mass. 540.

<sup>3</sup> McKee v. Preston, 66 Cal. 522.

<sup>4</sup> Rogers v. Gosnell, 58 Mo. 589; Strohecker v. Grant, 16 Serg. & R. 241; Kreutz v. Livingston, 15 Cal. 344; Felton v. Dickinson, 10 Mass. 287; Huckabee v. Barry, 14 Ala. 263; Lovely v. Caldwell, 4 Ala. 684; Motley v. Mfrs. Ins. Co., 29 Me. 337; 50

Am. Dec. 591; Todd v. Tobey, 29 Me. 219; Hinkley v. Fowler, 15 Me. 285; Farlow v. Kemp, 7 Blackf. 544; Warren Academy v. Starrett, 5 Blackf. 179; Harper v. Ragan, 2 Blackf. 39; Barker v. Bucklin, 2 Denio, 45; 43 Am. Dec. 726; Schemerhorn v. Vanderheyden, 1 Johns. 139; 3 Am. Dec. 304.

<sup>5</sup> Hinkley v. Fowler, 15 Me. 285.

<sup>6</sup> Steene v. Aylesworth, 18 Conn. 244.

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promise.<sup>1</sup> And if money be given to one person to be delivered to another, the right to the money is transferred to the latter, and he may maintain an action of *assumpsit* for its recovery.<sup>2</sup> Where land is conveyed subject to a mortgage, for which the grantor is personally liable, and the deed declares that the grantee is to pay the mortgage as a part of the purchase-money, the grantor may maintain *assumpsit* against him, the grantee not having executed the deed, without having himself first paid the amount of the mortgage.<sup>3</sup> Where the defendant obtained goods on the letter of credit of the plaintiff, who subsequently paid for the same, it was held that the plaintiff was the proper party to sue defendant in *assumpsit*, although the goods had been charged to defendant and a third person, and plaintiff had paid without suit.<sup>4</sup> And where a third person remitted money to defendant to be paid over to plaintiff, and afterwards the defendant promised to pay it over to plaintiff, *assumpsit* can be brought by the plaintiff against defendant to recover the money.<sup>5</sup> Where A was indebted to B, and B to C, and it was agreed between them that A should pay C the amount of the debt due B, and C agreed, with the consent of A and B, to take A as his debtor, it was held that C might sue A for the amount, and that B's debt to C was extinguished.<sup>6</sup> Where an attorney receives a note for collection from an agent, of whose agency he is not informed, either the agent or his principal may maintain an action upon the implied promise to pay over the amount collected.<sup>7</sup> *Assumpsit* on a *quantum meruit*, for work done by two partners, must be brought in the name of both, though the contract was made by one before the partnership.<sup>8</sup> And the assignee of a chose in action, to whom the debtor has promised

<sup>1</sup> Corl v. Riggs, 12 Mo. 430; Belt v. McLaughlin, 12 Mo. 433.

<sup>2</sup> Hitchcock v. Lukens, 8 Port. 233.

<sup>3</sup> Rawson v. Copland, 2 Sand. Ch. 251; Burr v. Beers, 24 N. Y. 178; 80 Am. Dec. 327.

<sup>4</sup> Lindsay v. Moore, 9 Mo. 176.

<sup>5</sup> Wyman v. Smith, 2 Sandf. 331.

<sup>6</sup> Grover v. Sims, 5 Blackf. 498.

<sup>7</sup> Atcherson v. Talbot, 5 Dana, 324.

<sup>8</sup> Schnader v. Schnader, 26 Pa. St. 384.

payment, may support *assumpsit* against such debtor.<sup>1</sup> So, also, the assignee of a person having only an equitable title to a vessel may bring *assumpsit* for her earnings in the name of his assignor.<sup>2</sup> Also, where personal property attached on several writs was sold by consent of parties, and the proceeds paid over as an aggregate sum by the officer, to the attorney of all the parties, who retained the same until after suing out execution, it was held that he was liable in *assumpsit* to each plaintiff for his proportion of the proceeds, according to the priority of his attachment.<sup>3</sup> But where, upon the completion of a contract for labor, the balance due the contractor was, at his request, placed to the credit of a third person, it was held that the latter could not maintain an action in his own name, he being a stranger to the contract and consideration.<sup>4</sup> And where two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, the latter cannot maintain *assumpsit* thereon.<sup>5</sup> If a bank takes a draft as so much money, and agrees to pay the note of the person who delivers the draft, the holder of the note, thereafter assenting to such arrangement, may recover the amount of the note from the bank; the indebtedness of the maker of the note being a sufficient consideration, and the holder becoming thereby the party beneficially interested and entitled to sue.<sup>6</sup>

§ 3694. Right to Elect between Assumpsit and Tort.—

Where personal property has been wrongfully taken from its owner, he may in many cases waive the tort and sue in *assumpsit* for the value of the property of which he has

<sup>1</sup> Lang v. Fiske, 11 Me. 385.

<sup>2</sup> Brigham v. Clark, 20 Pick. 43.

<sup>3</sup> Hardy v. Peters, 19 Pick. 370.

<sup>4</sup> Robertson v. Reed, 47 Pa. St. 115.

<sup>5</sup> Lake Ontario etc. R. R. Co. v. Curtiss, 80 N. Y. 219; Simpson v. Brown, 68 N. Y. 355.

<sup>6</sup> Commercial Bank v. Wood, 7 Watts & S. 89.

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been deprived.<sup>1</sup> There is some conflict in the decisions as to whether the owner of property wrongfully converted can waive the tort and sue in *assumpsit* when the defendant has not sold the goods, but retains possession of them.<sup>2</sup> But the weight of authority seems to be that the election may be made, at all events where the property has been used by the wrong-doer and its character and condition altered.<sup>3</sup> The right of election thus given is based upon the principle that a party cannot be permitted to deny liability for the value of the goods he has taken or the money he has received for them, on the ground that his appropriation of them was wrongful, as by so doing he would be taking advantage of his own wrong.<sup>4</sup> The action of *assumpsit*, also, enables the defendant to pay money into court or to plead a set-off.<sup>5</sup> And under the law of some of the states, the defendant escapes liability for arrest where no actual fraud has been committed by him.<sup>6</sup> It is also more advantageous to the plaintiff, as it can be maintained against the legal personal representatives of the defendant where the action in tort would not survive.<sup>7</sup> It is, however, not always an easy matter to decide whether, under the circumstances of any particular case, the right of election exists or not; but where the defendant has sold or disposed of the property, and received money or money's worth for it, the rule is well established, that the tort may be waived and an action of *assumpsit* maintained.<sup>8</sup>

<sup>1</sup> McCullough v. McCullough, 14 Pa. St. 295; Willet v. Willet, 3 Watts, 277; Isaacs v. Hermann, 49 Miss. 449; Cummings v. Noyes, 10 Mass. 433; Chambers v. Lewis, 2 Hilt. 591; Sangster v. Commonwealth, 17 Gratt. 124.

<sup>2</sup> Harpending v. Shoemaker, 37 Barb. 270; McKnight v. Dunlap, 4 Barb. 36; Watson v. Stever, 25 Mich. 386; Tryon v. Baker, 7 Lans. 511; Winchell v. Noyes, 23 Vt. 303; Fuller v. Duren, 36 Ala. 73; 76 Am. Dec. 318; Smith v. Smith, 43 N. H. 536.

<sup>3</sup> McGoldrick v. Willits, 52 N. Y.

612; Alsbrook v. Hathaway, 3 Sneed, 454; Abbott v. Blossom, 66 Barb. 353; Jones v. Gregg, 17 Ind. 84; Hill v. Davis, 3 N. H. 384; Butts v. Collins, 13 Wend. 154.

<sup>4</sup> Abbott v. Blossom, 66 Barb. 353.

<sup>5</sup> Butts v. Collins, 13 Wend. 156.

<sup>6</sup> Roth v. Palmer, 27 Barb. 652.

<sup>7</sup> Cravath v. Plympton, 13 Mass. 454.

<sup>8</sup> Barlow v. Stalworth, 27 Ga. 517; Pike v. Bright, 29 Ala. 332; Jones v. Hoar, 5 Pick. 285; Watson v. Stever, 25 Mich. 386; Staat v. Evans, 35 Ill. 455.



And where a sale of goods has been induced by the fraud of the purchaser, the vendor may repudiate the contract, waive the tort, and sue in *assumpsit* for goods sold and delivered.<sup>1</sup>

It is also held in some of the states that an action for money had and received will lie in a case where money or goods have been feloniously taken, and that even before criminal proceedings have been taken against the wrongdoer.<sup>2</sup> The right of election, however, cannot be exercised partially, and the tort must be waived in its entirety, or not at all. So if the plaintiff's property has been wrongfully sold by one assuming to act as his agent, the authority of the agent is ratified when the plaintiff brings *assumpsit* against the purchaser of the goods.<sup>3</sup> Whether the plaintiff has elected to waive the tort was, at common law, indicated by his bringing *assumpsit* instead of an action in tort; but under the New York code the statement of facts, as appearing in the complaint or the form of relief demanded, determines whether there is a waiver or not; and where the facts are such as would justify an order of arrest, the action is held to be in tort.<sup>4</sup> Where property owned by several tenants in common has been converted, they may all waive the tort and join in *assumpsit*, or each one may bring a separate action for his interest, without joining the others.<sup>5</sup> And where the gist of an action is a tort, if it arises out of a contract, the plaintiff may declare in tort or in contract, at his election.<sup>6</sup> Where the plaintiff was imprisoned under a sentence of a court having no jurisdiction, it was held that he might waive the tort and bring *assumpsit* against the

<sup>1</sup> Blalock v. Phillips, 38 Ga. 216; Wingand v. Sichel, 33 How. Pr. 174; Ascutney Bank v. McOrmsby, 28 Vt. 721; Gray v. Griffith, 10 Waits, 431; Benedict v. Nat. Bank of Commonwealth, 4 Daly, 171.

<sup>2</sup> Benedict v. Nat. Bank of Commonwealth, 4 Daly, 171; Boston and Worcester R. R. Co. v. Dana, 1 Gray,

83. Contra, Belknap v. Milliken, 23 Me. 381.

<sup>3</sup> Brigham v. Palmer, 3 Allen, 450.

<sup>4</sup> Chambers v. Lewis, 2 Hilt. 591.

<sup>5</sup> Tankersley v. Childers, 23 Ala. 781.

<sup>6</sup> Vasse v. Smith, 6 Cranch, 226;

Stoyel v. Westcott, 2 Day, 422; 2 Am. Dec. 109; Bulkley v. Storer, 2 Day, 531.

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keeper of the penitentiary, who had been benefited by his labor during his confinement;<sup>1</sup> and an infant may be sued in *assumpsit* for money had and received for money wrongfully taken by him.<sup>2</sup> But *assumpsit* will not lie against a public officer for selling the personal property of the plaintiff, in good faith, under color of lawful authority.<sup>3</sup>

There are many cases in which the right of election exists as against the defendant personally, but after his death the only remedy is in *assumpsit*, as in those personal actions which do not survive, but where the wrongful act of the deceased not only inflicted injury on the plaintiff, but was a source of advantage to the estate of the deceased, by reason of the acquisition of the property belonging to the plaintiff.<sup>4</sup> Where growing wood which has been wrongfully cut and carried away cannot be found to be returned in specie, the owner may waive the tort and sue for the value of the wood, as on an implied contract of sale.<sup>5</sup> And where an intruder or trespasser upon a wharf collects wharfage of steamboats, the owner of the wharf may waive the trespass and recover the amount collected in *assumpsit* for money had and received.<sup>6</sup> Either tort or *assumpsit* will lie where the pledgee of property refuses to restore it upon request and performance of the obligation to secure which the pledge was made.<sup>7</sup> But where the defendant, a trespasser, had cut and carried away grass belonging to the plaintiff, but had not sold it, nor had any benefit from it but in its use, there is no right of election, and the tort cannot be waived.<sup>8</sup> So if a corporation under legislative authority improves a stream

<sup>1</sup> Patterson v. Prior, 18 Ind. 440; 51 Am. Dec. 367.

<sup>2</sup> Elwell v. Martin, 32 Vt. 217.

<sup>3</sup> Osborn v. Bell, 5 Denio, 370; 49 Am. Dec. 275.

<sup>4</sup> Ford v. Caldwell, 3 Hill (S. C.), 248;

Cravath v. Plympton, 13 Mass. 453;

Ryan v. Marsh, 2 Nott & McC. 156;

Wilbur v. Gilmore, 21 Pick. 252.

<sup>5</sup> Halleck v. Mixer, 16 Cal. 574.

<sup>6</sup> O'Conley v. Natchez, 9 Miss. 31; 40 Am. Dec. 87.

<sup>7</sup> International Bank v. Monteath, 39 N. Y. 297.

<sup>8</sup> Balch v. Patten, 45 Me. 41; 71 Am. Dec. 520.

to make it suitable for rafting logs, and the stream and improvements are made use of by another company without permission, the former cannot waive the tort and sue upon an implied promise to pay for such use.<sup>1</sup> *Assumpsit* cannot be maintained by the owner of a horse against one who has exchanged it for another, and has not sold such other.<sup>2</sup> And the doctrine of election applies only where the owner of the property converted has a right to the money produced by a sale thereof at the time when the tort was committed.<sup>3</sup> And where the plaintiff's goods were destroyed by fire while in the possession of the defendant, who had tortiously taken them, the plaintiff cannot waive the tort and sue in *assumpsit*.<sup>4</sup>

The vendor of goods sold on credit cannot bring *assumpsit* for goods sold before the credit, has expired,<sup>5</sup> unless he can show that the purchaser induced him to sell the goods by fraudulent representations, when it is held that the fraud vitiates the clause as to credit, and enables the vendor to sue at once for his money.<sup>6</sup> Where one is compelled to pay money owing to a breach of covenant by another, he may recover it back either in an action of *assumpsit* or covenant, as he may elect.<sup>7</sup> And a recovered lunatic can maintain *assumpsit* against his late guardian for the balance in his hands, although he might elect to sue on the guardian's bond.<sup>8</sup> The right of election still subsists under the code practice. Though, as there is now only one form of action, it is often a matter of considerable difficulty and importance to decide whether the plaintiff has waived the tort and elected to sue as in *assumpsit*.<sup>9</sup> Where the facts stated in the complaint or petition show

<sup>1</sup> Carson River etc. Co. v. Bassett, 2 Nev. 249.

<sup>2</sup> Fuller v. Duren, 36 Ala. 73; 76 Am. Dec. 318.

<sup>3</sup> Jones v. Baird, 7 Jones, 152.

<sup>4</sup> Schweizer v. Weiber, 6 Rich. 159.

<sup>5</sup> Allen v. Ford, 19 Pick. 218; Gal-  
loway v. Holmes, 1 Doug. (Mich.) 130.

<sup>6</sup> Wigand v. Sichel, 33 How. Pr. 174.

<sup>7</sup> Weaver v. Bentley, 1 Caines, 47; Douglass v. Waer, Anth. 179.

<sup>8</sup> Shepherd v. Newkirk, 21 N. J. L. 302.

<sup>9</sup> Bliss on Code Pleading, secs. 153, 155.

<sup>1</sup> Corn  
Gillett v.  
<sup>2</sup> Alle  
decker v.  
<sup>3</sup> Hob  
Abb. N.  
<sup>4</sup> Farr  
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<sup>5</sup> Taylo  
Rep. 107;

that the plaintiff is entitled to exercise the right of election, it is held that the prayer may be resorted to to determine whether or not the tort has been waived.<sup>1</sup> But where the allegations of the complaint show an action of tort, the plaintiff will not be permitted to recover as upon contract for money had and received.<sup>2</sup> And where an action of contract is stated, the nature of the cause of action is not changed by adding allegations showing fraud, in compliance with code provisions as to arrest.<sup>3</sup>

§ 3695. **Pleading.**—The use of the common counts in *assumpsit* is retained under the code practice in some of the states;<sup>4</sup> and a plaintiff may declare on a special contract, and failing to prove it, may recover on a *quantum meruit*;<sup>5</sup> and suit may be brought under the common count for work and labor done, and evidence of a special contract admitted to show the value of the work;<sup>6</sup> but no recovery can be had under the common counts for work done under special written contract.<sup>7</sup> In an action of *indebitatus assumpsit* to recover money alleged to have been illegally exacted, a declaration which avers the fact of indebtedness and a promise in consideration thereof is sufficient.<sup>8</sup> With regard to the propriety of alleging the fictitious promise as at common law, the decisions are not harmonious, but the weight of authority appears to be against the allegation.<sup>9</sup> The declaration or complaint

<sup>1</sup> Corry v. Gaynor, 21 Ohio St. 277; 319; Smith v. Lippencott, 49 Barb. Gillett v. Treganza, 13 Wis. 472.

<sup>2</sup> Allen v. Allen, 52 Hun, 398; Neudecker v. Kohlberg, 81 N. Y. 297.

<sup>3</sup> Hoboken Beef Co. v. Loeffel, 23 Abb. N. C. 93.

<sup>4</sup> Farron v. Sherwood, 17 N. Y. 227; Hosley v. Black, 28 N. Y. 438; Hurst v. Litchfield, 39 N. Y. 377; Fells v. Vestvali, 2 Keyes, 152; Grannis v. Hooker, 29 Wis. 65; Freeborn v. Glazier, 10 Cal. 337; Magee v. Kast, 49 Cal. 141; Van Brunt v. Mather, 48 Iowa, 503.

<sup>5</sup> Taylor v. Pinckney, 12 Civ. Proc. Rep. 107; Sussdorff v. Schmidt, 55 N. Y.

<sup>6</sup> Scott v. Congdon, 106 Ind. 268.

<sup>7</sup> Hubbard v. New York etc. Investment Co. Bank, 119 U. S. 696.

<sup>8</sup> Liverpool etc. Steamship Co. v. Comm'rs of Emigration, 113 U. S. 33.

<sup>9</sup> Wilkins v. Stidger, 22 Cal. 235; Stephenson v. Ballard, 50 Ind. 176; Wills v. Wills, 34 Ind. 106; Jordan etc. Co. v. Morley, 23 N. Y. 552; Allen v. Patterson, 7 N. Y. 476; Cropsey v. Sweeney, 27 Barb. 310; Moore v. Hobbs, 79 N. C. 535. *Contra*, Booth v. Farmers' and Mech. Bank, 65 Barb. 457; Bird v. Meyer, 8 Wis. 362.

must set out the promise, either expressly or by clear implication,<sup>1</sup> the consideration on which the contract is based,<sup>2</sup> and the breach thereof.<sup>3</sup> The consideration must be truly stated, and must be proved as laid in the declaration.<sup>4</sup> The declaration is of two kinds, general or special, the former being the *indebitatus*, or common count, and the latter requiring the terms of the contract to be stated specially.<sup>5</sup> The *indebitatus* count requires only a general recital of a consideration, promise, and breach, and several of the common counts are often used to describe the same cause of action.<sup>6</sup>

The only distinguishing feature between the common counts in *assumpsit* and in debt is, that in the former action the word "promised" is used, and in the latter the word "agreed."<sup>7</sup> In *assumpsit* for goods sold, the declaration must allege the value of the goods, or that the defendant promised to pay a certain sum for them; a mere allegation of his indebtedness in a certain sum is not enough.<sup>8</sup> And a count in general terms "for certain lands sold and conveyed" is bad. The lands should be described.<sup>9</sup> So in *assumpsit* for rent, the declaration must give a description of the premises.<sup>10</sup> In *assumpsit* on a warranty of chattels, it is sufficient to aver in the decla-

<sup>1</sup> Cooke v. Simms, 2 Call, 39; Roget v. Merritt, 2 Caines, 117; Avery v. Inhabs. of Tynningham, 3 Mass. 160; Bruner v. Stout, Hardin, 225; Muldrows v. Tappan, 6 Mo. 276; Grant v. Jackson, Kirby, 90.

<sup>2</sup> De Forest v. Frary, 6 Cow. 151; Lansing v. McKillip, 3 Caines, 288; Burnet v. Biscoe, 4 Johns. 235; Davison v. Ford, 23 W. Va. 617; Beverleys v. Holmes, 4 Munf. 95; People's Bank v. Adams, 43 Vt. 195; Tavor v. Philbrick, 7 N. H. 326; Hendrick v. Seely, 6 Conn. 176; Beauchamp v. Bosworth, 3 Bibb, 115; Brooks v. Lowrie, 1 Nott & McC. 342; Douglass v. Davie, 2 McCord, 218; Hemmenway v. Hicks, 4 Pick. 497.

<sup>3</sup> Benden v. Manning, 2 N. H. 289; Williams v. Staton, 13 Miss. 347.

<sup>4</sup> Colburn v. Pomeroy, 44 N. H. 19; Smith v. Wheeler, 29 N. H. 334; Moore v. Ross, 7 N. H. 528; Shelton v. Bruce, 9 Yerg. 24.

<sup>5</sup> Northrup v. Jackson, 13 Wend. 85; Royalton v. R. & W. Turnp. Co., 14 Vt. 311; Woody v. Flournoy, 6 Munf. 506.

<sup>6</sup> Nave v. Berry, 22 Ala. 382; Wheelwright v. Moore, 1 Hall, 201; Morris v. Durham, 9 Cow. 151; Bailey v. Freeman, 4 Johns. 280; Bayer v. Reeside, 14 Pa. St. 167; Copes v. Matthews, 18 Miss. 398.

<sup>7</sup> McGinnity v. Lagnereenne, 10 Ill. 101; Crutshank v. Brown, 10 Ill. 75.

<sup>8</sup> Foerster v. Kirkpatrick, 2 Minn. 210.

<sup>9</sup> Nelson v. Swan, 13 Johns. 483.

<sup>10</sup> Hilton v. Burley, 2 N. H. 193.

<sup>1</sup> McMillan  
<sup>2</sup> People  
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<sup>3</sup> Russell  
<sup>4</sup> Johnson  
<sup>5</sup> Merriam  
<sup>6</sup> Neylan  
<sup>7</sup> Whittall

ration a sale at and for a certain price, without specifying the amount actually paid. But if the price paid is alleged, it must be proved as laid, or there will be a fatal variance.<sup>1</sup> The declaration must contain a statement of facts showing a sufficient consideration to support the alleged promise.<sup>2</sup> Where there are mutual promises in an executory agreement, the declaration must allege the plaintiff's promise expressly and explicitly.<sup>3</sup> And in *assumpsit* on a collateral undertaking the consideration of the promise must be shown as well as the special circumstances under which it was made.<sup>4</sup> In Maryland it is necessary to prefix the averment "for money payable by the defendant to the plaintiff" to the common counts in a declaration in *indebitatus assumpsit*, or it is bad on demurrer.<sup>5</sup> Where the action is in *indebitatus assumpsit* to recover the balance of accounts, which the plaintiff claims have been finally adjusted, he must make a full exhibit of the accounts in his pleading, that the defendant may have an opportunity of objecting to any of the items therein.<sup>6</sup> Mutual promises must be alleged to have been made at the same time, and the promise and the breach must both be alleged to have been made before the commencement of the action.<sup>7</sup> In case of a new promise after a discharge in insolvency, the plaintiff may declare on the original promise, and insist on the new promise by way of replication.<sup>8</sup>

Where the performance of anything by the plaintiff is a condition precedent to his right of recovery from the defendant, actual performance by the plaintiff must be alleged in the declaration, and an allegation of readiness

<sup>1</sup> *McMillan v. Theaker*, 12 Ohio, 24.

<sup>2</sup> *People's Bank v. Adams*, 43 Vt. 195.

<sup>3</sup> *Russell v. Slade*, 12 Conn. 455.

<sup>4</sup> *Johnson v. Clark*, 5 Blackf. 564.

<sup>5</sup> *Merriman v. Ryder*, 34 Md. 98.

<sup>6</sup> *Neyland v. Neyland*, 19 Tex. 423.

<sup>7</sup> *Whitall v. Morse*, 5 Serg. & R. 358;

*Livingston v. Rogers*, 1 Caines, 583;

*Boyce v. Morgan*, 3 Caines, 133;

*Warring v. Yates*, 10 Johns. 119;

*Gordon v. Kennedy*, 2 Binn. 287; *Rund*

*v. Griffiths*, 11 Serg. & R. 130; *Langer*

*v. Parish*, 8 Serg. & R. 134.

<sup>8</sup> *Fitzgerald v. Alexander*, 19 Wend. 402.

is not sufficient.<sup>1</sup> But where the defendant has prevented himself from performing his part of the contract, the rule does not apply.<sup>2</sup> And if the agreement is wholly executory, and the promise on one part is the consideration for the promise on the other, the party who has refused to fulfill his part cannot maintain the action;<sup>3</sup> but in such a case it is not necessary, in suing for a breach of the one promise, to allege performance of the other.<sup>4</sup> If a declaration sets out a legal liability, and alleges a subsequent promise to pay on request, it is good, although there is no allegation of request made.<sup>5</sup> A count for goods sold and delivered, which avers that the defendant promised to pay on request, and concluding with the general allegation of non-payment, is good, without averring a special request.<sup>6</sup> In a declaration on a promise to pay on demand, where *sæpius requisitus* is alleged, a special demand need not be averred, and if averred, need not be proved.<sup>7</sup> In an action on an *insimul computassent*, it is not necessary to allege a demand, the bringing of the action being a sufficient demand;<sup>8</sup> and the same rule applies in all cases where there is a precedent debt or duty.<sup>9</sup> In *assumpsit* for installments of stock payable on the requisition of directors and on the publication of notice, such requisition and notice must be specially stated, and a general allegation that they have been made is not sufficient.<sup>10</sup> A breach of the promise must also be alleged, or the declaration is demurrable;<sup>11</sup> and several breaches of the same contract

<sup>1</sup> McIntire v. Clark, 7 Wend. 330; Bank v. Hagner, 1 Pet. 467; Gray v. James, Pet. C. C. 482; Salmon v. Jenkins, 4 McCord, 288; Justice v. Board of Justices, 2 Blackf. 149; Zerger v. Sailer, 6 Binn. 24.

<sup>2</sup> Clark v. Moody, 17 Mass. 149; Newcomb v. Brackett, 16 Mass. 161; Cooper v. Mowry, 16 Mass. 5; Webster v. Coffin, 14 Mass. 196; Hilt v. Campbell, 6 Me. 111; Davis v. Crawford, 2 Mill Const. 401; 12 Am. Dec. 682.

<sup>3</sup> Dey v. Dox, 9 Wend. 129; 24 Am. Dec. 137.

<sup>4</sup> Close v. Miller, 10 Johns. 99; Whitall v. Morse, 5 Serg. & R. 358.

<sup>5</sup> Henderson v. Howard, 2 Ala. 342.

<sup>6</sup> Walker v. Welch, 13 Ill. 674.

<sup>7</sup> Pettibone v. Pettibone, 5 Day, 324.

<sup>8</sup> Greenwood v. Curtis, 6 Mass. 358; 4 Am. Dec. 145.

<sup>9</sup> Thomas v. Roosa, 7 Johns. 462; Ernst v. Bartle, 1 Johns. Cas. 319; Quimby v. Lyon, 63 Cal. 394.

<sup>10</sup> Pa. etc. Co. v. Webb, 9 Ohio, 136.

<sup>11</sup> Benden v. Manning, 2 N. H. 289.

<sup>1</sup> Smith v. Dodgson, 1 Whitt. 462; 4 Falc. Heck v. Am. De. Pa. St. 4 373.

may be assigned in the same count.<sup>1</sup> In declaring on a promise to pay money when collected, it is necessary to allege that it has been collected;<sup>2</sup> and in an action on a promise to pay the plaintiff a sum of money, if and when the defendant shall have collected his demands against a third person, it is sufficient to allege that the defendant did not use due diligence, without alleging that it was necessary for him so to do.<sup>3</sup> In pleading to the merits in an action of *assumpsit*, the defendant must show that there was no contract, or that it was void, or that he has performed it;<sup>4</sup> and where the plaintiff has elected to bring *assumpsit* in lieu of tort, the defendant may set up any defense available in the former action, even though it could not have been maintained had the latter been brought.<sup>5</sup> In *assumpsit* on a promise to pay the debt of another in consideration of forbearance, the fact that the debt was not due at the time of the promise, or that it was voidable in consequence of the infancy of the maker, or barred by the statute of limitations, furnishes no defense.<sup>6</sup> Where the action is brought by two plaintiffs, it is no defense to show a contract in writing with one only, which does not disprove the joint interest, especially where the defendant can avail himself of any defenses in the joint which he could in the single action.<sup>7</sup> Where plaintiff, who was a carriage-repairer, sued defendant for the price of certain repairs done to defendant's carriages, defendant set up that plaintiff had bribed his coachman to take the carriages to him, it was held that if the repairs were necessary, and defendant retained the benefit of them, he must pay for them.<sup>8</sup> Where the plaintiffs,

<sup>1</sup> Smith v. R. R. Co., 36 N. H. 458.

<sup>2</sup> Dodge v. Coddington, 3 Johns. 146.

<sup>3</sup> White v. Snell, 9 Pick. 16.

<sup>4</sup> Falconer v. Smith, 18 Pa. St. 130;

Heck v. Shener, 4 Serg. & R. 249; 8

Am. Dec. 700; Gaw v. Wolcott, 10

Pa. St. 43; Sisson v. Willard, 25 Wend.

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<sup>5</sup> Meredith v. Richardson, 10 Ala. 828.

<sup>6</sup> Hesser v. Stineer, 5 Watts & S. 476.

<sup>7</sup> McCormick v. Elston, 16 Ill. 204.

<sup>8</sup> Brewster v. Hatch, 18 Abb. N. C. 205.



bankers, sued one of their depositors on an account stated, it is a good defense to show that the accounts contained fraudulent charges and omission of credits.<sup>1</sup> If the defendant agreed to pay money to the plaintiff, he cannot, when sued, contend that the plaintiff earned it by services rendered in fraud of the rights of a third party.<sup>2</sup> Under a plea of *non assumpsit*, any inherent defect or imperfection in the plaintiff's case involving a failure of consideration may be shown.<sup>3</sup>

And in an action for goods sold and delivered, the defendant may show, under a general denial, that the goods were sold on a credit which had not expired at the commencement of the action, and that the action was consequently premature.<sup>4</sup> Where the defendant is sued in *assumpsit* as the indorser of a note, and he pleads the general issue, he thereby admits the character of indorser, in which he is sued.<sup>5</sup> Certain matters may be specially pleaded in *assumpsit*, or given under the general issue; but a special plea in bar must always give color to the plaintiff's right.<sup>6</sup> And where the general issue was pleaded to the whole declaration, and a special plea to the first count, it was held to be error to render a judgment in bar of the action while the issue under the special plea remained undisposed of.<sup>7</sup> A plea of the general issue in *assumpsit* is not vitiated by omitting the words "undertake or" before "promise in manner," etc., in the ordinary precedents.<sup>8</sup> In an action for money received, the defendant may, under a general denial, prove that it was agreed that the same should be applied in payment of advances previously made by him.<sup>9</sup> Under the Ala-

<sup>1</sup> McKinster v. Hitchcock, 19 Neb. 100.

<sup>2</sup> Tucker v. Grover, 60 Wis. 233.

<sup>3</sup> Keen v. Ranck, 14 Phila. 168; Blessing v. Miller, 102 Pa. St. 45.

<sup>4</sup> Wilder v. Colby, 134 Mass. 377; Landis v. Morrissey, 69 Cal. 83.

<sup>5</sup> Dillman v. Ailles, 13 Miss. 373; 43 Am. Dec. 520.

<sup>6</sup> Dibble v. Duncan, 2 McLean, 553.

<sup>7</sup> Armstrong v. Webster, 30 Ill. 333.

<sup>8</sup> Schufeldt v. Fidelity Sav. Bank, 93 Ill. 937. See also Eastman v. Anthony, 93 Ill. 599.

<sup>9</sup> Marvin v. Mandell, 125 Mass. 562.

<sup>1</sup> Burham  
<sup>2</sup> Kautzler  
<sup>3</sup> Merchant  
<sup>4</sup> W. Va. 37  
<sup>5</sup> Campbell  
<sup>6</sup> McAr. 533

bama code, as at common law, a recovery cannot be had under the common counts, as therein abbreviated, when the evidence shows only a valid special contract and its breach.<sup>1</sup> If facts exist which in law constitute a defense to an action of *assumpsit*, the defendant may avail himself of them for the first time on the trial of the cause.<sup>2</sup> Special pleas which set forth facts showing that the plaintiff never had a cause of action ought, in an action of *assumpsit*, to be rejected; but otherwise where the matter set forth is in discharge of the action.<sup>3</sup> In an action of *assumpsit* upon the common counts, a plea *puis darrein continuance* of payment is a waiver of the prior pleas; and the only question is, whether the plaintiff's claim has been paid since the original pleas were filed.<sup>4</sup> Recovery cannot be had as on an implied contract when the facts show an express agreement; but if, while relying on an express agreement, the plaintiff also claims that, if that should not be shown, the facts will imply an understanding, and that he will rely on that, he may recover on whichever contract is made out.<sup>5</sup>

§ 3696. **Evidence.**—In an action on the common counts in *assumpsit*, an express promise, if alleged, need not be proved; and if incompetent evidence of such express promise be admitted upon trial, it is no ground for reversal.<sup>6</sup> In this species of action a request may be proved by circumstantial evidence.<sup>7</sup> In an action for money had and received, the form of the complaint under the New York code is substantially like the former common count therefor, and the plaintiff may thereunder prove any special circumstances which create the liability; but if the complaint sets forth the special circumstances, he is confined to proof of those alleged.<sup>8</sup> In an

<sup>1</sup> *Burham v. Spiers*, 56 Ala. 547.

<sup>2</sup> *Kantzler v. Grant*, 2 Ill. App. 236.

<sup>3</sup> *Merchants' etc. Bank v. Evans*, 21 W. Va. 373.

<sup>4</sup> *Campbell v. District of Columbia*, 2 McAr. 533.

<sup>5</sup> *Van Fleet v. Van Fleet*, 50 Mich. 1.

<sup>6</sup> *De la Guerra v. Newhall*, 55 Cal. 21.

<sup>7</sup> *Hill v. Packard*, 69 Me. 158.

<sup>8</sup> *Am. Bank v. Wheelock*, 45 N. Y. Sup. Ct. 205.

action by a physician to recover for professional services, the burden of proof of want of skill is on the defendant pleading the same as a defense; and in such an action the defendant's pecuniary ability cannot be shown by the plaintiff to affect the reasonableness of the charges.<sup>1</sup> Under a plea of the general issue to an implied *assumpsit*, the plaintiff is obliged to prove not only performance, but also the understanding on which it was based.<sup>2</sup> A check offered in evidence under the money counts is only *prima facie* evidence that money passed; if that fact is disproved, the presumption is rebutted, and no recovery on these counts can be had.<sup>3</sup> In an action of *assumpsit* to recover the price of a boiler and engine, the shipping bills of the carrier are not admissible to show the condition of the machinery when shipped.<sup>4</sup> And where the action is brought to recover the price of work and labor done under a special contract, the plaintiff must prove the performance of the work, although the answer admits that he performed certain work, and merely denies allegations of value.<sup>5</sup> Evidence of the mutual assignment of interests among several plaintiffs for the purpose of bringing joint suit is inadmissible in an action on the common counts, such assignment not being averred in the declaration.<sup>6</sup> In an action on an account stated, evidence that defendant, while denying his ability to pay, had expressed a willingness to pay if he could, and that he had paid a part, is admissible on the issue of his liability.<sup>7</sup> And where a woman sues on a claim for services consisting of nursing her father-in-law, evidence that she and her husband lived in the father's house as members of his family is admissible.<sup>8</sup>

<sup>1</sup> Robinson v. Campbell, 47 Iowa, 625.

<sup>2</sup> Beninger v. Lake Superior Iron Co., 41 Mich. 305.

<sup>3</sup> Blair v. Wilson, 28 Gratt. 165; Howes v. Austin, 35 Ill. 396; Carter v. Hope, 10 Barb. 180.

<sup>4</sup> Mitchell v. Willard, 21 Ill. App. 500.

<sup>5</sup> Farley v. Browning, 13 Daly, 85.

<sup>6</sup> Cilley v. Van Patten, 58 Miss. 404.

<sup>7</sup> Kenworthy v. Phillips, 51 N. Y. Sup. Ct. 43.

<sup>8</sup> Johnson v. Johnson, 100 Ind. 389.

<sup>1</sup> Sher  
<sup>2</sup> Will  
<sup>3</sup> Koe  
<sup>4</sup> Cow  
<sup>5</sup> Hill

In an action to recover for services, as upon a *quantum meruit*, the plaintiff is not concluded as to the value of the services by the amount originally claimed in the complaint, which has been amended by increasing the amount, nor by discrepancies between different bills of particulars furnished.<sup>1</sup> Where defendant gave plaintiff a paper, stating that he did so to show that he wanted him to have twelve hundred dollars at his death, it was held that the paper was testamentary in its nature, and was inadmissible in evidence under a general claim for services.<sup>2</sup> In an action on an account stated, evidence of former transactions is admissible to show a foundation for the account, but not to inquire into the merits of such transactions;<sup>3</sup> and in *assumpsit* for services by one who was alleged by the defendant to have rendered them as a member of the family, the will of the head of the family leaving the plaintiff considerable property is admissible in support of the defense.<sup>4</sup> Upon a writ to recover rents and profits claimed to have been received by defendant to the use of the plaintiff, evidence of the use and occupation, and of the fair rental value of the premises, is admissible.<sup>5</sup> And where the plaintiff sues specially on an alleged agreement to pay a specified price for services, evidence of the value of the services may be admitted without material error.<sup>6</sup> But in an action to recover reasonable compensation for services, the usual and customary price of the latter can be shown only by evidence of wages actually paid under contract;<sup>7</sup> and where the plaintiff sues in the common count for money due for services rendered on a contract, the contract may be admitted in evidence;<sup>8</sup> but where the action is brought upon a special contract, in order to entitle the plaintiff to

<sup>1</sup> *Sherwood v. Hauser*, 94 N. Y. 626.

<sup>2</sup> *Wilson v. Van Leer*, 103 Pa. St. 600.

<sup>3</sup> *Koegel v. Givens*, 79 Mo. 77.

<sup>4</sup> *Cowell v. Roberts*, 79 Mo. 218.

<sup>5</sup> *Hill v. Cooper*, 10 Or. 153.

<sup>6</sup> *Tarrant v. Gittelson*, 16 S. C. 231;

*Shulters v. Searls*, 48 Mich. 550.

<sup>7</sup> *Jenks v. Knotts etc. Mining Co.*,

58 Iowa, 549.

<sup>8</sup> *Beadle v. Graham*, 66 Ala. 99.

recover, he must prove the contract substantially as he alleges it.<sup>1</sup>

Under the plea of *non assumpsit* the defendant may give in evidence any matter which tends to show that the plaintiff never had a cause of action, and, generally, any facts which show that, even though he might at one time have been in a position to maintain the suit, circumstances have since arisen, before action brought, whereby the right of action has become discharged or defeated.<sup>2</sup> Where payment is pleaded, the defendant is confined to that issue, and evidence tending to disprove the cause of action is inadmissible.<sup>3</sup> The following rules have been laid down as to the inadmissibility of certain matters of evidence in an action on the common counts, viz.: A special contract which has not been performed;<sup>4</sup> claims by one partner against another upon partnership accounts;<sup>5</sup> damages occurring after action brought;<sup>6</sup> an accepted order for the delivery of specified goods;<sup>7</sup> a written promise of indemnity;<sup>8</sup> a draft on a specified fund, but not expressed to be for any consideration;<sup>9</sup> and where a common carrier is sued on the common counts in *assumpsit*, the bills of lading are not admissible in evidence in support of the declaration.<sup>10</sup>

<sup>1</sup> Kidder v. Flagg, 28 Me. 477; Crawford v. Morrell, 8 Johns. 253; Blake v. Crowninshield, 9 N. H. 304.

<sup>2</sup> Edson v. Weston, 7 Cow. 278; Sill v. Road, 15 Johns. 230; Witt v. Ogden, 13 Johns. 56; Wailing v. Toll, 9 Johns. 141; Drake v. Drake, 11 Johns. 531; Young v. Rummell, 2 Hill, 478; 38 Am. Dec. 594; Boyd v. Weeks, 2 Denio, 321; 43 Am. Dec. 749; Craig v. Missouri, 4 Pet. 426; Arnold v. Paxton, 6 J. J. Marsh. 503; Smart v. Baugh, 3 J. J. Marsh. 163; Jones v. Pryor, 1 Bibb, 514; Cook v. Vimont, 6 T. B. Mon. 284; Cotton v. Lake, 2 Mass. 540; Mitchell v. Kingman, 5 Pick. 431; Hilton v. Burley, 2 N. H. 193; Pemigewasset Bank v. Brackett, 4 N. H. 557; Stansbury v. Marks, 4 Dall. 130; McMillian v. Wallace, 3 Stew. 185; Rainey v. Long, 9 Ala.

754; Hendrickson v. Hutchinson, 29 N. J. L. 180; Dingee v. Letson, 15 N. J. L. 259; Kilheffer v. Herr, 17 Serg. & R. 325; 17 Am. Dec. 658; Cargill v. Carrigues, 5 Pa. St. 152; Dawson v. Tibbs, 4 Yeates, 439; Britton v. Bishop, 11 Vt. 70; Harrison v. Brock, 1 Munf. 22; Stewart v. Sayhook, Wright, 374; Talbert v. Cason, 1 Brev. 298; Young v. Black, 7 Cranch, 565; McDonald v. Faulkner, 2 Ark. 472.

<sup>3</sup> Hamilton v. Moore, 4 Watts & S. 570; Hubbard v. Blow, 4 Call, 224.

<sup>4</sup> Maynard v. Tidball, 2 Wis. 34.

<sup>5</sup> Wright v. Cobleigh, 21 N. H. 339.

<sup>6</sup> Greenleaf v. McColey, 14 N. H. 303.

<sup>7</sup> Burrall v. Jacot, 1 Barb. 165.

<sup>8</sup> Winton v. Meeker, 25 Conn. 456.

<sup>9</sup> Raiganel v. Ayliff, 16 Ark. 594.

<sup>10</sup> Baltimore etc. R. R. Co. v. Rathbone, 1 W. Va. 87; 88 Am. Dec. 604.

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PART IX. — INJUNCTION.

CHAPTER CLXXXV.

INJUNCTION.

- § 3697. General principles.
- § 3698. Waste.
- § 3699. Real estate.
- § 3700. Nuisance.
- § 3701. Judicial proceedings.
- § 3702. Judgments.
- § 3703. Violation.
- § 3704. Practice.
- § 3705. Appellate jurisdiction.

§ 3697. **General Principles.**—Injunctions are either preventive or mandatory; the former prohibiting the defendant from doing or permitting to be done the act or thing against which the injunction is directed, and the latter ordering him to do some particular thing as applied for by the plaintiff.<sup>1</sup> The latter is seldom used, and is rarely granted previous to the final hearing of the cause.<sup>2</sup> The preventive injunction is subdivided into the temporary, interlocutory or preliminary, and the final or perpetual. The interlocutory injunction, which may be granted on or at any time after the commencement of the suit, does not in any way decide upon the final rights of the parties, but merely enjoins the defendant from doing some act until the duties and obligations of the

<sup>1</sup> High on Injunctions, sec. 1; Jeremy's Eq. 307; Eden on Injunctions, c. 1; Willard's Eq. Jur. 341; 2 Story's Eq. Jur., sec. 861; Shearman & Clark, 4 Nev. 138; McDonogh v. Calloway, 7 Rob. (La.) 442; Attorney-General v. New Jersey R. & T. Co., 3 N. J. Eq. 136; Childless v. Perkins, Cooke, 87; Wash. Univ. v. Green, 1 Md. Ch. 97.

<sup>2</sup> Bailey v. Schnitzius, 45 N. J. Eq. 178; Delaware etc. R. R. Co. v. Central S. T. & T. Co., 43 N. J. Eq. 77; Herbert v. R. R. Co., 43 N. J. Eq. 21; Rogers L. & M. Works v. R. R. Co., 20 N. J. Eq. 379; Gaines v. Hale, 26 Ark. 168; Corning v. Troy Factory, 40 N. Y. 191; Black v. Good Intent T. B. Co., 31 La. Ann. 497; Gardner v. Stroeve, 81 Cal. 148.

parties shall have been determined.<sup>1</sup> Such an injunction will not be granted where the party seeking it has no title to or interest in the property to be protected by it, or no claim to the relief to be asked for on the final hearing, or where the effect of the injunction would be to promote litigation rather than diminish it.<sup>2</sup> The perpetual injunction is directed to issue after the final hearing of the cause has been had, for the purpose of enforcing and as a part of the decree itself, and is conclusive upon all parties in interest.<sup>3</sup> The purposes for which an injunction will be granted are very numerous. Among them may be mentioned the restraining an infringement of a patent, copyright, or trade-mark;<sup>4</sup> the prevention or continuance of a public or private nuisance;<sup>5</sup> the restraining the transfer or issuing of stock in a corporation;<sup>6</sup> the restraining the doing of unauthorized acts by a copartner or a corporation;<sup>7</sup> the restraining the disclosure of confidential communications, secrets, or papers;<sup>8</sup> the restraining the removal of property, or the evidences of indebtedness, or of title to property out of the jurisdiction of the court, and also the commission of waste;<sup>9</sup> the restraining the transfer of property, or the parting with the possession of

<sup>1</sup> Mammoth Vein Co.'s Appeal, 54 Pa. St. 183; Commonwealth v. R. R. Co., 24 Pa. St. 159; Andrae v. Redfield, 12 Blatch. 407; Flippin v. Knaffle, 2 Tenn. Ch. 238.

<sup>2</sup> Bank of Cal. v. Fresno etc. Co., 53 Cal. 201; State v. McGlynn, 20 Cal. 233; 81 Am. Dec. 118; O'Brien v. O'Connell, 4 Hun, 228; Atlantic City W. W. Co. v. Consumers' Water Co., 44 N. J. Eq. 427; Head v. James, 13 Wis. 641.

<sup>3</sup> Brinckerhoff v. Lansing, 4 Johns. Ch. 65; 1 High on Injunctions, sec. 3.

<sup>4</sup> Atwell v. Ferrett, 2 Blatchf. 39; Schneider v. Missouri Glass Co., 36 Fed. Rep. 582; Eagle Mfg. Co. v. Chamberlain Plough Co., 36 Fed. Rep. 905; Singer Mfg. Co. v. Wilson Sewing Machine Co., 38 Fed. Rep. 586; Schneider v. Williams, 44 N. J. Eq.

391; Brown Chemical Co. v. Stearns, 37 Fed. Rep. 360.

<sup>5</sup> Cumberland Valley R. R. Co.'s Appeal, 62 Pa. St. 227; Catlin v. Valentine, 9 Paige, 575; 38 Am. Dec. 567; Bigelow v. Hartford Bridge Co., 14 Conn. 565; 36 Am. Dec. 502.

<sup>6</sup> Osborn v. Bank, 9 Wheat. 738.

<sup>7</sup> Dodge v. Woolsey, 18 How. 331; Kean v. Johnson, 9 N. J. Eq. 401.

<sup>8</sup> Salomon v. Hertz, 40 N. J. Eq. 400; Hoyt v. McKenzie, 3 Barb. Ch. 320; 49 Am. Dec. 178; Wetmore v. Scovell, 3 Edw. Ch. 515.

<sup>9</sup> Livingston v. Gibbons, 4 Johns. Ch. 571; Osborn v. Bank, 9 Wheat. 738; Johnson v. Conn. Bank, 21 Conn. 148; Smith v. Gibbs, 44 N. H. 336; Mitchell v. Amador Canal & Min. Co., 75 Cal. 464; Cowand v. Meyers, 99 N. C. 198.

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such property.<sup>1</sup> An injunction will be granted only where there is no other adequate remedy, or where there is an urgent necessity for restraining the commission of the threatened act, or where it is made to appear that irreparable injury will be otherwise sustained by the plaintiff.<sup>2</sup> An injunction can be obtained only for the protection of civil and private rights; and will not be issued for the prevention of criminal or immoral acts.<sup>3</sup> And where a special remedy is provided by statute, it takes the place of the relief which might otherwise have been obtained by injunction; but such statutory remedy, to supersede an injunction, must be obtainable in the courts of the state where the right exists,<sup>4</sup> as the jurisdiction in equity is strictly *in personam*, and it cannot compel action by a person not within the jurisdiction of the court.<sup>5</sup> To entitle a plaintiff to an interlocutory injunction, he must make a clear showing that he will, beyond reasonable doubt, be entitled to relief on the final hearing of the cause.<sup>6</sup> The bill for an injunction must allege the facts in a positive manner and with particularity, showing the sources and means of knowledge, and must be verified;<sup>7</sup> but if the material allegations of the bill are positively and circumstantially denied under oath by the defendant, a pre-

<sup>1</sup> *Thorns v. Southard*, 2 Dana, 475; 26 Am. Dec. 467; *Denson v. Stewart*, 15 La. Ann. 456; *Malcolm v. Miller*, 6 How. Pr. 456.

<sup>2</sup> *Hall v. Rood*, 40 Mich. 46; 29 Am. Rep. 528; *Powell v. Parker*, 38 Ga. 644; *Bucher v. Bedinger*, 7 Blatchf. 170; *Citizens' Coach Co. v. R. R. Co.*, 29 N. J. Eq. 299; *Potter v. Schenck*, 1 Biss. 545.

<sup>3</sup> *Gault v. Wallis*, 53 Ga. 675; *Joseph v. Burke*, 46 Ind. 59; *Babcock v. N. Jersey S. Y. Co.*, 20 N. J. Eq. 296; *Burnett v. Craig*, 30 Ala. 135; 68 Am. Dec. 115; *Moses v. Mayor*, 52 Ala. 198; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371; *Sparhawk v. R. R. Co.*, 54 Pa. St. 401.

<sup>4</sup> *Stanton v. Embry*, 46 Conn. 595; *Irwin v. Lewis*, 56 Mo. 363; *Brown's*

*Appeal*, 66 Pa. St. 155; *Nessle v. Reese*, 29 How. Pr. 382; *Coe v. R. R. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518; *Watson v. Sutherland*, 5 Wall. 74.

<sup>5</sup> *Hazlehurst v. R. R. Co.*, 43 Ga. 13; *Roberts v. Davidson*, 83 Ky. 279; *West. U. Tel. Co. v. Pacific and Atlantic T. Co.*, 49 Ill. 90.

<sup>6</sup> *Washburn v. Miller*, 117 Mass. 376; *State v. McGlynn*, 20 Cal. 233; 81 Am. Dec. 118; *Branch v. Supervisors*, 13 Cal. 190; *Minnig's Appeal*, 82 Pa. St. 373; *Burnham v. Kempton*, 44 N. H. 92; *Jones v. R. R. Co.*, 39 Ga. 138; *Battle v. Stephens*, 32 Ga. 25; *Holdrege v. Gwynne*, 18 N. J. Eq. 26.

<sup>7</sup> *Armstrong v. Sanford*, 7 Minn. 49; *Youngblood v. Schamp*, 15 N. J. Eq. 42; *Blondheim v. Moore*, 11 Md. 365.



liminary injunction will not be granted.<sup>1</sup> The writ of injunction gives no remedy for an act which has been committed; it is not in any sense restorative, and will not even affect an act done before service, though after issuance;<sup>2</sup> and in the absence of a showing of a present or impending injury, an injunction will be refused.<sup>3</sup>

§ 3698. **Waste.**—An injunction to restrain waste is usually granted *pendente lite*; but where its protection is necessary in the case of trust estates or estates in reversion or remainder, it will be granted, though no action at law is pending.<sup>4</sup> An injunction will not usually be granted where the title to the property is in dispute and the defendant is in possession claiming by adverse title.<sup>5</sup> And unless it is made to appear circumstantially that the injury complained of will damage the inheritance or be productive of irreparable mischief, it will not, as a rule, be enjoined.<sup>6</sup> An injunction is commonly granted to restrain the cutting and removal of timber during the pendency of an action to try the title to the lands, where the land is chiefly valuable for the timber, and particularly where the defendant is not able to respond in damages.<sup>7</sup> And where one is in possession of lands which he has contracted to buy, but has not paid the purchase-money, an injunction will be granted to restrain him from committing waste which would render the land an insufficient security for the unpaid purchase-money.<sup>8</sup> So where a

<sup>1</sup> Lady Bryan etc. Co. v. Lady Bryan etc. Co., 4 Nev. 414.

<sup>2</sup> Ramsdall v. Craighill, 9 Ohio, 197; People v. R. R. Co., 20 How. Pr. 353; Lexington Nat. Bank v. Gwynn, 4 Bush. 486; Attorney-General v. R. R. Co., 17 N. J. Eq. 136.

<sup>3</sup> Blatchford v. Chicago etc. Co., 22 Ill. App. 376.

<sup>4</sup> Dennett v. Dennett, 43 N. H. 503; Denny v. Brunson, 29 Pa. St. 382; Kane v. Vanderburgh, 1 Johns. Ch. 11; Markham v. Howell, 33 Ga. 508.

<sup>5</sup> Lansing v. North River Steamboat Co., 7 Johns. Ch. 165; Storm v. Mann,

4 Johns. Ch. 21; Nevitt v. Gillespie, 1 How. (Miss.) 108; Brown v. Folwell, 7 N. J. Eq. 593.

<sup>6</sup> Bogey v. Shute, 4 Jones Eq. 174; Smith and Fleck's Appeal, 69 Pa. St. 474; Silva v. Garcia, 65 Cal. 591.

<sup>7</sup> Watson v. Hunter, 5 Johns. Ch. 169; 9 Am. Dec. 295; Hicks v. Michael, 15 Cal. 107; Kinsler v. Clarke, 2 Hill Eq. 617; Peak v. Hayden, 3 Bush, 125.

<sup>8</sup> Tufts v. Little, 56 Ga. 139; Cook v. Doolittle, 5 Hun, 342; Van Wyck v. Alliger, 6 Barb. 507. But see Van Deusen v. Young, 29 Barb. 9.

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mortgagor is committing or threatening to commit waste, such as cutting down and removing timber, or of such other nature as would render the security of the property insufficient to pay the mortgage debt, he will be restrained in equity, even before the debt is due, and even though he is responsible.<sup>1</sup> Before an injunction will be granted to restrain anticipated waste, the facts and circumstances causing the apprehension must be fully stated to the court, and unless probable cause is shown, the application will be denied.<sup>2</sup> But it is not necessary to wait until the actual commission of waste before applying to enjoin it, and where it is of a character capable of being repeated or continued, an injunction will issue to restrain the repetition or continuance thereof on a showing of its being likely to occur.<sup>3</sup> Where the plaintiff and his predecessors in title have been in possession of lands for a great number of years under color of title, an injunction will be granted against waste, although defendant claims under an older patent.<sup>4</sup> And an outgoing tenant will be enjoined from plowing up all the meadow-land on the farm.<sup>5</sup> But an injunction will not be granted against a stranger to the premises, without interest or title therein, or where no privity exists between the parties to the action,—an action of trespass at law being the proper remedy in such cases.<sup>6</sup> An injunction against waste will not be granted against a temporary administrator upon the ground of the insolvency of his surety, when the law affords ample remedy by compelling the giving of sufficient security.<sup>7</sup> But the tilling of farming lands contrary to the custom of the

<sup>1</sup> *Fairbank v. Cudworth*, 33 Wis. 358; *Ensign v. Colburn*, 11 Paige, 503; *Nelson v. Pingard*, 30 Ill. 473; *Bank v. Cox*, 36 N. J. Eq. 452; *Cooper v. Davis*, 15 Conn. 561. In California the insolvency of the defendant must be shown: *Robinson v. Russell*, 24 Cal. 467. But see *Crescent City Wharf etc. Co. v. Simpson*, 77 Cal. 286.  
<sup>2</sup> *Lehman v. Logan*, 7 Ired. Eq. 296; *London v. Warfield*, 5 J. J. Marsh. 196.

<sup>3</sup> *Livingston v. Reynolds*, 26 Wend. 115; *Winship v. Pitts*, 3 Paige, 259.

<sup>4</sup> *Basore v. Henkel*, 82 Va. 474.

<sup>5</sup> *Chapel v. Hull*, 60 Mich. 167.

<sup>6</sup> *Cingledon v. Mitchell*, 12 Ired. Eq. 45; *Blackwood v. Van Vleet*, 11 Mich. 252; *Georges Creek Co. v. Detmold*, 1 Md. Ch. 371.

<sup>7</sup> *Montgomery v. Walker*, 36 Ga. 575.

neighborhood where the lands are situated, or contrary to the recognized rotation of crops, may be restrained by injunction in equity;<sup>1</sup> though an injunction will not be granted against the removal of timber already cut on the premises, since it has become personal property, for which trover will lie.<sup>4</sup>

§ 3699. **Real Estate.**—A party to an action of ejectment, or for the recovery of possession of land, will not be enjoined from proceeding with his suit, unless the defendant is possessed of a superior equity, or if he has a good defense at law.<sup>2</sup> And the obligee of a bond for the conveyance of land cannot obtain an injunction to restrain a *bona fide* purchaser without notice or knowledge of the equities of such obligee.<sup>4</sup> As a general rule, a court of equity will not interfere in a suit to recover land, unless fraud, mistake, accident, or surprise are alleged as grounds for its interposition.<sup>5</sup> Where the action is pending in a court of law, and the defense can be properly raised in that tribunal, equity will not interfere, though it may have concurrent jurisdiction in the matter.<sup>6</sup> The sale of lands will sometimes be enjoined on the ground of an estoppel *in pais*, as where, from the acts of the owner, it may be inferred that there has been a dedication of the lands to public use;<sup>7</sup> or where the plaintiff holds a judgment which is a lien on the lands, and by which his rights therein are determined.<sup>8</sup> So where, by reason of accident, great injury would result from the sale, as where the grantee has lost his deed before recording, the repre-

<sup>1</sup> Wilds v. Layton, 1 Del. Ch. 226; Bonnel v. Allen, 53 Ind. 130.

<sup>2</sup> Watson v. Hunter, 5 Johns. Ch. 169.

<sup>3</sup> Womack v. Powers, 50 Ala. 5; Morris C. & B. Co. v. Jersey City, 12 N. J. Eq. 227; Bishop of Chicago v. Chimiquy, 74 Ill. 317; Lamb v. Drew, 20 Iowa, 15; Chadwin v. Magee, 20 Tex. 476.

<sup>4</sup> McFarlane v. Griffith, 4 Wash. C. C. 585.

<sup>5</sup> Cook v. Burnley, 45 Tex. 97; Ex parte Foster, 11 Ark. 304; Evans v. Lovengood, 1 Jones Eq. 298.

<sup>6</sup> Stockton v. Williams, 1 Doug. (Mich.) 546.

<sup>7</sup> Mayer v. Franklin, 12 Ga. 239; Kurtz v. Beatty, 2 Cranch C. C. 699.

<sup>8</sup> Buchanan v. Marsh, 17 Iowa, 494; Wiggins v. Armstrong, 2 Johns. Ch. 144.

representatives of the grantor may be restrained from selling the land.<sup>1</sup> And where the execution of a deed of conveyance would tend to cloud the title of the real owner of the land, even though no title would really pass by such deed, its execution will be restrained.<sup>2</sup> So where a sale has actually been made, and there are grounds for fearing that the proceeds will be misapplied, an injunction will be granted to enjoin such anticipated misapplication.<sup>3</sup> But equity will not interfere to prevent the execution by a trustee of a general power to sell lands for the benefit of others, where it does not appear that the power is being inequitably or unjustly exercised.<sup>4</sup> But where a trustee has perverted his powers, misapplied the proceeds of sales of the trust estate, and refused to account to the beneficiaries, he may be enjoined from a threatened sale of other portions of the property, his insolvency being shown.<sup>5</sup> An injunction will not be readily granted to restrain the breach of a party-wall agreement between the owners of adjacent premises, there being no irreparable injury shown, it being considered that the remedy in damages is sufficient.<sup>6</sup> And where land-owners sought to enjoin the further prosecution of proceedings to condemn a right of way, the fact that the railroad company is insolvent affords no ground for an injunction.<sup>7</sup> And an injunction will not lie to restrain one from mining upon the mining location of another, if he has never done so or never threatened to do so.<sup>8</sup> Where the owner of a lot on a city street sought to restrain the use of a railroad track laid in the street without damages having been assessed and paid, alleging that the track interfered with

<sup>1</sup> *Wright v. Christie*, 39 Mo. 125. And see *Lawrence v. Mayor*, 2 Barb. 577.

<sup>2</sup> *Ragland v. Cantrell*, 49 Ala. 294; *Eldridge v. Smith*, 34 Vt. 484; *Vogle v. Montgomery*, 54 Mo. 578; *Goodsell v. Blumer*, 41 Wis. 436.

<sup>3</sup> *Cranston v. Plumb*, 54 Barb. 59; *Hine v. Handy*, 1 Johns. Ch. 6.

<sup>4</sup> *Selden v. Vermilyea*, 1 Barb. 58.

<sup>5</sup> *Albright v. Albright*, 91 N. C. 220.

<sup>6</sup> *Mayer's Appeal*, 73 Pa. St. 164; *Barton v. Moffitt*, 3 Or. 29.

<sup>7</sup> *Cooper v. R. R. Co.*, 85 Ala. 106.

<sup>8</sup> *Champion Mining Co. v. Mining Co.*, 75 Cal. 78.

the convenient use of his warehouse, but had permitted two years to elapse after filing his bill before applying for the injunction, it was held that, under the circumstances, the injunction should be refused, and the plaintiff left to his remedy at law.<sup>1</sup> And where defendant verbally promised plaintiff that if she should do his housework and take care of him so long as he lived, he would devise to her a house and lot, and she did so for three years, and then defendant went and lived with another person, to whom he made a similar promise, it was held that the conveyance should be enjoined.<sup>2</sup> Where defendant, under a verbal license from plaintiff to place a few rocks for a short time on certain lots, covered them with bowlders fourteen feet high, a mandatory injunction will be granted to compel their removal.<sup>3</sup> And an injunction is properly granted against a city to restrain it from discharging sewage on land to which the applicant's title has been established in a former suit.<sup>4</sup> But in order to enjoin the sale of mortgaged property, under a power given in the mortgage, some special equity must appear, and it is not enough that, on a future accounting in partnership transactions between mortgagor and mortgagee, it may turn out that a balance may be found due to the former.<sup>5</sup> Where a tenant threatens to remove a house from off the land, an injunction will be granted to restrain him.<sup>6</sup>

§ 3700. **Nuisance.**—An injunction is granted to restrain the commission of a nuisance, where irreparable mischief would otherwise ensue, or where circuity of action or multiplicity of suits will thereby be prevented.<sup>7</sup> But, as a general rule, a court of equity will not interpose where

<sup>1</sup> Osborne v. R. R. Co., 37 Fed. Rep. 830.

<sup>2</sup> Pflugar v. Pultz, 43 N. J. Eq. 440.

<sup>3</sup> Wheelock v. Noonan, 108 N. Y. 179; 2 Am. St. Rep. 405.

<sup>4</sup> Vick v. Rochester, 46 Hun, 607.

<sup>5</sup> Glover v. Hembree, 82 Ala. 324.

<sup>6</sup> Dougherty v. Spencer, 23 Ill. App. 357.

<sup>7</sup> Burnham v. Kempton, 44 N. H. 79; Porter v. Witham, 17 Me. 292.

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there is a plain, speedy, and adequate remedy at law, or unless the injury is not susceptible of compensation in damages, or is irreparable.<sup>1</sup> In many cases, where there is any doubt as to the applicant's title, an injunction will not be granted until the title has been established by proceedings at law.<sup>2</sup> But in some instances the necessity of first establishing the legal title is dispensed with.<sup>3</sup> Where the injury complained of is temporary and trifling, an injunction will not be ordered.<sup>4</sup> But if the nuisance complained of materially interferes with the comforts or common physical enjoyments of a person residing in the neighborhood where it exists, it will be restrained, and it is not essential that it be injurious to health, though if it be so, it is good cause for restraining it. So the burning of bricks, or the causing of smoke, bad smells, or noise, thereby rendering the occupation of another's property uncomfortable, though not dangerous to health, is ground for an injunction;<sup>5</sup> and the conducting the business of a livery-stable may be enjoined, where it is shown to be an actual nuisance.<sup>6</sup> So, also, with regard to machinery run by steam-power, whereby the complainant's building was jarred and shaken.<sup>7</sup> Whether any particular thing is a nuisance or not depends upon circumstances, and an injunction will not be ordered where the injury is not made to appear by the case presented;<sup>8</sup> and where the injury is only possible or contingent, and there is no cer-

<sup>1</sup> *Remington v. Foster*, 42 Wis. 608; *Fort v. Graves*, 29 Md. 188; *Bean v. Coleman*, 44 N. H. 539; *Powell v. Foster*, 59 Ga. 790; *Parker v. Woolen Co.*, 2 Black, 545; *Gilbert v. Morris C. & B. Co.*, 8 N. J. Eq. 495.

<sup>2</sup> *Rosser v. Randolph*, 7 Port. 238; 31 Am. Dec. 712; *Mammoth Vein Coal Co.'s Appeal*, 44 Pa. St. 183; *Dunning v. Aurora*, 40 Ill. 481; *Porter v. Witham*, 11 Me. 392; 8 Am. Dec. 511; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282.

<sup>3</sup> *Campbell v. Seaman*, 63 N. Y. 568; 20 Am. Rep. 567; *Pa. R. R. Co. v. R.*

*R. Co.*, 23 N. J. Eq. 157; *Sprague v. Rhodes*, 4 R. I. 301.

<sup>4</sup> *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *McCord v. Iker*, 12 Ohio, 387.

<sup>5</sup> *Robinson v. Baugh*, 31 Mich. 290; *Ross v. Butler*, 19 N. J. Eq. 294; *Hutchins v. Smith*, 63 Barb. 251; *Atty.-Gen. v. Steward*, 20 N. J. Eq. 415.

<sup>6</sup> *Shiras v. Olinger*, 50 Iowa, 571.

<sup>7</sup> *McKeon v. See*, 51 N. Y. 300; 10 Am. Rep. 659.

<sup>8</sup> *Rhodes v. Dunbar*, 57 Pa. St. 274; *Lake View v. Letz*, 44 Ill. 81; *Duncan v. Hayes*, 22 N. J. Eq. 25.

tainty from the showing that injury will result, an injunction will not be granted.<sup>1</sup> Where the matter charged as a nuisance consists of the erection of public or other buildings of general utility or benefit, or of public convenience, an injunction will be granted only on a showing of a clear case of positive injury, and in such cases the court will regard the general public good in preference to private inconveniences of minor importance;<sup>2</sup> and though equity will not grant an injunction to interfere with the legitimate exercise of the powers conferred by law upon municipal authorities for the abatement of nuisances, it will assist in preventing such authorities from prohibiting a citizen from conducting a legitimate business which is not necessarily a nuisance.<sup>3</sup> If the owner of land, though using it in accordance with the requirements of good husbandry, interferes with the natural flow of surface water over his own land so as to affect the quantity reaching the land of a neighboring proprietor, he may not be liable, but he has no right, by the construction of artificial means, to collect the waters and discharge them with unusual force upon the lands of an adjoining owner, to his great injury; and in such a case an injunction will be granted.<sup>4</sup> The infringement of the right to lateral support constitutes a nuisance in equity, so that the removal of earth from adjoining land, in such manner as to endanger the stability of plaintiff's soil and fences, will be enjoined.<sup>5</sup> In cases of purpresture and other instances of public nuisance, injunctions will be granted in equity on the ground of preventing irreparable mischief and avoiding vexatious litigation.<sup>6</sup> Where the existence of the

<sup>1</sup> *Simpson v. Justice*, 8 Ired. Eq. 115; *Parker v. Laney*, 58 N. Y. 469; *Kirkman v. Handy*, 11 Humph. 406; *Adams v. Michael*, 38 Md. 123.

<sup>2</sup> *Mygatt v. Goetchins*, 20 Ga. 350; *Attorney-General v. Perkins*, 2 Dev. Eq. 38; *Thebaut v. Canova*, 11 Fla. 143; *Green v. Lake*, 54 Miss. 540.

<sup>3</sup> *Weil v. Ricord*, 24 N. J. Eq. 169; *Taunton v. Taylor*, 116 Mass. 254.

<sup>4</sup> *Moore v. R. R. Co.*, 75 Iowa, 263; *Nininger v. Nowood*, 72 Ala. 277; *G. H. & S. A. R. R. Co. v. Tait*, 63 Tex. 223; *Blaine v. Brady*, 64 Md. 373.

<sup>5</sup> *Trowbridge v. True*, 52 Conn. 190; *Farrand v. Marshall*, 21 Barb. 409.

<sup>6</sup> *People v. N. Y. & S. I. F. Co.*, 68 N. Y. 71; *People v. Davidson*, 30 Cal. 379; *Attorney-General v. R. R. Co.*, 27 N. J. Eq. 1.

<sup>1</sup> *Atte*  
*Paige*,  
<sup>2</sup> *Uni*  
*Co.*, 33  
night,  
*Fleming*  
<sup>3</sup> *Paltr*  
*William*  
*Shermer*  
*Gould v.*  
46; *Coas*  
*Ga.* 451.  
<sup>4</sup> *Davis*

nuisance is in doubt, it should be first determined by a jury before the injunction is granted.<sup>1</sup> But any unauthorized appropriation of public property to private uses, amounting to a public nuisance, is within the jurisdiction of equity to enjoin.<sup>2</sup> Where, however, the enjoining of a public nuisance is sought by a private person, he must show some special injury peculiar to himself in addition to that suffered by the general public; otherwise no injunction will be granted him.<sup>3</sup> An act which is authorized by legislative sanction cannot constitute a nuisance, even though in the absence of the statute it might be so held.<sup>4</sup> And an injunction will not be granted against an act prohibited by statute, on the ground of diminution of the profits of an occupation pursued by complainant in common with others.<sup>5</sup> But the erection of a bay-window beyond the building line, and into a public street, constitutes a public nuisance, and may be enjoined at the suit of the attorney-general.<sup>6</sup>

§ 3701. **Judicial Proceedings.**—Injunctions are frequently granted to restrain a party from an unfair use of the process of a legal tribunal, or where there is no other adequate remedy.<sup>7</sup> In cases of this kind a court of equity does not assume to restrain the court of law in the exercise of its proper powers, but the injunction acts upon the one party to the action who is endeavoring to acquire an inequitable advantage over the other, who is without remedy in the proceeding itself.<sup>8</sup> And where a

<sup>1</sup> *Attorney-General v. Cohoes*, 6 Paige, 133.

<sup>2</sup> *United States v. Cleveland etc. Co.*, 33 Fed. Rep. 323; *State v. Goodnight*, 70 Tex. 682; *Ravenswood v. Flemings*, 22 W. Va. 52.

<sup>3</sup> *Palmer v. R. R. Co.*, 108 Ind. 137; *Williams v. Smith*, 22 Wis. 594; *Shermerhorn v. Webber*, 67 Iowa, 278; *Gould v. City of Rochester*, 105 N. Y. 46; *Coast Line R. R. Co. v. Cohen*, 50 Ga. 451.

<sup>4</sup> *Davis v. Mayer*, 14 N. Y. 556;

*Attorney-General v. R. R. Co.*, 24 N. J. Eq. 49; *Hogencamp v. R. R. Co.*, 17 N. J. Eq. 83.

<sup>5</sup> *Smith v. Lockwood*, 13 Barb. 209.

<sup>6</sup> *Reimer's Appeal*, 100 Pa. St. 182.

<sup>7</sup> *Screw Mower etc. Co. v. Mettler*, 26 N. J. Eq. 264; *Tyler v. Hamersly*, 44 Conn. 419; *Savage v. Allen*, 54 N. Y. 458.

<sup>8</sup> *Bishop of Chicago v. Chiniquy*, 74 Ill. 317; *Platt v. Woodruff*, 61 N. Y. 378; *Bissell v. Beckwith*, 33 Conn. 357; *Hinwood v. Jarvis*, 27 N. J. Eq. 247.



case is properly before a court of law, equity will not interfere, even though it has concurrent jurisdiction, unless the defendant is unable to obtain in the legal action all the relief to which he is entitled.<sup>1</sup> A court of equity will set aside a judgment obtained by fraud, and, in extension of the application of that principle, will enjoin the plaintiff from issuing execution on such a judgment.<sup>2</sup> But proceedings to enforce a judgment will not be restrained merely because the defendant negligently permitted it to be rendered against him by default, or on the ground of defenses which he might have pleaded at law, but neglected to do so.<sup>3</sup> An injunction will not, as a general rule, be granted to enjoin the prosecution of a suit in the same court, as all the objects thereof may usually be attained by motion or petition in the case pending.<sup>4</sup> But this rule is not without its exceptions, and in an extreme case a court of equity will restrain a party from proceeding with another equitable action in the same court.<sup>5</sup> State courts cannot, in general, enjoin parties proceeding in the federal courts; and it is provided by the federal statute that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of the state, except in cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy.<sup>6</sup> An injunction will not be granted to restrain proceedings in an action at law where its effect would be to contravene the equitable maxim that

<sup>1</sup> *Morgan v. Morgan*, 50 Ala. 89; *New Jersey Z. Co. v. Franklin Iron Co.*, 29 N. J. Eq. 422; *Pirault v. Rand*, 10 Hun, 222.

<sup>2</sup> *Chambers v. Bridge Mfg. Co.*, 16 Kan. 270; *Ridgeway v. Bank*, 11 Humph. 523; *Bibb v. Hitchcock*, 49 Ala. 468; 20 Am. Rep. 288; *Ross v. Harper*, 99 Mass. 175; *Stanton v. Embury*, 46 Conn. 595.

<sup>3</sup> *Stilwell v. Carpenter*, 50 N. Y. 414; *Jordan v. Corley*, 42 Tex. 284; *Robuck v. Harkins*, 38 Ga. 174; *Holmes v. Stateler*, 57 Ill. 209.

<sup>4</sup> *Erie R. R. Co. v. Ramsey*, 57 Barb. 449; *Tuents v. Gaines*, 1 Wood, 112; *Redd v. Blandford*, 54 Ga. 123.

<sup>5</sup> *Baseye v. Beard*, 12 B. Mon. 581; *Platt v. Woodruff*, 61 N. Y. 373; *Ely v. Lowenstein*, 9 Abb. Pr., N. S., 37; *Conover v. Mayor*, 25 Barb. 531.

<sup>6</sup> U. S. Rev. Stats., sec. 720; *Phelan v. Smith*, 8 Cal. 520; *United States v. Keokuk*, 6 Wall. 514; *Bryan v. Hickson*, 40 Ga. 405; *Dial v. Reynolds*, 96 U. S. 340; *Moore v. Holliday*, 4 Dill. 52.

<sup>1</sup> Com. 615; E. 357.

<sup>2</sup> Bro. mission. Rep. 32.

S. 575; Mich. 2.

203; W. 496; Lon. 109; Ta. 49 Ala.

Ill. 77; C. 299.

<sup>3</sup> Savin 415; Ban. v. Kennis v. Davis,

"he who seeks equity must do equity," so that where a defendant seeks to restrain an action at law upon a usurious contract, he must first offer to pay what he legally owes on the transaction.<sup>1</sup> And the collection of a tax will not be enjoined, where a portion of it is just and lawful, until there is a payment or tender of the portion justly due and payable.<sup>2</sup> But where the tax would throw a cloud upon the title of the complainant, or where there would be irreparable injury, owing to a want of legal remedy, or in case of fraud or mistake, or where the enforcement of the tax would lead to a multiplicity of suits, an injunction will be granted.<sup>3</sup> Though where the objection to the validity of the tax is manifest upon the record, and the purchaser at a sale for unpaid taxes has not even a *prima facie* title, there is an adequate remedy at law, and an injunction will be refused.<sup>4</sup> But if the tax is in fact unlawful and the proceedings void, though the tax deed may be *prima facie* evidence of the regularity of the proceedings, an injunction will be granted to remove the cloud upon the title.<sup>5</sup> Where taxes have been levied upon property which is exempt from taxation, either under general statutory provisions, or under a special statute exempting corporation lands from taxation for a limited period, an injunction will be granted restraining the collection of such taxes.<sup>6</sup>

<sup>1</sup> Comstock v. Johnson, 46 N. Y. 615; Edgerton v. Peckham, 11 Paige, 357.

<sup>2</sup> Brown v. Huron, 59 Ind. 61; Commissioners v. Elston, 32 Ind. 27; 2 Am. Rep. 327; Railroad Tax Cases, 92 U. S. 575; Pillsbury v. Humphrey, 26 Mich. 245; Overall v. Ruenzi, 67 Mo. 203; Worthen v. Badgett, 32 Ark. 496; London v. Wilmington, 78 N. C. 109; Tallassee Mfg. Co. v. Spigener, 49 Ala. 262; Swinney v. Beard, 71 Ill. 77; Osborn Co. v. Blake, 19 Kan. 299.

<sup>3</sup> Savings etc. Soc. v. Austin, 46 Cal. 415; Bank v. Cook, 77 Ill. 642; Tucker v. Kenniston, 47 N. H. 267; Barrow v. Davis, 46 Mo. 394; Siegel v. Super-

visors, 26 Wis. 70; Tilton v. R. R. Co., 3 Saw. 22; Clarke v. Ganz, 21 Minn. 387.

<sup>4</sup> Bucknall v. Story, 36 Cal. 67; Bouton v. Brooklyn, 15 Barb. 393; Curtis v. East Saginaw, 35 Mich. 508; Minturn v. Smith, 3 Saw. 142.

<sup>5</sup> Johnson v. Milwaukee, 40 Wis. 315; Jenkins v. Rock County, 15 Wis. 11; Fowler v. St. Joseph, 37 Mo. 228; Mobile and Girard R. R. Co. v. Peebles, 47 Ala. 317; Palmer v. Rich, 12 Mich. 414; Greedup v. Franklin Co., 30 Ark. 107.

<sup>6</sup> Mobile & O. R. R. Co. v. Moseley, 52 Miss. 127; Railway Co. v. McShane, 22 Wall. 444; Marquette etc. R. R. Co. v. Marquette, 35 Mich. 504.

§ 3702. **Judgments.**—A fraudulent or void judgment will be set aside in equity, and the execution of such a judgment will be restrained by injunction, where its enforcement would give the execution creditor an unfair advantage, resulting from accident, mistake, or fraud, and not from his own negligence.<sup>1</sup> But it must appear that the execution of the judgment would be against conscience, and that the person aggrieved could not avail himself at law of the equities invoked, or that he was prevented from so doing by fraud, accident, mistake, or surprise, and be free from laches on his part.<sup>2</sup> And the application must show that the judgment is contrary to equity and good conscience, that the applicant has a good defense on the merits, and that he has used due diligence in availing himself of his legal defenses.<sup>3</sup> Where a mistake or miscalculation of a jury is discovered after the time allowed by law for making a motion for a new trial has expired, and which, if discovered in time, would have been a good ground for a new trial, an injunction will be granted restraining the execution of the judgment.<sup>4</sup> But an injunction will not be granted where it was owing to his own negligence that the complainant has failed to obtain justice, or where the newly discovered evidence would not be ground for changing the result, in the event of a new trial being granted.<sup>5</sup> Inasmuch as the legal presumption is in favor of judgments and executions, where application is made to restrain their enforcement, it must be clearly shown wherein their want of equity or fairness exists, and

<sup>1</sup> *Jones v. Bank*, 5 How. (Miss.) 43; 35 Am. Dec. 419; *Mallory v. Norton*, 21 Barb. 424; *Chambers v. Bridge Mfg. Co.*, 16 Kan. 270; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Stanton v. Embry*, 46 Conn. 595.

<sup>2</sup> *Fowler v. Lee*, 10 Gill & J. 358; 32 Am. Dec. 172; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Wingate v. Haywood*, 40 N. H. 437; *McCauley v. State*, 21 Md. 569.

<sup>3</sup> *Womack v. Powers*, 50 Ala. 5; *Slack v. Wood*, 9 Gratt. 40; *Savage v.*

*Allen*, 54 N. Y. 458; *Gregory v. Ford*, 14 Cal. 142; *Hazeltine v. Reusch*, 51 Mo. 50.

<sup>4</sup> *Brown v. Luchers*, 79 Ill. 575; *Baltzell v. Randolph*, 9 Fla. 366; *Rust v. Ware*, 6 Gratt. 50; *Ferrell v. Allen*, 5 W. Va. 43.

<sup>5</sup> *Holmes v. Stateler*, 57 Ill. 209; *Hill v. Harris*, 51 Ga. 628; *Newman v. Morris*, 52 Miss. 402; *Crim v. Handley*, 94 U. S. 652; *Ludington v. Handley*, 7 W. Va. 269.

<sup>1</sup> *Jones*  
etc. R.  
<sup>2</sup> *Poin*  
*McFarl*  
*Harly*  
*v. Righ*  
*Sutherl*  
*hard, 11*  
*ring, 49*  
<sup>3</sup> *Perr*  
*Buie v. C*

the facts must be sworn to positively.<sup>1</sup> Where the property of one person is being sold under an execution against another, the sale will be restrained, notwithstanding the existence of a remedy at law, as in such a case the jurisdiction is exercised to preserve the property in specie, the legal remedy of damages or in replevin being inadequate or uncertain.<sup>2</sup> Injunctions have been frequently granted to enjoin attempts at enforcing judgments which have been fully paid, but of which satisfaction has not been entered of record, or which have been partly paid, and execution is issued for the full amount.<sup>3</sup> But the decisions are not harmonious on the point, and the injunction is sometimes denied, particularly where the remedy at law is ample, or no equitable reason is advanced why the judgment should not be enforced.<sup>4</sup> The writ, when granted, operates, as in other cases, only *in personam*, and does not affect the lien of the judgment or impair an execution which has been levied.<sup>5</sup> Where the judgment sought to be enjoined has been obtained upon a contract founded upon a gambling transaction, an additional reason exists in favor of the exercise of the jurisdiction; but still the court will generally manifest a reluctance to deviate from the rule requiring the defense to have been first raised in the action at law.<sup>6</sup> Unless a creditor has obtained a judgment for his claim which is a lien on the debtor's property, an injunction will not, as a rule, be granted to restrain the debtor from disposing of such property, and therefore a foreign judgment, as such, will not be enjoined, even though the parties reside in the

<sup>1</sup> Jones v. Thatcher, 48 Ga. 83; N. Y. etc. R. R. Co. v. Haws, 56 N. Y. 175.

<sup>2</sup> Poincey v. Burke, 28 La. Ann. 673; McFarland v. Dilly, 5 W. Va. 135; Harly v. Broadus, 35 Tex. 668; Ford v. Rigby, 10 Cal. 449; Watson v. Sutherland, 5 Wall. 74; Baker v. Rinehard, 11 W. Va. 238; Ferguson v. Herring, 49 Tex. 126.

<sup>3</sup> Perry v. Kearney, 14 La. Ann. 400; Buie v. Crouch, 37 Tex. 53.

<sup>4</sup> Foster v. Wood, 6 Johns. Ch. 87; Crandall v. Bacon, 20 Wis. 629; Sauer v. Kansas City, 69 Mo. 46; Stuart v. Supers, 83 Ill. 341.

<sup>5</sup> St. Louis etc. Co. v. Todd, 40 Ill. 89; Knox v. Randall, 24 Minn. 479; Miller v. Estell, 8 Yerg. 452.

<sup>6</sup> Giddens v. Lea, 3 Humph. 133; White v. Washington, 5 Gratt. 645.

state where the injunction is applied for, until reduced to a judgment of a court of that state, and thereby rendered a lien on the land in question.<sup>1</sup>

§ 3703. **Violation.**—The party against whom a writ of injunction is issued, and upon whom it is served, or who has sufficient notice of it, must implicitly conform to its requirements. He has no right to ignore it on the ground of any irregularities in obtaining it, or for what he may consider or may be advised are weaknesses in the showing upon which it was granted; these being all matters to be disposed of by the court when properly brought before it.<sup>2</sup> Where, however, the court, from which the injunction issued, had no jurisdiction in the premises, the defendant would be justified in refusing to comply with the writ, as under such circumstances it would be absolutely void, and liable to either direct or collateral attack.<sup>3</sup> However *bona fide* the motives of the defendant may be which actuated him in his disobedience, or whether he acts in an honest mistake of his rights, or under the advice of counsel, it will not exonerate him from the contempt of court committed by his disobedience of the writ.<sup>4</sup> But the grounds of the defendant's conduct in disregarding the injunction, and also the fact of its having been erroneously issued, will be taken into account in fixing the punishment for the contempt; and the court sometimes refuses to take other action than that of requiring the payment of costs.<sup>5</sup> In order to render the defendant liable on the injunction, it is not absolutely necessary that he should be actually served with the injunction. If he has knowledge or

<sup>1</sup> Mayer v. Wood, 56 Ga. 427; Buchanan v. Marsh, 17 Iowa, 494; Holdrege v. Gwynne, 18 N. J. Eq. 26; Bigelow v. Andress, 31 Ill. 322.

<sup>2</sup> Mayor v. New York etc. Co., 64 N. Y. 623; Rogers Mfg. Co. v. Rogers, 38 Conn. 121; Richards v. West, 3 N. J. Eq. 456.

<sup>3</sup> Dickey v. Reed, 78 Ill. 261; Brewer v. Kidd, 23 Mich. 440; People v. Sturtevant, 9 N. Y. 263.

<sup>4</sup> Mead v. Norris, 21 Wis. 310; Lansing v. Easton, 7 Paige, 364; McKillopp v. Taylor, 25 N. J. Eq. 139.

<sup>5</sup> Erie Co. v. Ramsey, 45 N. Y. 637; Watson v. Bank, 5 S. C. 159.

notice of it, he is as much bound by it as he would be by a formal service of it.<sup>1</sup> And the general rule is, that where the act charged as contempt is one which could not in any way injure the plaintiff, it will not be regarded as a breach of the writ;<sup>2</sup> and the writ does not usually bind persons not actually mentioned in it; as where it restrains a person and his servants or agents, his tenants are not included.<sup>3</sup> A strict compliance with the spirit of the mandate is required, and no mere subterfuge or frivolous excuse will be permitted in excuse of its violation.<sup>4</sup> In case of the party enjoined refusing to comply with the injunction, the remedy is by proceeding to have him punished for contempt of court, when the only question to be determined is the fact of the violation, the merits of the case having been decided when the injunction was granted.<sup>5</sup> And it is a proper punishment to require a party who has violated an injunction to pay the actual damages which have been sustained by the plaintiff by reason of such violation, with the costs of the proceedings for contempt.<sup>6</sup> The punishment is not confined to individuals. A corporation may be punished for violating an injunction.<sup>7</sup> Where an attachment for contempt of court in violating an injunction is applied for, it is necessary to show the making of the order for the injunction, the service or notice, and the breach of the order.<sup>8</sup> Unless the violation is very gross and flagrant, the practice is to apply in the first instance for an order to show cause, and on the hearing thereof, if the defendant claims that the violation was unintentional, and promises not to

<sup>1</sup> *Howe v. Willard*, 40 Vt. 654; *Sickles v. Borden*, 4 Blatch. 14; *Pocketner v. Russell*, 33 Wis. 193; *Hull v. Thomas*, 3 Edw. Ch. 236.

<sup>2</sup> *Hudson v. Plets*, 11 Paige, 180.  
<sup>3</sup> *In Re South Side R. R. Co.*, 10 Bank Reg. 274.

<sup>4</sup> *Morris v. Hill*, 28 N. J. Eq. 33; *Mayor v. New York and S. I. F. Co.*, 64 N. Y. 623; *Craig v. Fisher*, 2 Saw. 345; *Safford v. People*, 85 Ill. 558.

<sup>5</sup> *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *People v. Spaulding*, 2 Paige, 326.

<sup>6</sup> *Chapel v. Hull*, 60 Mich. 167; *Thweatt v. Gammell*, 56 Ga. 98.

<sup>7</sup> *Golden Gate C. H. M. Co. v. Superior Court*, 65 Cal. 187.

<sup>8</sup> *State v. Gilpin*, 1 Del. Ch. 25; *State v. Myers*, 44 Iowa, 580; *State v. Cutler*, 13 Kan. 131; *Whipple v. Hutchinson*, 4 Blatch. 190.

again commit the act complained of, the court will render judgment on the defendant's duty in the premises and discharge the rule.<sup>1</sup> Where defendant sets up that he was ignorant of his duty when he committed the act, and that after taking the opinion of his counsel on the question he discontinued it, or where he comes promptly into court, and tenders a full explanation of his action, the court may consider his conduct as in mitigation of his offense, and will frequently not visit upon him a more severe punishment than payment of the costs of the proceedings.<sup>2</sup> But where there are no circumstances of mitigation in the case, the offense may be punished by fine or imprisonment, or both, and the payment of costs, and counsel's fees will be superadded.<sup>3</sup>

**§ 3704. Practice.**—This is generally regulated by statute in the various states. The general rule is, that an injunction, particularly as an independent remedy, will not be granted, except on the filing of a complaint or petition setting forth with circumstance and detail the grounds on which the injunction is asked, and which must constitute a cause of relief in equity, and be verified absolutely, and not on information and belief; or if not so verified, the facts stated in the complaint or petition must be embodied in affidavits by such persons as can depose positively thereto.<sup>4</sup> The verification by a corporation must be by some officer conversant with the facts.<sup>5</sup> The verification must be so worded that perjury will lie on it if untrue.<sup>6</sup> But where the only injunction asked for is final,

<sup>1</sup> Longwood etc. Co. v. Baker, 27 N. J. Eq. 166.

<sup>2</sup> State v. Eddy, 2 Del. Ch. 269; Bradford v. Peckham, 9 R. I. 250.

<sup>3</sup> Doubleday v. Sherman, 8 Blatchf. Mich. 189.

<sup>4</sup> Bank v. Skinner, 9 Paige, 305; Campbell v. Morrison, 7 Paige, 157; Gaertner v. Fond du Lac, 34 Wis. 497; Faison v. McIlwaine, 72 N. C. 312; Youngblood v. Schamp, 15 N. J. Eq. 42; Ballard v. Eckman, 20 Fla. 661; Mayor v. Finney, 54 Ga. 317; Long v. Kasebeer, 28 Kan. 226.

<sup>5</sup> Bank v. Skinner, 9 Paige, 305; Manistique L. Co. v. Lovejoy, 55 Mich. 189.

<sup>6</sup> Elder v. City of New Orleans, 31 La. Ann. 500; Sauvinet v. Ponpono, 14 La. 87; Catlett v. McDonald, 13 La. 44; Renul's Heirs v. Behreus, 5 La. 79; Hone v. Moody, 59 Ga. 731; Landes v. Globe P. M. Co., 73 Ga. 176.

and no interlocutory one is sought, the complaint need not be verified at all.<sup>1</sup> Though, as a rule, an information in equity filed by the attorney-general of a state need not be verified, yet where an injunction is prayed for, such information or complaint must be duly verified or supported by affidavit.<sup>2</sup> Where the right to the injunction claimed is based on documentary evidence, the documents should be properly exhibited to the bill, notwithstanding it is duly verified.<sup>3</sup> The prayer for general relief is not sufficient to support an injunction, but the bill must contain an express prayer; and the bill is demurrable unless the injunction is asked for both in the prayer for relief and for process.<sup>4</sup> It is usual to grant interlocutory injunctions on the bill alone before issue of process, but a motion for injunction may be made at any time before final decree.<sup>5</sup> On motion for interlocutory injunction, the plaintiff is entitled to read affidavits in support of his bill, but not to enlarge its scope.<sup>6</sup> Where the motion is made upon notice to the defendant, he is entitled to read affidavits in opposition, and the answer of one of several defendants may be read as an affidavit to contradict the case set up in the bill.<sup>7</sup> Whether a defendant is entitled to notice is a question dependent upon statutory regulation, and varies in the different states. In the federal courts notice is not now necessary.<sup>8</sup> But when it is given, the plaintiff is not entitled to fix it so far ahead as to

<sup>1</sup> *Rich v. Dessar*, 50 Ind. 309.

<sup>2</sup> *Attorney-General v. Eau Claire*, 37 Wis. 400; *Attorney-General v. R. R. Co.*, 35 Wis. 593.

<sup>3</sup> *Parsons v. Wilkerson*, 10 Mo. 713; *Nusbaum v. Stein*, 12 Md. 315.

<sup>4</sup> *Thompson v. Maxwell*, 16 Fla. 773; *African M. E. Church v. Conover*, 27 N. J. Eq. 157; *Lewiston F. M. Co. v. Franklin Co.*, 54 Me. 402; *College C. & R. G. R. Co. v. Moss*, 77 Ind. 139; *Jefferson v. Hamilton*, 69 Ga. 401.

<sup>5</sup> *Jones v. Magill*, 1 Bland, 177; *Warren R. R. Co. v. Clarion Co.*, 54 Pa. St. 23; *Krone v. Krone*, 27 Md.

77; *Hall v. McPherson*, 3 Bland, 529; *Wellman v. Harker*, 3 Or. 253; *New Jersey Z. Co. v. Franklin I. Co.*, 29 N. J. Eq. 422.

<sup>6</sup> *Leo v. Union Pacific R. R. Co.*, 17 Fed. Rep. 273; *United States v. Parrott*, McAll. 271.

<sup>7</sup> *Seneca Falls v. Matthews*, 9 Paige, 504; *Shreeve v. Black*, 4 N. J. Eq. 177; *Baker v. Taylor*, 2 Blatchf. 82; *Stoddard v. Van Laningham*, 14 Kan. 18.

<sup>8</sup> U. S. Rev. Stats., sec. 718; *Yuengling v. Johnson*, 1 Hughes, 607.



prejudice the defendant, who may come in and have the matter disposed of promptly.<sup>1</sup>

It is regarded as the better practice, however, to give notice, except where so doing would cause irreparable injury to the plaintiff's rights.<sup>2</sup> The particular circumstances of each case will of course give rise to corresponding variations in the writ with regard to the subject-matter of the injunction and the parties against whom it is directed, but it should contain a precise description of the particular acts or things enjoined.<sup>3</sup> And it must not exceed the relief prayed for in the bill, or it may be set aside.<sup>4</sup> A preliminary injunction may be granted at any time, whether in term or vacation, and independently of statute; a court of equity has inherent power to issue an injunction, even on Sunday, where necessary for the prevention of irreparable injury.<sup>5</sup> Where the motion has been denied, it may be repeated any number of times up to final hearing of the suit, on the discovery of new matter since the last refusal.<sup>6</sup> When a bill for an injunction has been reported by the master as scandalous, it will not support a motion for injunction until amended.<sup>7</sup> Where it is apparent to the court that there is an important question to be disposed of at the hearing, the injunction will, on motion, be continued until then.<sup>8</sup> A bill for an injunction may be amended even after motion to dissolve, and if, after such amendment, it shows good grounds for so doing, the injunction will be continued to the hearing.<sup>9</sup> But the power of amendment should be exercised spar-

<sup>1</sup> *Walworth v. Board of Supervisors*, 5 Biss. 133.

<sup>2</sup> *Androvette v. Browne*, 4 Abb. Pr. 440; *Atchison etc. R. R. Co. v. Fletcher*, 35 Kan. 236; *Swepton v. Call*, 13 Fla. 337; *Lewton v. Hower*, 18 Fla. 872; *Buckley v. Corse*, 1 N. J. Eq. 504.

<sup>3</sup> *Summers v. Farish*, 10 Cal. 347; *Whipple v. Hutchinson*, 4 Blatchf. 190.

<sup>4</sup> *Leitham v. Cusick*, 1 Utah, 242.

<sup>5</sup> *Langabier v. R. R. Co.*, 64 Ill. 243; 16 Am. Rep. 550.

<sup>6</sup> *Halcombe v. Commissioners*, 89 N. C. 340; *Blizzard v. Nosworthy*, 50 Ga. 514.

<sup>7</sup> *Davenport v. Davenport*, 6 Madd. 251.

<sup>8</sup> *Donnell v. Church*, 4 Ired. Eq. 630; *Manhattan M. & F. Co. v. Van Keuren*, 23 N. J. Eq. 251.

<sup>9</sup> *Sweatt v. Faville*, 23 Iowa, 321; *Crawford v. Paine*, 19 Iowa, 172.

ingly and with caution, and amendments allowed only when the interests of justice manifestly require it.<sup>1</sup> Where the proposed amendments relate to matters existing when the bill was filed, it may be amended accordingly, by leave, without prejudice to an existing injunction.<sup>2</sup> But material allegations cannot be expunged by amendment, which must be confined to the addition of explanatory and supplemental matter.<sup>3</sup> Where the amendments go so far as to transform the bill into a new one praying for a new injunction, the court may dissolve an injunction granted on the original bill.<sup>4</sup> When an amended bill prays for an injunction, which the original bill did not, the defendant is entitled to reasonable notice to show cause why an injunction should not be granted.<sup>5</sup> A motion to dissolve an interlocutory injunction is usually made at the time of filing the answer, but if the injunction was granted *ex parte*, a motion to dissolve it will be heard at any time for want of equity in the bill.<sup>6</sup> And the motion need not be made to the same judge who allowed the writ.<sup>7</sup> Even where the statutory power exists of dissolving an injunction without notice, it should not be done except in cases of extreme urgency.<sup>8</sup> An answer filed after notice of motion to dissolve cannot be read in support of the motion.<sup>9</sup> Nor, as a general rule, is a plaintiff permitted to file further affidavits in opposition to a motion to dissolve made on the coming in of the answer.<sup>10</sup> Except that where a dissolution would alter the *status* of

<sup>1</sup> *Calderwood v. Trent*, 9 Rob. (La.) 227; *Jackson & S. Co. v. R. R. Co.*, 3 Del. Ch. 512.

<sup>2</sup> *Walker v. Walker*, 3 Ga. 302; *Selden v. Vermilya*, 4 Sand. Ch. 573.

<sup>3</sup> *Carey v. Smith*, 11 Ga. 539.

<sup>4</sup> *Des Moines R. R. Co. v. Carpenter*, 27 Iowa, 487.

<sup>5</sup> *Keller v. The Jack Mfg. Co.*, 55 Ga. 639.

<sup>6</sup> *Murwin v. Smith*, 2 N. J. Eq. 182; *Receivers v. Biddle*, 4 N. J. Eq. 222; *Harris v. Sangston*, 4 Md. Ch. 394.

<sup>7</sup> *Woodruff v. Fisher*, 17 Barb. 224.

<sup>8</sup> *O'Conner v. Starke*, 59 Miss. 481; *Hiller v. Cotten*, 54 Miss. 551; *Newton Mfg. Co. v. White*, 47 Ga. 400; *Peck v. Yorks*, 41 Barb. 547; *Florence v. Paschal*, 48 Ala. 458.

<sup>9</sup> *Cattell v. Nelson*, 7 N. J. Eq. 122.

<sup>10</sup> *Roberts v. Anderson*, 2 Johns. Ch. 202; *Eastburn v. Kirk*, 1 Johns. Ch. 444; *Moredock v. Williams*, 1 Over. 325; *Howell v. Robb*, 7 N. J. Eq. 17; *Gentry v. Hamilton*, 3 Fred. Eq. 376. But see *Poor v. Carlton*, 3 Sum. 70; and *Naylor v. Wellington*, 8 Sim. 396.

the parties or irreparable mischief would ensue from the delay, the rule may be modified.<sup>1</sup> The motion to dissolve must be based upon the answer, and *ex parte* affidavits cannot be substituted for it.<sup>2</sup>

In cases of special injunctions for the prevention of irreparable injuries, the bill may, on motion to dissolve, be read in contradiction to the answer, and if the equity appears doubtful, the motion will be denied.<sup>3</sup> New matter not responsive to the bill will not be considered on motion to dissolve, unless defendant relies on it, when plaintiff may contradict it by further affidavits.<sup>4</sup> Death does not dissolve an injunction; and where plaintiff dies, motion should be made calling upon his personal representative to show cause why the suit should not be revived or the injunction dissolved;<sup>5</sup> and a similar practice obtains in case of the death of a defendant.<sup>6</sup> A motion to dissolve will not be continued except for the weightiest reasons;<sup>7</sup> and an injunction will be dissolved if the sworn answer denies positively the equities of the bill.<sup>8</sup> An objection on the ground of multifariousness is premature on motion to dissolve, but misjoinder of parties may be taken advantage of on such a motion.<sup>9</sup> A defective verification cannot be amended on the hearing of the motion to dissolve, but the omission of the officer to sign the jurat may be rectified.<sup>10</sup> A stranger to the suit, whose rights are affected by

<sup>1</sup> *Barnard v. Davis*, 54 Ala. 565; *Davis's Ex'rs v. Fulton*, 1 Over. 121.

<sup>2</sup> *Sacket v. Hill*, 2 Mich. 182; *Bradford v. Peckham*, 9 R. I. 250; *Hoffman v. Livingston*, 1 Johns. Ch. 211.

<sup>3</sup> *Troy v. Norment*, 2 Jones Eq. 318; *Purnell v. Daniel*, 8 Ired. Eq. 9; *Lloyd v. Heath*, Busb. Eq. 39; *Brooks v. Bicknell*, 3 McLean, 250.

<sup>4</sup> *Merwin v. Smith*, 2 N. J. Eq. 182; *Kinsler v. Clarke*, 2 Hill Eq. (S. C.) 617; *Carroll v. Farmers' Bank*, Harr. (Mich.) 197.

<sup>5</sup> *Carter v. Washington*, 1 Hen. & M. 203; *Jackson v. Arnold*, 4 Rand. 195; *Hawley v. Bennett*, 4 Paige, 163; *Walsh v. Smyth*, 3 Bland, 9; *Griffith*

*v. Bronaugh*, 1 Bland, 547; *Collier v. Bank of Newbern*, 1 Dev. & B. Eq. 328; *Hill v. Jones*, 1 Murph. 211.

<sup>6</sup> *Dennis v. Green*, 8 Ga. 197; *Cummins v. Cummins*, 8 N. J. Eq. 173; *White v. Fitzhugh*, 1 Hen. & M. 1.

<sup>7</sup> *Pithole P. C. Co. v. Rittenhouse*, 12 W. Va. 313; *Horn v. Perry*, 11 W. Va. 694.

<sup>8</sup> *Lockhart v. City of Troy*, 48 Ala. 579; *Manchester v. Dey*, 6 Paige, 295.

<sup>9</sup> *Shirley v. Long*, 6 Rand. 764; *Hudson v. Maddison*, 12 Sim. 416.

<sup>10</sup> *Perkins v. Collins*, 3 N. J. Eq. 482; *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467.

the injunction, may apply to have it modified so as not to interfere with his rights.<sup>1</sup> A bond with sufficient sureties is usually required to be given by the plaintiff to indemnify the defendant against damage which may be occasioned by the injunction, if improperly granted, and where such a bond is required by statute, it cannot be dispensed with by the court;<sup>2</sup> but the bond is governed by the statute in force at the time of its execution, and not by one coming into operation subsequently thereto.<sup>3</sup> In the absence of statutory regulations as to the bond, the court prescribes its conditions, and where the plaintiff is unsuccessful, he is liable for all damages sustained;<sup>4</sup> but the plaintiff will not be prevented from obtaining a perpetual injunction or final hearing by reason of his failure to give the bond required on a preliminary injunction.<sup>5</sup> Insufficiency of the bond is not a ground for dissolution of the injunction, and where the writ is properly granted in other respects, it will not be set aside on that ground, unless the plaintiff neglects to furnish a sufficient bond, after order duly made requiring him to do so.<sup>6</sup> Where the conditions are prescribed by statute, anything in excess of them is regarded as surplusage, and rejected.<sup>7</sup> Where an injunction is granted "on the usual terms," it is understood that a bond as prescribed by law is to be given, and the obligors are estopped from denying that the bond is in conformity with the directions of the judge who granted the injunction.<sup>8</sup> It is not indispensable that any particular sum should be mentioned in the bond, it being given to indemnify against all damages sustained,<sup>9</sup> but where the bond is directed to be in a given

<sup>1</sup> *Speak v. Ransom*, 2 Tenn. Ch. 210.

<sup>2</sup> *Miller v. Parker*, 73 N. C. 58.

<sup>3</sup> *Mix v. Vail*, 83 Ill. 40.

<sup>4</sup> *Foster v. Shephard*, 33 Tex. 687; *Newell v. Partee*, 10 Humph. 325.

<sup>5</sup> *Harrison v. Board of Supervisors*, 51 Wis. 645.

<sup>6</sup> *Beauchamp v. Supervisors*, 45 Ill. 274; *Drake v. Phillips*, 40 Ill. 388;

*Crawford v. Paine*, 19 Iowa, 172; *Chesapeake etc. R. R. Co. v. Patton*, 5 W. Va. 234; *Woolfolk v. Woolfolk*, 22 La. Ann. 206.

<sup>7</sup> *Menken v. Frank*, 57 Miss. 732; *Holliday's Executors v. Myers*, 11 W. Va. 276.

<sup>8</sup> *Harman v. Howe*, 27 Gratt. 676.

<sup>9</sup> *North Carolina G. A. Co. v. North Carolina O. D. Co.*, 79 N. C. 48.

sum, defendants are limited to the amount of the penalty.<sup>1</sup> Where the sureties do not join the principal in an appeal from a judgment awarding damages on the dissolution of an injunction, the validity of the bond cannot be questioned in the higher court.<sup>2</sup>

The rules and methods for the enforcement of the obligations of sureties on injunction bonds are similar to those relating to sureties on other bonds, except that in doubtful cases a construction will be put upon the bond more favorable to the obliger than would be done in other cases.<sup>3</sup> The liability of the surety, being within the statute of frauds, is to be strictly construed, and parol evidence is not admissible to add to, vary, or contradict it.<sup>4</sup> The sureties are bound by the decree in the injunction suit, and cannot by any means attack its validity.<sup>5</sup> An action at law is the usual means of enforcing the sureties' liability.<sup>6</sup> And in New York they are bound by an assessment of damages made on a reference of which they had no knowledge, unless such assessment was obtained by fraud.<sup>7</sup> But in Louisiana the sureties are regarded as parties to the injunction suit itself, and damages may be awarded against them in that suit without any new action.<sup>8</sup> Though elsewhere the sureties, not being regarded as parties, have no right to appeal from the decision, and until sued on the bond have no such interest in the original suit as entitles them to prosecute an appeal.<sup>9</sup> It is now held that the defendant in an injunction suit

<sup>1</sup> *Glover v. McGaffey*, 56 Vt. 294.

<sup>2</sup> *Gibson v. O'Connell*, 30 Tex. 684.

<sup>3</sup> *Ovington v. Smith*, 78 Ill. 250; *Anderson v. Falconer*, 34 Miss. 257; *Webber v. Wilcox*, 45 Cal. 301; *Tarpey v. Shillenberger*, 10 Cal. 390; *Hall v. Williamson's Adm'r*, 9 Ohio St. 17; *Cummings v. Mugge*, 94 Ill. 186; *Dunn v. Davis*, 37 Ala. 95.

<sup>4</sup> *Williamson's Adm'r v. Hall*, 1 Ohio St. 190.

<sup>5</sup> *Oelrichs v. Spain*, 15 Wall, 211;

*Towle v. Towle*, 46 N. H. 431; *McAlister v. Clark*, 86 Ill. 236.

<sup>6</sup> *Clayton v. Martin*, 31 Ark. 217; *Hughes v. Hughes's Adm'r*, 4 B. Mon. 43.

<sup>7</sup> *Poillon v. Volkenning*, 11 Hun, 385; *Jordan v. Volkenning*, 72 N. Y. 300; *Methodist Churches v. Barker*, 18 N. Y. 463.

<sup>8</sup> *Mora v. Avery*, 22 La. Ann. 417; *Frantz v. Waggaman*, 28 La. Ann. 514.

<sup>9</sup> *St. Louis Zinc Co. v. Hesselmeyer*, 50 Mo. 180.

has a common-law right of action to recover damages for having been improperly enjoined, in addition to his remedy upon the bond.<sup>1</sup> The right of action on the bond accrues immediately on failure to comply with its conditions;<sup>2</sup> but it is held that there must be a final determination of the cause in which the injunction issued, and that the dissolution of an injunction before that period does not of itself authorize an action on the bond.<sup>3</sup> And no action can be maintained during the pendency of an appeal from a decree dismissing the suit.<sup>4</sup>

Where the plaintiff voluntarily dismisses his suit after obtaining a preliminary injunction, the defendant's right of action on the bond accrues at once;<sup>5</sup> but no action will lie on the bond until the injunction is actually in force;<sup>6</sup> nor where the injunction suit is discontinued by agreement of the parties.<sup>7</sup> The merits of the injunction suit cannot be inquired into in an action on the bond after dissolution;<sup>8</sup> but an action may be maintained upon the bond, notwithstanding that the bill for an injunction was dismissed for want of prosecution;<sup>9</sup> and demand of payment is not necessary before bringing suit.<sup>10</sup> In an action on the bond, the question whether the plaintiffs obeyed or disobeyed the writ is immaterial, as that is a matter to be dealt with in the injunction suit.<sup>11</sup> The modes of ascertaining the damages accrued on an injunction bond are generally regulated by statutes and rules of practice in

<sup>1</sup> *Mitchell v. R. R. Co.*, 75 Ga. 398; *Manlove v. Vick*, 55 Miss. 567; *Girton v. Brown*, 27 Ill. 489; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Hayden v. Keith*, 32 Minn. 277.

<sup>2</sup> *Sizer v. Anthony*, 22 Ark. 465; *Dougherty v. Dore*, 63 Cal. 170.

<sup>3</sup> *Penny v. Holberg*, 53 Miss. 567; *Gray v. Veirs*, 33 Md. 159; *Thompson v. McNair*, 64 N. C. 448.

<sup>4</sup> *Cohn v. Lehman*, 93 Mo. 574; *Shackelford v. Smith*, 61 Miss. 5.

<sup>5</sup> *Mitchell v. Sullivan*, 30 Kan. 231; *Swan v. Timmons*, 81 Ind. 243; *Fac. Mail S. Co. v. Joel*, 85 N. Y. 646;

*Richardson v. Allen*, 74 Ga. 719; *Pugh's Adm'r v. White*, 78 Ky. 210.

<sup>6</sup> *McCoun v. Delany*, 2 Bibb, 440; *Eckle v. Smith*, 27 Md. 467.

<sup>7</sup> *Palmer v. Foley*, 71 N. Y. 106.

<sup>8</sup> *Sipe v. Holliday*, 62 Ind. 4; *Hughes's Adm'r v. Wickliffe*, 11 B. Mon. 202. But see *Burnett v. Nicholson*, 79 N. C. 548; *Smith v. Kuhl*, 26 N. J. Eq. 97; *Boden v. Dill*, 58 Ind. 273.

<sup>9</sup> *Kimm v. Steketee*, 44 Mich. 527.

<sup>10</sup> *Rosendorf v. Mandel*, 18 Nev. 129.

<sup>11</sup> *Colcord v. Sylvester*, 66 Ill. 540.

the various states. The weight of authority is against the assessment thereof by a court of equity, in the exercise of its general jurisdiction, without the aid of statutory powers.<sup>1</sup> And where a final injunction is reversed on appeal, there having been no interlocutory injunction, no damages are assessable by reason of the granting of such injunction.<sup>2</sup> In New York, damages are assessed by reference in the original cause, as a matter of course, but there must be a final decision in the injunction suit before the order of reference will be made,<sup>3</sup> and the practice is the same in Wisconsin and South Carolina.<sup>4</sup> In California a separate action must be brought upon the bond, and the cause of action does not accrue until the final determination of the injunction suit.<sup>5</sup> But a ruling against plaintiff on demurrer to complaint, without amendment or further action, amounts to a final determination sufficient to sustain suit on the bond;<sup>6</sup> though the sureties on a bond conditioned to pay all damages awarded are not liable, unless it is alleged in the complaint that damages have been awarded.<sup>7</sup> And as the functions of a preliminary injunction cease when the final decree is made, damages accruing subsequently cannot be recovered, although the final decree be reversed on appeal.<sup>8</sup>

In Illinois there is a statutory provision that the defendant, upon dissolution of an injunction, may, before decree, present his claim for damages and have it passed upon in the injunction suit;<sup>9</sup> but the assessment is binding on the plaintiff only, and does not affect the sureties on the

<sup>1</sup> *Lawton v. Green*, 64 N. Y. 326; *Musgrave v. Sherwood*, 76 N. Y. 194.

<sup>2</sup> *Parish v. Reese*, 61 Wis. 315; *Hill v. Thomas*, 10 Cal. 30.

<sup>3</sup> *Dougherty v. Moore*, 63 Cal. 100; *Clark v. Clay*, 61 Cal. 634.

<sup>4</sup> *Bennett v. Gardini*, 63 Cal. 154.

<sup>5</sup> *Tarpey v. Shillenberger*, 10 Cal. 390.

<sup>6</sup> *Lambert v. Haskell*, 80 Cal. 612.

<sup>7</sup> *Wilson v. Haecker*, 85 Ill. 349; *Wing v. Dodge*, 80 Ill. 564; *Albright v. Smith*, 68 Ill. 181.

<sup>8</sup> *Jacobs v. Miller*, 11 Hun, 441; *Benedict v. Benedict*, 15 Hun, 305; *Waterbury v. Bouker*, 10 Hun, 262;

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bond.<sup>1</sup> Where an injunction against a judgment at law has been dissolved in Kentucky, the code of that state provides that the court may assess the damages and render judgment thereon in the injunction suit;<sup>2</sup> but this practice is applicable only to injunctions staying proceedings upon a judgment,<sup>3</sup> and is an exclusive, not a cumulative, remedy.<sup>4</sup> In Missouri the practice is for the court to enter judgment against the obligors for the damages occasioned by the injunction, and there can be no recovery upon the bond until such adjudication has been made;<sup>5</sup> but notice of motion to assess the damages at a subsequent term of court must be given when an interlocutory injunction has been dissolved upon final hearing.<sup>6</sup> In North Carolina, under the Code of Civil Procedure, the damages may be ascertained by a referee or otherwise, as the judge in the injunction suit shall direct.<sup>7</sup> And in Texas it seems that, upon proper pleadings in reconvention and proof, the defendant in the injunction suit may recover his damages in that suit for the wrongful issue of the writ of injunction, and that without serving citation upon the sureties.<sup>8</sup> The liability upon an injunction bond is limited to such damages as are caused by the injunction, by reason of its interference with the exercise of vested legal rights. Remote or consequential damages are not recoverable.<sup>9</sup>

Where the injunction restrained the collection of a judgment at law, damages are assessable only in respect of so much of the judgment as was then unpaid.<sup>10</sup> And

<sup>1</sup> *McWilliams v. Morgan*, 70 Ill. 551; *Alwood v. Mansfield*, 81 Ill. 314; *Darst v. Gale*, 83 Ill. 136; *Danville B. & T. Co. v. Parks*, 88 Ill. 170.

<sup>2</sup> *Logsdon v. Willis*, 14 Bush, 183.

<sup>3</sup> *Rankin v. Estes*, 13 Bush, 428.

<sup>4</sup> *Crawford v. Woodworth*, 9 Bush, 745. And in Louisiana a similar practice exists: *Crescent City Co. v. Larrieux*, 30 La. Ann. 740.

<sup>5</sup> *Dorriss v. Carter*, 67 Mo. 544.

<sup>6</sup> *Hoffelmann v. Franke*, 96 Mo. 533.

<sup>7</sup> *McKesson v. Hennessee*, 66 N. C. 473.

<sup>8</sup> *Coates v. Caldwell*, 71 Tex. 19; *Sharp v. Schmidt*, 62 Tex. 263.

<sup>9</sup> *Chicago City R. R. Co. v. Howison*, 86 Ill. 215; *Morgan v. Negley*, 53 Pa. St. 153; *Livingston v. Exum*, 19 S. C. 223; *Stewart v. State*, 20 Md. 97; *Bank of Monroe v. Gifford*, 70 Iowa, 580; *Burgen v. Sharer*, 14 B. Mon. 497; *Brown's Adm'r v. Tyler*, 34 Tex. 168.

<sup>10</sup> *Southerland v. Crawford*, 2 J. J. Marsh. 370; *Gist v. Maguire*, 4 Har. & J. 9; *Grundy v. Young*, 2 Crauch, 114.



where the payment of money has been enjoined, interest is recoverable up to the time of payment into court on the dissolution.<sup>1</sup> Where it is provided by statute that a percentage of the judgment enjoined shall be assessed as damages, the plaintiff in the injunction suit is liable for the percentage on a dissolution of the injunction.<sup>2</sup> When the dissolution is only partial, damages may be awarded as appertaining to the part dissolved.<sup>3</sup> Where damages are decreed upon the dissolution, no greater amount than the penalty of the bond can be awarded.<sup>4</sup> And where the bond is conditioned for the payment of such damages as the court may award, and the court, on dissolving the injunction, does not award any damages, it seems that the order of dissolution implies that the damages sustained must be paid.<sup>5</sup> Upon an injunction to an action at law on a promissory note being dissolved, the plaintiffs are entitled to their taxed costs incurred during the time they were delayed, both in the action at law and in the suit in equity, as damages in an action on the bond.<sup>6</sup> The amount of damages recoverable in an action on a bond given on an injunction restraining the exercise of acts of ownership over real property is such as are caused directly and necessarily by the injunction.<sup>7</sup> Though it is defendant's duty to mitigate plaintiff's damages, yet if they acted in good faith they will not be held liable for not having adopted a course which would have reduced plaintiff's loss.<sup>8</sup> Where the injunction was obtained by fraudulent suppression of the truth, upon dissolving such injunction it is the duty of the court to give the highest damages

<sup>1</sup> Wallis v. Dilley, 7 Md. 237.

<sup>2</sup> Claytor v. Anthony, 15 Gratt. 518; Martin v. Wade's Executors, 5 T. B. Mon. 77; Joslyn v. Dickerson, 71 Ill. 25; Camp v. Bryan, 84 Ill. 250; Roberts v. Fahs, 36 Ill. 268.

<sup>3</sup> Perry v. Kearney, 14 La. Ann. 400.

<sup>4</sup> Lawton v. Green, 64 N. Y. 326; Sturgis v. Knapp, 33 Vt. 486.

<sup>5</sup> Claytor v. Anthony, 15 Gratt. 518.

But see *contra*, Ashby v. Chambers, 3 Dana, 437.

<sup>6</sup> Derry Bank v. Heath, 45 N. H. 524.

<sup>7</sup> Banks v. State, 62 Md. 68; Alexander v. Colcord, 85 Ill. 323; Richardson v. Allen, 74 Ga. 719; Hosmer v. Campbell, 98 Ill. 572; Hill v. Hill, 59 Vt. 125; Hill v. Thomas, 19 S. C. 230.

<sup>8</sup> Roberts v. White, 73 N. Y. 375; Muller v. Fern, 35 Iowa, 420; Cumberland Co. v. Hoffman Co., 39 Barb. 16.

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allowed by law.<sup>1</sup> When the real party in interest has incurred damages and expenses by reason of an injunction having been granted restraining proceedings at law carried on in the name of a third party, on the dissolution of the injunction such third party may recover in his name such damages and expenses for the benefit of the real party in interest.<sup>2</sup> Counsel fees to a reasonable amount, incurred in procuring the dissolution of the injunction, may be included in the assessment of damages, or recovered in an action on the bond, but this is confined to fees incurred in procuring the dissolution, and does not include fees for defending the entire case.<sup>3</sup> But fees paid to counsel for services rendered during the progress of the cause after the dissolution are not damages occasioned by suing out the injunction, even when the bond is conditioned for the payment of all damages so sustained, and such fees will not be allowed, although the object of the suit is to obtain a perpetual injunction.<sup>4</sup>

§ 3705. **Appellate Jurisdiction.**— The right of appeal from an order granting, continuing, or dissolving a preliminary or interlocutory injunction is now regulated by statute in most of the states. Such orders, not being in their nature final, were formerly held to be non-appealable.<sup>5</sup> The present rule in New York is, that the order

<sup>1</sup> *Pendleton v. Eaton*, 23 La. Ann. 435.

<sup>2</sup> *Andrews v. Glenville Woolen Co.*, 50 N. Y. 232.

<sup>3</sup> *Newton v. Russell*, 87 N. Y. 531; *Rose v. Post*, 56 N. Y. 603; *Baylis v. Scudder*, 6 Hun, 300; *Corcoran v. Judson*, 24 N. Y. 106; *Edwards v. Bodine*, 11 Paige, 224; *Coates v. Coates*, 1 Duer, 664; *Cummings v. Burleson*, 78 Ill. 281; *Joslyn v. Dickerson*, 71 Ill. 55; *Derry Bank v. Heath*, 45 N. H. 524; *Whittach v. O'Neal*, 22 Fla. 592; *Garratt v. Logan*, 19 Ala. 344; *Richardson v. Allen*, 74 Ga. 719; *Beeson v. Beeson*, 59 Ind. 97; *Bohan v. Casey*, 5 Mo. App. 101; *Lambert v. Haskell*, 80 Cal.

611; *Mitchell v. Hawley*, 79 Cal. 301; *Bustamente v. Stewart*, 55 Cal. 115. But see *contra*, *Oelrichs v. Spain*, 15 Wall. 211; *New Nat. T. Co. v. Dulaney*, 80 Ky. 516; *Sensevig v. Parry*, 113 Pa. St. 115; *Oliphint v. Mansfield*, 36 Ark. 191; *Bolling v. Tate*, 65 Ala. 417; 39 Am. Rep. 5.

<sup>4</sup> *Lambert v. Haskell*, 80 Cal. 611; *Porter v. Hopkins*, 63 Cal. 53; *Robertson v. Robertson*, 58 Ala. 68.

<sup>5</sup> *Miller v. O'Brien*, 36 Ark. 200; *Wells v. Coleman*, 53 Cal. 416; *Marble v. Bonhotel*, 35 Ill. 240; *Raymond v. Conger*, 51 Tex. 536; *Hobart v. Ford*, 6 Nev. 77; *Hanford v. Blessing*, 80 Ill. 188.

of the lower court will not be disturbed, unless it is manifest from the complaint that the plaintiff cannot, under any circumstances, be entitled to a perpetual injunction.<sup>1</sup> In Louisiana an appeal lies, that the appellate court may determine whether the discretion of the lower court has been abused or not;<sup>2</sup> and where such court refuses to allow an appeal, *mandamus* will lie to compel it.<sup>3</sup> But in Iowa and New Jersey all orders granting, refusing continuing, or dissolving interlocutory or preliminary injunctions are appealable.<sup>4</sup> Though even where the appellate court has the jurisdiction, it exercises it with reluctance, being averse to interfering with the exercise of the sound discretion of the inferior tribunal, unless some established principle of law or equity has been violated.<sup>5</sup> But if a *supersedeas* is granted on an appeal from an order granting an interlocutory injunction, and appointing a receiver *pendente lite*, the operation of the order is thereby suspended.<sup>6</sup> Though where an order granting a preliminary injunction is appealed from, the effect is not to authorize the doing of the act enjoined;<sup>7</sup> and where the appeal is from a final decree granting a perpetual injunction, the giving of a *supersedeas* bond does not permit the doing of the act enjoined.<sup>8</sup> But where a bill for an injunction is dismissed on the hearing, and an appeal taken, the original court has no power to grant an injunction in the cause pending the appeal, unless such power has been conferred upon it by statute.<sup>9</sup> The power of dissolving, like that of granting, preliminary injunctions is now held to vest in the sound

<sup>1</sup> Strasser v. Moonelis, 108 N. Y. 611; McHenry v. Jewett, 90 N. Y. 58.

<sup>2</sup> Beebe v. Guinault, 29 La. Ann. 795.

<sup>3</sup> State v. Judge of Superior Dist. Ct., 26 La. Ann. 550.

<sup>4</sup> Bennett v. Hetherington, 41 Iowa, 142; Morgan v. Rose, 22 N. J. Eq. 583.

<sup>5</sup> Collier v. Sapp, 49 Ga. 93; Patterson v. Board of Supervisors, 50 Cal. 344; Georgia State Co. v. Davitte, 79

Ga. 627; Mead v. Anderson, 40 Kan. 203; City of New Orleans v. Great Southern T. Co., 37 La. Ann. 571.

<sup>6</sup> State v. Johnson, 13 Fla. 33.

<sup>7</sup> Green v. Griffin, 95 N. C. 50; State v. Chase, 41 Ind. 356.

<sup>8</sup> Heinlein v. Cross, 63 Cal. 44; Leonard v. Ozark Land Co., 115 U. S. 465; Slaughter-house Cases, 10 Wall. 273.

<sup>9</sup> Eureka M. Co. v. Richmond M. Co., 5 Saw. 121.

judicial discretion of the court, and in the absence of statutory provision an appeal will not lie from such an order.<sup>1</sup> In New York an appeal will not now lie from an order dissolving an injunction, especially when the injunction was merely incidental, and the merits of the case have not been disposed of.<sup>2</sup> In Illinois, however, it is held that where an injunction is the only relief sought, and a motion to dissolve is sustained, the order of dissolution is sufficiently final to be appealable.<sup>3</sup> In Iowa the distinction is recognized between orders dissolving injunctions affecting the merits of the cause and those relating merely to some collateral matter, the former being appealable, while the latter are not.<sup>4</sup> In Louisiana an appeal does not lie unless the order of dissolution would cause irreparable injury to the plaintiff, and in such a case *mandamus* will issue to compel the allowance of the appeal.<sup>5</sup>

<sup>1</sup> *Spencer v. Stearns*, 28 Mich. 463; *Vandewater v. Kelsey*, 1 N. Y. 533; *Pickle v. Holland*, 24 Miss. 566.  
<sup>2</sup> *Paul v. Munger*, 47 N. Y. 469; *Pfohl v. Samson*, 59 N. Y. 174.  
<sup>3</sup> *Weaver v. Poyer*, 70 Ill. 567; *Gardt v. Brown*, 113 Ill. 475; 55 Am. Rep. 434.  
<sup>4</sup> *Trustees v. Davenport*, 7 Iowa, 213; *Sinnett v. Moles*, 38 Iowa, 25.  
<sup>5</sup> *Woolfolk v. Woolfolk*, 22 La. Ann. 206; *State v. Judge of Fourth Dist. Ct.*, 23 La. Ann. 151.

## CHAPTER CLXXXVI.

## EJECTMENT.

- § 3706. At common law.
- § 3707. Under the modern statutes and codes.
- § 3708. Necessary evidence.
- § 3709. What title sufficient.
- § 3710. Parties plaintiff.
- § 3711. Parties defendant.
- § 3712. Defenses.
- § 3713. Improvements.
- § 3714. Judgment.

§ 3706. **At Common Law.** — The action of ejectment was perhaps the most fictitious of all the fictitious forms of action known to that system. It differed in its commencement from any other form of action, in that no writ of summons or *capias* issued. The first step was the declaration, every allegation in which was untrue. It alleged a lease from the claimant to the fictitious plaintiff (John Doe); an entry by him under such lease; and his subsequent ouster by the fictitious defendant (Richard Roe); appended to the declaration was a notice addressed to the tenants in possession, that unless they appeared and defended the action within a specified time, they would be turned out of possession; but they were not permitted to defend the action, except upon entering into a "consent rule," whereby they bound themselves to confess the alleged lease, entry, and ouster, to plead the general issue, and to insist on the title only. They thereby admitted all the fictions of the declaration, and the only matter in issue was a fact or point not alleged in the declaration, viz., whether the claimant on the date of the alleged lease, and from thence until the service of the declaration, was entitled to demise the property claimed.<sup>1</sup>

<sup>1</sup> Cole on Ejectment, 1.

It came into the American colonies in this form as part of the common law of England, and in a few of the states it is still retained in substantially its old form, but in most of them it has undergone changes of the most radical nature, rendering it more in conformity with the exigencies of modern civilization. It was originally an action *in personam* for the recovery of damages only under the writ of *ejectione firmæ*; afterwards, the possession of the land for a term was recoverable, and subsequently the entire title.<sup>1</sup> As it is not within the scope or object of the present chapter to enter into any detailed discussion of the law or practice as it was, we therefore proceed to treat of it in its present form.

§ 3707. **Under the Modern Statutes and Codes.**—It lies to recover the possession of lands, with damages and costs for the wrongful withholding of them, and is the principal method in modern use for trying titles to land.<sup>2</sup> In the code states, it is known as an action for the recovery of land.<sup>3</sup> At common law it lay only for corporeal hereditaments, and the same rule is now generally prevalent in this country.<sup>4</sup> In Pennsylvania it may be maintained to recover a valid equitable title, there being in that state no court of chancery to compel the execution of a trust or the performance of a contract; from necessity the courts of common law have there assumed chancery powers, and the action of ejectment is substituted for the bill in chancery.<sup>5</sup> But it will not lie there to enforce the performance of a contract which is the consideration of an absolute deed of conveyance.<sup>6</sup> In the states of Illinois, Maine, Michigan, and New York the action lies under statutory provision for the recovery of a freehold or lease-

<sup>1</sup> Rapalje and Lawrence's Law Dict. 342.

<sup>2</sup> Burrill's Law Dict.

<sup>3</sup> Rapalje and Lawrence's Law Dict. 434.

<sup>4</sup> Den v. Craig, 15 N. J. L. 191; Nichols v. Lewis, 15 Conn. 137; Black

v. Hepburn, 2 Yeates, 331; City of Racine v. Crottsenber, 61 Wis. 481; 50 Am. Rep. 149.

<sup>5</sup> Peebles v. Reading, 8 Serg. & R. 484; Chase v. Irvin, 87 Pa. St. 286.

<sup>6</sup> Krebs v. Stroub, 116 Pa. St. 405.

hold estate in lands, tenements, and hereditaments;<sup>1</sup> but in Massachusetts only an estate of freehold can be recovered in this species of action.<sup>2</sup> It will lie to recover a church or chapel, by persons having sufficient interest therein, though it may not be demisable;<sup>3</sup> but it seems that it cannot be maintained for the space occupied by the leaning wall or projecting eaves of an adjacent proprietor;<sup>4</sup> though it has recently been held in Vermont that one is liable in ejectment for the projection of his roof over the land of another.<sup>5</sup> A house or a room in a house may be recovered by its means, if properly identified,<sup>6</sup> and a building erected on the land of another, under an agreement with the owner to buy it or convey the land to the builder, may also be recovered.<sup>7</sup> The title, as a general rule, must be a legal one, and the claim of possession such as is capable of delivery by the sheriff, and not a mere incorporeal hereditament.<sup>8</sup> A riparian proprietor may maintain ejectment or an action for the recovery of land against one who ousts him from or interferes with the exercise of his lawful rights in the land up to the center of the stream, or between high and low water mark;<sup>9</sup> and where the legal title to the soil of a street or highway remains in the proprietor of the servient estate, he may sue in ejectment any one who appropriates it to his private use, or who occupies or encumbers it in any

<sup>1</sup> Ill. Rev. Stats., c. 45, sec. 2; Me. Rev. Stats., c. 104, sec. 1; Mich. Ann. Stats., sec. 7789; 3 N. Y. Rev. Stats., 5th ed., c. 5, tit. 1, sec. 2.

<sup>2</sup> Mass. Rev. Stats., c. 101, sec. 1.

<sup>3</sup> Van Duzen v. Presbyterian Congregation, 3 Keyes, 550.

<sup>4</sup> Vrooman v. Jackson, 6 Hun, 326; Aiken v. Benedict, 39 Barb. 400; overruling Sherry v. Frecking, 4 Duer, 452; Hoffman v. Armstrong, 48 N. Y. 201; 8 Am. Rep. 537.

<sup>5</sup> Murphy v. Bolger, 60 Vt. 723. See also McCourt v. Eckstein, 22 Wis. 153.

<sup>6</sup> Woodhull v. Rosenthal, 61 N. Y. 382; Child v. Chappell, 9 N. Y. 246; Rowan v. Kelsey, 18 Barb. 484; White

v. White, 16 N. J. L. 202; 31 Am. Dec. 232.

<sup>7</sup> King v. Catlin, 1 Tyler, 355.

<sup>8</sup> Jackson v. Van Slyck, 8 Johns. 487; Smith v. Allen, 1 Blackf. 22; Swayze v. Burke, 12 Pet. 11. But in Texas and Kansas power is given by statute to bring the action upon an equitable as well as a legal title; Walker v. Howard, 34 Tex. 478; Kansas etc. R. R. Co. v. McBratney, 12 Kan. 9.

<sup>9</sup> Champlain and St. Lawrence R. R. Co. v. Valentine, 19 Barb. 484; People v. Mawram, 5 Denio, 389; Woodhull v. Rosenthal, 61 N. Y. 382; Nichols v. Lewis, 15 Conn. 157.

manner inconsistent with its use as a public way.<sup>1</sup> So where a railroad company, without compensation to the owner of the legal title, appropriates, either wholly or partly, an existing highway or street for their track, ejectment will lie against them;<sup>2</sup> but where the owner permits the railroad company to enter upon his lands and construct its road, he cannot maintain ejectment for the land so taken.<sup>3</sup> And it is held that, though as a general rule ejectment will not lie for an easement, or to be let into the use or occupation of a servitude, it will lie for the recovery of lands claimed and condemned as the road-bed and right of way of a railroad.<sup>4</sup> It will lie in favor of a city for lands dedicated for a street where the city owns the fee of the street;<sup>5</sup> but not where the fee is in the adjoining owners,<sup>6</sup> or by a county for a strip of land dedicated for a street, and duly accepted by the proper authorities, where the defendant holds adversely to the public and creates obstructions.<sup>7</sup> It will not lie to recover the use of an alley, as that is a mere incorporeal easement;<sup>8</sup> but where a city wrongfully takes land and converts it into a public street, the owner of the land may bring ejectment for its recovery.<sup>9</sup> It will not lie for a right to take oil on the land of another;<sup>10</sup> nor, even in Pennsylvania, to recover a legacy charged on land;<sup>11</sup> or by a husband to recover lands claimed in right of his wife;<sup>12</sup> or to set aside a sale of land by a trustee in breach of his

<sup>1</sup> *Wright v. Carter*, 27 N. J. L. 76; *Warwick v. Mayo*, 15 Gratt. 528; *Bolling v. Mayor etc.*, 3 Rand. 563; *Brown v. Galley, Hill & D.* 308; *Mahon v. San Rafael T. R. Co.*, 49 Cal. 270; *Weisbrod v. R. R. Co.*, 21 Wis. 602; *Mankato v. Willard*, 13 Minn. 13; 97 Am. Dec. 208; *Winona v. Huff*, 11 Minn. 119.

<sup>2</sup> *Wager v. R. R. Co.*, 25 N. Y. 525; *Carpenter v. R. R. Co.*, 24 N. Y. 655; *Lozier v. R. R. Co.*, 42 Barb. 465; *Lake Erie etc. R. R. Co. v. Kinsey*, 87 Ind. 514.

<sup>3</sup> *Kanaga v. R. R. Co.*, 76 Mo. 207.

<sup>4</sup> *Tenn. and Coosa R. R. Co. v. R. R. Co.*, 75 Ala. 516; 51 Am. Rep. 475.

<sup>5</sup> *California v. Howard*, 78 Mo. 88.

<sup>6</sup> *City of Racine v. Crotsenberg*, 61 Wis. 481; 50 Am. Rep. 149.

<sup>7</sup> *Bay County v. Bradley*, 39 Mich. 163; 33 Am. Rep. 367.

<sup>8</sup> *Taylor v. Gladwin*, 40 Mich. 232.

<sup>9</sup> *Armstrong v. City of St. Louis*, 69 Mo. 309; 33 Am. Rep. 499.

<sup>10</sup> *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732.

<sup>11</sup> *Gause v. Wiley*, 4 Serg. & R. 509; *Craven v. Bleakney*, 9 Watts, 19.

<sup>12</sup> *Bratton v. Mitchell*, 7 Watts, 113.



trust.<sup>1</sup> But the right to quarry or remove limestone is, in Virginia, an interest in land sufficient to support ejectment.<sup>2</sup>

§ 3708. **Necessary Evidence.**—It must be shown that the defendant is in the actual possession of the property in question, and that the plaintiff has a superior right and title to the possession thereof.<sup>3</sup> The prime object of the action being to obtain possession and the recovery of damages, even though substantial ones are now allowed, being only incidental, it is necessary that the presumption of law arising from the defendant's possession must be countervailed by evidence of a superior title, or equitable right, where permissible, sufficient to carry with it the right of possession.<sup>4</sup> The almost universal rule is, that the plaintiff must have the right to the possession, not only at the institution of the suit, but at the time of trial also.<sup>5</sup> The plaintiff's right is dependent on the strength of his own title; not on the weakness of the defendant's. Therefore, to entitle the plaintiff to recover, he must establish a title superior to that of the defendant;<sup>6</sup> and if the defendant has no title, the plaintiff cannot recover, unless he proves some title, or that defendant is in possession as his tenant.<sup>7</sup> And where the action is

<sup>1</sup> Clagett v. Kilbourne, 1 Black, 346; Dawson v. Hayden, 67 Ill. 52.

<sup>2</sup> Reynolds v. Cook, 83 Va. 817; 5 Am. St. Rep. 317.

<sup>3</sup> O'Connell v. Dougherty, 32 Cal. 458; Kane v. Canovan, 21 Cal. 291; Thompson v. Adams, 55 Pa. St. 479; Smith v. McCann, 24 How. 398; Beach v. Beach, 20 Vt. 83; Dyer v. Day, 61 Ill. 336; Leonard v. Diamond, 31 Md. 536; Daniel v. Lefevre, 19 Ark. 201; Mulford v. Tunis, 35 N. J. L. 256; Eaton v. Smith, 19 Wis. 539.

<sup>4</sup> Ricard v. Williams, 7 Wheat. 59; Kane v. Canovan, 21 Cal. 291; Adams v. Guice, 30 Miss. 397; Robinoe v. Doe, 6 Blackf. 85; Jackson v. Porter, 1 Paine, 457.

<sup>5</sup> Heffner v. Betz, 32 Pa. St. 376; Alden v. Grove, 18 Pa. St. 377; Kile v. Tubbs, 32 Cal. 332; Torrance v.

Betsy, 30 Miss. 129; Cincinnati v. White, 6 Pet. 41. The exception is in Vermont, where it is held that the plaintiff may recover even though he has parted with the title before trial: Edgerton v. Clark, 20 Vt. 264.

<sup>6</sup> Wallace v. Swinton, 64 N. Y. 188; Stanford v. Mangin, 30 Ga. 355; Tracy v. R. R. Co., 29 Conn. 382; Goulding v. Clark, 34 N. H. 148; Mil- laudon v. Ranny, 18 La. Ann. 196; Williams v. Ingle, 21 Pick. 288; Steh- man v. Crull, 26 Ind. 436. But see Jones v. Bland, 112 Pa. St. 176; Hacker v. Horlemus, 74 Wis. 21.

<sup>7</sup> Foster v. Evans, 51 Mo. 39; Doug- lass v. Libby, 59 Me. 200; Sullivan v. Dimmitt, 34 Tex. 114; Holbrook v. Nichol, 36 Ill. 161; Perry v. Whipple, 38 Vt. 278.

brought by a nominal plaintiff for the benefit of another, the title of the latter and his right to possession must be shown.<sup>1</sup> When the plaintiff's title is put in issue, it may be traced back to a government patent, which would be at least *prima facie* evidence of a title in fee;<sup>2</sup> or it may be established by uninterrupted and exclusive possession, or by adverse possession under color of title, by the plaintiff or his predecessors, for the period prescribed by the statute of limitation.<sup>3</sup> Inasmuch as the action is not always brought to try the title to real estate, but sometimes only the right to possession, in the latter case it is not essential to prove a complete legal title, but a showing of a superior right to possession by the plaintiff will suffice.<sup>4</sup> But where, under the modern practice, the question of title is not in issue, it is not always indispensable for the plaintiff to show a perfect title in fee; and it is sometimes sufficient to show a good title against the defendant only where the question involves only the right to possession.<sup>5</sup> If, however, the defendant has no title, the plaintiff need not prove more than a *prima facie* title to the possession;<sup>6</sup> and in such a case, where the plaintiff holds merely a bond to convey from the owner of the legal title it is sufficient to support the action, and that without proving performance of the condition of the bond.<sup>7</sup> Where ejectment is brought relating to government land, the certificate of the proper officer of the land-office is sufficient to constitute at least a *prima facie* right to possession and to establish the plaintiff's title, unless

<sup>1</sup> Adams v. McDonald, 29 Ca. 511; Ballance v. Flood, 52 Ill. 49.

<sup>2</sup> Hull v. Campbell, 56 Pa. St. 154; Savory v. Whayland, 1 Har. & McH. 206; Mitchell v. Mitchell, 1 Md. 44.

<sup>3</sup> Brown v. Brown, 15 La. Ann. 169; Plummer v. Lane, 4 Har. & McH. 72; 1 Am. Dec. 395.

<sup>4</sup> Wood v. West, 1 Blackf. 133; Jackson v. Parkhurst, 4 Wend. 369; Heath v. Knapp, 4 Pa. St. 230; Jack-

son v. Sisson, 2 Johns. Cas. 231; Sinclair v. Jackson, 3 Cow. 543.

<sup>5</sup> Campbell v. Fletcher, 37 Md. 340; Garrett v. Lyle, 27 Ala. 586; Johnston v. Jackson, 70 Pa. St. 164; Yoe v. Dyer, 6 Heisk. 16; Busenius v. Coffee, 14 Cal. 91.

<sup>6</sup> Lewis v. Goquette, 3 Stew. & P. 184; Zeringue v. Williams, 15 La. Ann. 76; Wilson v. Glenn, 68 Ala. 383.

<sup>7</sup> Hooper v. Hall, 30 Tex. 154.

rebutted.<sup>1</sup> And a sheriff's deed is *prima facie* evidence of title as against a trespasser, and the grantee could maintain ejectment against the execution debtor holding merely under a possession thereafter acquired.<sup>2</sup> Where the plaintiff sues in a representative capacity, he must prove his title to the character in which he sues, and also the title of his beneficiary to the land in question;<sup>3</sup> and the action will lie against an infant as well as an adult.<sup>4</sup>

Where there is privity of estate between the plaintiff and defendant, the former is, as a general rule, relieved from the necessity of proving his title, as the defendant is estopped from denying the title under which he obtained possession, and so the purchaser at a sheriff's sale is privy to the debtor's title, and is equally bound by the doctrine of estoppel.<sup>5</sup> And where both parties claim title from the same person, it is sufficient for the plaintiff to trace his title to such person, as the defendant would be estopped from denying the title of the latter. So if the action is by a mortgagee to recover the mortgaged premises, the widow and heir of the mortgagor are estopped from denying his title.<sup>6</sup> And it is sufficient, to make a *prima facie* case, to establish a common source of title and a conveyance thereof to the plaintiff.<sup>7</sup> Possession under a contract to purchase will support the action as against a stranger

<sup>1</sup> Davis v. Freeland, 32 Miss. 645; Gunderson v. Cook, 33 Wis. 557; Manny v. Smith, 10 Wis. 509; Rector v. Gaines, 19 Ark. 70; Tobin v. Walkinshadt, 1 McAll. 154; Young v. Shinn, 48 Cal. 25; Gunn v. Bates, 6 Cal. 263; Milsap v. Stone, 2 Cal. 137; Whittaker v. Pendola, 78 Cal. 296; Case v. Edgeworth, 87 Ala. 203.

<sup>2</sup> Whitaker v. Sumner, 7 Pick. 551; 19 Am. Dec. 298; Bott v. Burnell, 11 Mass. 163; Maynard v. Moore, 70 N. C. 546; Kimbrough v. Benton, 3 Humph. 129.

<sup>3</sup> Adams on Ejectment, 271, 275.

<sup>4</sup> McCoon v. Smith, 3 Hill, 147; Marshall v. Wing, 50 Me. 62.

<sup>5</sup> Jackson v. Bush, 10 Johns. 223; Jackson v. Graham, 3 Caines, 188.

<sup>6</sup> Low v. Settle, 32 W. Va. 600; Ames v. Beckley, 48 Vt. 395; Louchard v. Crow, 20 Cal. 150; Pollock v. Maison, 41 Ill. 516; Holbrook v. Brenner, 31 Ill. 501; Riddle v. Murphy, 7 Serg. & R. 230; Union Bank v. Maynard, 51 Mo. 548; Gordon v. Sizer, 39 Miss. 805; Sexton v. Rhames, 13 Wis. 99; Paschal v. Acklin, 27 Tex. 173; Spect v. Gregg, 51 Cal. 198; Barton v. Erickson, 14 Neb. 164; Myrick v. Wells, 52 Miss. 149; Miller v. Hardin, 64 Mo. 545; Whissenhunt v. Jones, 78 N. C. 361; Griesler v. McKennon, 44 Ark. 517; Mickay v. Stratton, 5 Saw. 475; McCready v. Lansdale, 58 Miss. 877.

<sup>7</sup> Roosevelt v. Hungate, 110 Ill. 595.

to the title, who wrongfully enters and withholds possession.<sup>1</sup> But one who has been unlawfully in possession of lands, and has been forcibly dispossessed by the true owner, cannot maintain ejectment to recover possession.<sup>2</sup> So, also, where the plaintiff claims as purchaser at a sheriff's sale, under an execution against the defendant in ejectment, it is, as a rule, sufficient for the plaintiff to show the execution and the proceedings under it, as it will be presumed that the judgment was right, and the sheriff's return under it will be conclusive.<sup>3</sup> Where, however, the action is against a stranger, there is no presumption of the validity of the judgment, and it must be proved, as well as the execution and the sheriff's deed;<sup>4</sup> and in some cases it must be shown that the defendant was in possession at the time of the sale;<sup>5</sup> and if not in possession, proof must be made that he claimed some interest in the premises.<sup>6</sup> And where defendant, who held a tax deed, had put it on record, and claimed an interest under it, which he refused to release when requested, it was held to be sufficient proof of his interest to enable plaintiff to maintain the action, the land being wholly unimproved, unfenced, and unoccupied.<sup>7</sup> And plaintiff must prove either a paper title or a title by adverse possession, and prayers based on the equity principles of acquiescence and estoppel in relation to boundary lines are properly refused.<sup>8</sup> One who seeks to recover land included in a swamp-land grant, though he has never been in possession, need not show a chain of title from the United States to himself, as judicial notice is taken of the acts of Congress granting swamp-lands.<sup>9</sup> But where plaintiffs in

<sup>1</sup> *Murphy v. Loomis*, 26 Hun, Jackson v. Davis, 18 Johns. 7; Davis v. Evans, 5 Ired. 525.

<sup>2</sup> *Moring v. Ables*, 62 Miss. 263; 52 Am. Rep. 186. <sup>6</sup> *Burkhalter v. Edwards*, 16 Ga. 593; 60 Am. Dec. 744; *Jackson v. Newton*, 18 Johns. 355.

<sup>3</sup> *Lawrence v. Pond*, 17 Mass. 433. <sup>7</sup> *Heinmiller v. Hatheway*, 60 Mich. 391.

<sup>4</sup> *Cooper v. Galbraith*, 3 Wash. C. C. 546. <sup>8</sup> *Winter v. White*, 70 Md. 305.

<sup>5</sup> *Matney v. Graham*, 59 Mo. 190; <sup>9</sup> *Nitchie v. Earle*, 117 Ind. 270.

ejectment, who claimed under an administrator's deed, failed to show that such deed was executed in pursuance of a decree of a court of competent jurisdiction, it was held that they could not recover.<sup>1</sup>

§ 3709. **What Title Sufficient.**—Title by prescription, or adverse possession under color of title or claim of right, for the requisite term, affords a good title to support an action of ejectment, even where it is disputed, and the rights of the parties depend upon the best title.<sup>2</sup> And actual possession under claim or color of right is usually sufficient to sustain ejectment against all but the true owner. Where the controversy is based upon the possession of the parties, the longer possession, though less than the statutory period of limitation, gives a superior right over a shorter possession by a mere trespasser,—*qui prior in tempore, potior in jure*.<sup>3</sup> And however short the prior possession may have been, it is *prima facie* sufficient against a wrong-doer, and will support ejectment against a subsequent wrongful entry.<sup>4</sup> Possession, to be adverse, must be accompanied by a claim of ownership, and it must be actual, visible, notorious, open, hostile, and uninterrupted.<sup>5</sup> The land must be under the actual control of the holder, and mere casual acts of ownership, or a mere claim or assertion of title, will not suffice; and where the plaintiff claims color of title, he must show actual possession or occupation by himself or his grantors under a claim of title; and if constructive, it must be based upon some deed, decree, or other proceeding de-

<sup>1</sup> Dawson v. Parham, 47 Ark. 215.

<sup>2</sup> Davis v. Thompson, 56 Mo. 39; Cannon v. Phelps, 2 Sneed, 211; Jackson v. Oltz, 8 Wend. 440; Abel v. Hutto, 8 Rich. 42; Jacks v. Chaffin, 34 Ark. 534; Bradshaw v. Emory, 65 Ala. 208; Thompson v. Brannon, 14 S. C. 542.

<sup>3</sup> Leport v. Todd, 32 N. J. L. 124; Middleton v. Johns, 4 Gratt. 129;

Smith v. Lorillard, 10 Johns. 338; Hunter v. Starin, 26 Hun, 529; Eagle etc. Mfg. Co. v. Gibson, 62 Ala. 369; Knight v. Alexander, 38 Minn. 384; 8 Am. St. Rep. 675.

<sup>4</sup> Nagle v. Macy, 9 Cal. 426; Newman v. Cincinnati, 18 Ohio, 223; Bates v. Campbell, 25 Wis. 613.

<sup>5</sup> De Haven v. Laudell, 31 Pa. St. 120; Wilson v. Palmer, 18 Tex. 592.

<sup>1</sup> B  
v. Hig  
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Sands  
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scribing and purporting to convey the land.<sup>1</sup> But where the plaintiff relies upon an inclosing of the land as amounting to constructive possession, he must show it to be of a substantial character, and sufficient to protect crops or turn stock.<sup>2</sup> To render color of title sufficient to support ejectment, the instrument constituting it must be good in form, profess to convey the title, and be duly executed.<sup>3</sup> And a conveyance of lands by one in possession of them gives a title sufficient to support the action against a stranger.<sup>4</sup> A quitclaim deed will give color of title and support ejectment by the grantee, if the grantor could have done so.<sup>5</sup> And a deed purporting to be executed under a power of attorney from the owner of the land, or by the proper officer on a tax sale, and followed by possession, constitutes color of title.<sup>6</sup> So, also, with regard to a deed from a married woman, which has been held to give sufficient color of title to support a *prima facie* case in ejectment.<sup>7</sup> Even in those states where an equitable title is sufficient to support ejectment, the plaintiff cannot recover if there is an outstanding legal estate.<sup>8</sup> Where the legal title is incomplete, as where the plaintiff holds a bond for a conveyance of the lands, he was formerly required to first establish his title in a court of equity before he could bring ejectment.<sup>9</sup> And if he claims that the defendant's title is void for fraud, he must proceed to have it so decreed in equity before suing in ejectment.<sup>10</sup> Also, where the plaintiff holds only an agree-

<sup>1</sup> Borel v. Rollins, 30 Cal. 408; Long v. Higginbotham, 56 Mo. 245.

<sup>2</sup> Southmayd v. Henley, 45 Cal. 101; Sands v. Hughes, 53 N. Y. 287.

<sup>3</sup> Hodges v. Eddy, 38 Vt. 327; Moore v. Brown, 11 How. 414; Brooks v. Bruyn, 35 Ill. 304; Marsh v. Veir, 21 Tex. 97; La Francois v. Jackson, 8 Cow. 589; Simons v. Lane, 25 Ga. 178.

<sup>4</sup> Pillow v. Roberts, 13 How. 472; Wofford v. McKinna, 23 Tex. 36; 76 Am. Dec. 53.

<sup>5</sup> Downer v. Smith, 24 Cal. 114.

<sup>6</sup> Thompson v. Burhans, 61 N. Y. 52; Munro v. Merchant, 28 N. Y. 9; Dillingham v. Brown, 38 Ala. 311; Wilks v. Elliot, 5 Cranch, 611; Meriot v. Brooks, 16 N. H. 376.

<sup>7</sup> Sanborn v. French, 22 N. H. 246.

<sup>8</sup> Peck v. Newton, 46 Barb. 173; Chapin v. First Universalist Soc., 8 Gray, 580; Thompson v. Lyon, 33 Mo. 219.

<sup>9</sup> Moody v. Farr, 33 Mass. 192; Eels v. Day, 4 Conn. 95.

<sup>10</sup> Walker v. Kywett, 32 Iowa, 524; Rountree v. Little, 54 Ill. 323.

ment of the vendor to convey, he cannot maintain ejectment against a subsequent grantee of the vendor.<sup>1</sup> And the grantor in a trust deed, or his subsequent grantee, having only an equitable estate in the land granted, cannot maintain ejectment.<sup>2</sup> The plaintiff may have only an apparent legal title, as where he has taken an absolute deed by way of security; and in such case the true nature of his title may be shown to defeat his action of ejectment.<sup>3</sup> As the surrender of a deed of conveyance, or its cancellation, does not operate to revest the title in the grantor, the latter, under such circumstances, would not have a title upon which he could maintain ejectment.<sup>4</sup> And a purchaser at an execution or tax sale has no sufficient title before he obtains his deed upon which to support this action.<sup>5</sup>

Formerly the rule was, that as the legal estate vested in the trustee, he could maintain ejectment even as against the *cestui que trust*.<sup>6</sup> But now, in most of the states, where the purposes of the trust have ceased to require the existence of the title in the trustee, or where the *cestui que trust* has paid the consideration for the land held in trust, or where he is entitled to the immediate possession of the premises, he may maintain ejectment in his own name.<sup>7</sup> The plaintiff must not only show his own right to possession, but also that the defendant has either the actual or constructive possession of the premises.<sup>8</sup> But the possession of one of several joint defendants would be sufficient to maintain the action against him; and if the defendant

<sup>1</sup> San Felipe Mining Co. v. Belshaw, 49 Cal. 655. Ward, 10 Cill & J. 444; Beach v. Beach, 14 Vt. 28; 39 Am. Dec. 204.

<sup>2</sup> Heard v. Baird, 40 Miss. 793.

<sup>3</sup> Murray v. Walker, 31 N. Y. 399; Carr v. Carr, 4 Lans. 314. School Directors v. Dunkleberger, 6 Pa. St. 29; Hunt v. Crawford, 3 Penn. & W. 426; Doggett v. Hart, 5 Fla. 215; 58 Am. Dec. 464.

<sup>4</sup> Cranmer v. Porter, 41 Cal. 462.

<sup>5</sup> Dean v. Pyncheon, 3 Chand. 9; Crawford v. Green, 1 Harr. (Del.) 464; Edwards v. Miller, 4 Heisk. 314. Owen v. Fowler, 24 Cal. 192; Pierce v. Tuttle, 53 Barb. 155; Costly v. Tarter, 38 Ala. 107; Wyman v. Bowen, 50 Me. 139; Doe v. Roe, 30 Ga. 553.

<sup>6</sup> Baker v. Nall, 59 Mo. 265; Lair v. Hunsicker, 58 Pa. St. 115; Cox v. Walker, 26 Me. 504; Mathews v.

<sup>7</sup> Gorton v. Daniels, 1 Gree. Am. St. 64 Ala. v. Henry, Platt, 30 Fla. 573. <sup>8</sup> Barco

has recorded a deed of the premises to himself, and claims the title and right of possession under another, it is sufficient.<sup>1</sup> It is requisite that the plaintiff should have sufficient title at the commencement of the action, as a title subsequently acquired will not suffice.<sup>2</sup> But an heir cannot maintain the action against an administrator to recover possession of land to which the latter is entitled as an asset of the estate.<sup>3</sup> Where the plaintiff has obtained a valid title to land by foreclosure, and is in possession of a portion of it, he can maintain ejectment for the remainder, and need not rely on a writ of assistance.<sup>4</sup> The heirs of a donor in a deed of gift for life brought ejectment against those claiming under the donee for life, after his death, and no right or title in the defendants to retain possession after the death of the donee was shown, and it was held that they need not establish any other title than that implied by the execution of the deed of gift and the donee's entering and holding thereunder.<sup>5</sup> Prior possession is a sufficient legal estate therein to support ejectment in a federal court for the recovery of possession of the same from an intruder.<sup>6</sup> And in Alabama a title acquired by ten years' adverse possession under color of title descends to the heirs of the claimant, and they may enforce such title by ejectment.<sup>7</sup> But though prior possession for less than the statutory period is sufficient *prima facie* proof of title to sustain a recovery against a mere trespasser, where the defendant's possession is lawful, the plaintiff must show adverse possession for the full period required by the statute.<sup>8</sup> And where both parties claim under the same patent, and defendant gave evidence of an earlier posses-

<sup>1</sup> Gordon v. Sizer, 39 Miss. 805; McDaniel v. Reed, 17 Vt. 674.

<sup>2</sup> Green v. Jordan, 83 Ala. 220; 3 Am. St. Rep. 711; Goodman v. Winter, 64 Ala. 410; 38 Am. Rep. 13; Dunlap v. Henry, 76 Mo. 106; Parcifull v. Platt, 36 Ark. 456; Paul v. Fries, 18 Fla. 573.

<sup>3</sup> Barco v. Fennell, 24 Fla. 378.

<sup>4</sup> Trope v. Kerns, 83 Cal. 553

<sup>5</sup> Noun v. Pittman, 82 Ga. 637. See also Burling v. Thompkins, 77 Cal. 257; Helm v. Wilson, 76 Cal. 476.

<sup>6</sup> Wilson v. Fine, 38 Fed. Rep. 739.

<sup>7</sup> Hall v. Caperton, 87 Ala. 285.

<sup>8</sup> Riverside Co. v. Townshend, 120 Ill. 9.



sion than that of the plaintiff, the latter need not show adverse possession for the full statutory period in order to recover.<sup>1</sup> Where a sale of mortgaged premises is made under foreclosure, the mortgagor having no interest in or title to them, and afterwards a judgment for a balance due on the mortgage debt is docketed against the real owner, one claiming under a sale made to satisfy the latter judgment can maintain ejectment against one claiming under the former sale.<sup>2</sup> A plaintiff who has made a homestead entry in due form of law on a tract of land has sufficient title to the whole tract to maintain ejectment against a mere trespasser in actual possession of all but a few acres.<sup>3</sup> And a certificate of purchase of state lands from the state, even though the application and affidavits are defective, confers sufficient title to maintain ejectment.<sup>4</sup> But in Illinois, where the plaintiff claims in fee-simple, he must show a legal as contradistinguished from an equitable title.<sup>5</sup>

§ 3710. **Parties Plaintiff.**—Under the code practice, all persons having an interest in the subject-matter of the action and in obtaining the relief demanded may be joined as plaintiffs, except where otherwise provided, and a demurrer will not lie to a complaint for misjoinder of parties plaintiff.<sup>6</sup> The action may be brought by the heir against a mere trespasser to recover possession of lands of which the intestate died seised;<sup>7</sup> and even though the ancestor were not in possession at the time of his death, his heirs may maintain the action, where a considerable time has elapsed after the death, without letters of administration being taken out, and even where that has been done,

<sup>1</sup> *Ratcliff v. Bellfonte Iron Works Co.*, 87 Ky. 559.

<sup>2</sup> *Leviston v. Henninger*, 77 Cal. 461.

<sup>3</sup> *Whittaker v. Pendola*, 78 Cal. 296.

<sup>4</sup> *Cucamonga etc. Co. Moir*, 83 Cal.

101. See also *Case v. Edgeworth*, 87 Ala. 203.

<sup>5</sup> *Barrett v. Hinckley*, 124 Ill. 32; 1 Am. St. Rep. 331.

<sup>6</sup> See *ante*, §§ 3426, 3427.

<sup>7</sup> *Tapscott v. Cobbs*, 11 Gratt. 172; *Carruthers v. Bailey*, 3 Ga. 105.

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and sufficient time has elapsed to raise a presumption that the debts of the deceased have been paid.<sup>1</sup> Executors and administrators could always maintain ejectment for the leasehold lands of which the deceased died possessed;<sup>2</sup> and now, as by virtue of statutory provisions in most of the states they have the right to the possession of the real property during the settlement of the estate, they can usually maintain ejectment where the deceased could have done so.<sup>3</sup> An infant, on attaining full age, may bring ejectment for lands conveyed by him during his minority, provided he returns the consideration, or otherwise places the grantee *in statu quo*.<sup>4</sup> But unless the action were brought within a short time after he attained his majority, he would be deemed to have ratified his deed, as would also be the case on his doing, when of full age, any acts inconsistent with the idea of his dissenting.<sup>5</sup> And a general guardian of the estate of an infant can maintain ejectment to recover his real estate, if the ward could do so if of full age.<sup>6</sup> Joint tenants and coparceners must join in ejectment, and the action will not lie by one against another, unless there has been such an ouster of the co-tenant, or such a denial of his rights, as amounts to a disseisin, or such acts as would tend to establish adverse possession.<sup>7</sup> But mere possession by one co-tenant is not evidence of ouster of his co-tenant;<sup>8</sup> though if one tenant in possession claims to hold the entire estate, and denies the title of his co-tenant, the action will lie.<sup>9</sup> A corpora-

<sup>1</sup> Austin v. Bailey, 37 Vt. 219; 86 Am. Dec. 703; Soto v. Kroder, 19 Cal. 87; Webster v. Webster, 53 Pa. St. 161; Mason v. Walker, 14 Me. 163; Brown v. Colson, 41 Ga. 42; Gourley v. Kinley, 66 Pa. St. 270. But see Doyle v. Wade, 23 Fla. 90; 11 Am. St. Rep. 334.

<sup>2</sup> Mosher v. Yost, 33 Barb. 277.

<sup>3</sup> Meeks v. Hahn, 20 Cal. 621; Russell v. Erwin, 41 Ala. 297; Kline v. Moulton, 11 Mich. 370; Menifee v. Menifee, 8 Ark. 9.

<sup>4</sup> Carr v. Clough, 26 N. H. 280; 59 Am. Dec. 345; Kline v. Beebe, 6

Conn. 494; Voorhies v. Voorhies, 24 Barb. 150; Vent v. Osgood, 19 Pick. 572.

<sup>5</sup> Henry v. Root, 33 N. Y. 526; Irvine v. Irvine, 9 Wall. 618.

<sup>6</sup> Holmes v. Seely, 17 Wend. 75.

<sup>7</sup> Edwards v. Bishop, 4 N. Y. 61; Ricard v. Williams, 7 Wheat. 59; Carpenter v. Thayer, 15 Vt. 552; Barnitz v. Casey, 7 Cranch, 456.

<sup>8</sup> McClung v. Ross, 5 Wheat. 116.

<sup>9</sup> Clark v. Vaughan, 3 Conn. 191; Keller v. Auble, 58 Pa. St. 410; 98 Am. Dec. 297; Russell v. Marks, 3 Met. (Ky.) 37.

tion having the right to hold real estate can maintain an action of ejectment in like manner as an individual.<sup>1</sup> As under the modern rule a mortgagor retains the title in the mortgaged premises, he may maintain ejectment against the mortgagee or a stranger, as though no mortgage existed.<sup>2</sup> But where the mortgagee has taken possession of the mortgaged premises in accordance with the terms of the mortgage, or if he is in possession after condition broken, he may bring ejectment against the mortgagor or his assigns, as well as against third parties.<sup>3</sup> And even if the mortgagor becomes a tenant of the mortgagee by proviso in the mortgage, still if the mortgage contains a power of entry and sale by the mortgagee on default, he may recover possession in ejectment, either against the mortgagor or his grantee, or the assignee of the reversion.<sup>4</sup>

In some of the states, however, the old common-law rule is retained and even confirmed by statute, and there the mortgagor cannot maintain the action against the mortgagee in possession after condition broken.<sup>5</sup> And under similar circumstances he could not maintain ejectment against a tenant of the mortgagee,<sup>6</sup> nor against a purchaser in an execution sale on a judgment against him obtained since the execution of the mortgage,<sup>7</sup> and *a fortiori* against a purchaser at a foreclosure sale under the mortgage.<sup>8</sup> Where an estate is conveyed upon condition with a right of re-entry and forfeiture in case of breach, the grantor, his heirs or assigns, may bring eject-

<sup>1</sup> Henley v. Bank, 16 Ala. 552.

<sup>2</sup> Carr v. Carr, 52 N. Y. 251; Dodge v. Wellman, 43 How. Pr. 427; Stewart v. Hutchins, 6 Hill, 143; Sahler v. Signer, 37 Barb. 329; Newton v. McKay, 30 Mich. 380; Fletcher v. Holmes, 32 Ind. 497; Carpenter v. Bowen, 42 Miss. 28.

<sup>3</sup> Bank v. Bates, 11 Conn. 519; Batcheller v. Pratt, 10 Cush. 185; Johnson v. Phillips, 13 Gray, 198; Jackson v. Warren, 32 Ill. 331; Reed v. Shepley, 6 Vt. 602.

<sup>4</sup> Ahern v. White, 39 Md. 409; Den v. Stockton, 12 N. J. L. 322; Pierce v. Brown, 24 Vt. 165.

<sup>5</sup> Johnson v. Huston, 47 Mo. 227; Conner v. Whitmore, 52 Me. 185; Gillett v. Eaton, 6 Wis. 30.

<sup>6</sup> Hennesy v. Farrell, 20 Wis. 42.

<sup>7</sup> Chase v. Peck, 21 N. Y. 581; Johnson v. Elliott, 26 N. H. 67; Doe v. Tunnell, 1 Houst. 320.

<sup>8</sup> Pace v. Chadderden, 4 Minn. 499; Stark v. Brown, 12 Wis. 572; 78 Am. Dec. 762.

<sup>1</sup> Moore v. Plumb v. r. McLane v. schae v. B. Hoge v. Barr v. Van R. 477. Willard v. Astor v. Rensselaer N. Y. 141.

ment to recover possession of the premises after a breach of the condition has been committed.<sup>1</sup> And where premises were devised in fee to one heir, upon condition that his sisters should be permitted to occupy one room in a dwelling-house on the land, and also that they should be supported out of the estate so long as they remained unmarried, they can maintain ejectment, on breach of condition, for their share of the estate, as if there had been an intestacy.<sup>2</sup> In Pennsylvania, however, the grantor of a trust estate cannot maintain ejectment to recover possession of the premises against the *cestuis qui trustent*, on the ground of breach of the conditions of the trust;<sup>3</sup> and in New York an executor of the grantor cannot bring ejectment after breach of a condition subsequent.<sup>4</sup> But the grantee or assignee of demised lands, or of the reversion thereof, or the heirs or personal representatives of the grantor, have the same remedy, in case of a breach of a condition subsequent, as the lessor would have had if no demise had been made;<sup>5</sup> and where the covenant is divisible in its nature, and the premises are occupied in separate parcels by different persons, ejectment will lie against each for the separate parcel he occupies.<sup>6</sup> Where the purchaser of lands goes into possession under a contract to pay the purchase-money in installments, and makes default in such payments, it is held that the vendor may elect to treat the contract as rescinded, and sue for recovery of possession of the lands, and in some cases without notice to quit or tender of a conveyance;<sup>7</sup> though in other cases it is held that notice to quit must be given.<sup>8</sup>

<sup>1</sup> Moore v. Wingate, 53 Mo. 398; Plumb v. Tubbs, 41 N. Y. 442; Cruger v. McLaury, 41 N. Y. 219; Van Rensselaer v. Barringer, 39 N. Y. 9.

<sup>2</sup> Hogeboom v. Hall, 24 Wend. 146.

<sup>3</sup> Barr v. Veld, 24 Pa. St. 84.

<sup>4</sup> Van Rensselaer v. Hayes, 5 Denio, 477.

<sup>5</sup> Willard v. Tillman, 2 Hill, 274.

<sup>6</sup> Astor v. Miller, 2 Paige, 68; Van Rensselaer v. Jewett, 5 Denio, 121; 2 N. Y. 141.

<sup>7</sup> Wright v. Moore, 21 Wend. 230; Dean v. Comstock, 32 Ill. 173; Gregg v. Von Phul, 1 Wall. 274; Baker v. Gittings, 16 Ohio, 485; Hotaling v. Hotaling, 47 Barb. 163; Hicks v. Lovell, 64 Cal. 14; 49 Am. Rep. 679; Moyer v. Garrett, 96 Pa. St. 376.

<sup>8</sup> Jackson v. Moncrief, 5 Wend. 26; Feass v. Merrill, 9 Ark. 59; Costigan v. Wood, 5 Cranch C. C. 507.

But where the default is on the part of the vendor, as where he fails to make a good title, he cannot bring ejectment without first refunding any part of the purchase-money which may have been paid, and any moneys which may have been expended on the premises on the strength of his being able to perform his contract.<sup>1</sup> Ejectment may be maintained by a widow to recover possession of her dower lands, particularly after assignment;<sup>2</sup> by the lessees of land who have been ousted from possession by an intruder;<sup>3</sup> by a grantee of a deed against a grantor who executed a deed to defraud his creditors;<sup>4</sup> by the purchaser of the equity of redemption against the mortgagor;<sup>5</sup> and in some states by the mortgagee against the mortgagor;<sup>6</sup> and by the holder of a school-land certificate.<sup>7</sup> A tenant in common may also in this action recover the entire premises, except as against his co-tenants;<sup>8</sup> and a partner may maintain ejectment in respect of land belonging to the firm.<sup>9</sup> In New York a child born after the making of a will, and unprovided for by or not mentioned in the will, may bring ejectment against the purchaser of land sold by the executor.<sup>10</sup> Where it has been adjudged by a decree in chancery that defendant's possession of the land in controversy is not adverse to plaintiff's title, the former is estopped from denying such title; and after plaintiff has conveyed the land, his grantee is the proper party plaintiff, though defendant is still in possession.<sup>11</sup>

§ 3711. **Parties Defendant.**—Whoever is in the actual possession of the premises must be defendant,<sup>12</sup> unless the

<sup>1</sup> *Pierce v. Tuttle*, 53 Barb. 155; 629; *Yancey v. Greenlee*, 90 N. C. 317; *Weese v. Barker*, 7 Col. 178.

<sup>2</sup> *Oothout v. Ledings*, 15 Wend. 410; But see *Wilson v. Chandler*, 60 Ga. Patch v. Keeler, 27 Vt. 252; *Ellicott v.* 129.

*Mosier*, 7 N. Y. 201.

<sup>3</sup> *Kirsch v. Brigard*, 63 Cal. 319.

<sup>4</sup> *Bush v. Rogan*, 65 Ga. 320; 38 555.

<sup>5</sup> *Black v. Justice*, 86 N. C. 504.

<sup>6</sup> *Oldham v. Pileger*, 84 Ill. 102.

<sup>7</sup> *Tobey v. Secor*, 60 Wis. 310.

<sup>8</sup> *Moulton v. McDermott*, 80 Cal.

<sup>9</sup> *Smith v. Smith*, 80 Cal. 323.

<sup>10</sup> *Smith v. Robertson*, 89 N. Y.

<sup>11</sup> *Branson v. Morgan*, 86 Ala. 318.

<sup>12</sup> *Klink v. Cohen*, 13 Cal. 623; *Schuy-*

*ler v. Marsh*, 37 Barb. 350; *People v.*

*Mayor etc.*, 28 Barb. 240; *Albertson v.*

*Reading*, 2 Murph. 283.

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occupant is merely the servant of the person who claims the title; and if the premises are unoccupied, then the person who is exercising acts of ownership over them, or claiming the title, is the party to be made defendant;<sup>1</sup> and it has been held that, except in a case of actual ouster, the defendant's claim must not be less than a freehold interest.<sup>2</sup> Under the code practice, any person may be made defendant who claims an interest in the property adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the questions involved therein;<sup>3</sup> and it is usually provided that in an action for the recovery of land both the landlord and tenant may be joined as defendants. The misjoinder of defendants, like the misjoinder of plaintiffs, is not material, and the action can be maintained against any one or more of the defendants against whom a case is made out.<sup>4</sup> A corporation can be sued in ejectment as well as an individual,<sup>5</sup> and an infant as well as an adult.<sup>6</sup> The heir of a tenant for life holding over after the death of their ancestor,<sup>7</sup> and a tenant at will who refuses to surrender the premises on demand, are proper parties defendant.<sup>8</sup> The holder of a tax deed, also, may be sued in this form of action, if the proceedings were irregular or the sale illegal.<sup>9</sup> Any person claiming to own unoccupied premises, and who has contracted to sell them, may be sued in ejectment, together with his vendees when they have assumed ownership of the premises; and if there are several persons occupying separate parcels in severalty,

<sup>1</sup> *Finnegan v. Carraher*, 47 N. Y. 493; *Abel v. Van Gelder*, 36 N. Y. 513; *Hawkins v. Reichert*, 28 Cal. 535; *Carter v. Hunt*, 40 Barb. 89; *Tuttle v. Lane*, 17 Me. 437; *Chiniquy v. Catholic Bishop*, 41 Ill. 148.

<sup>2</sup> *Wyman v. Brown*, 50 Me. 139.

<sup>3</sup> See *ante*, § 3428.

<sup>4</sup> *Rutenberg v. Main*, 47 Cal. 213; *Stafford v. Nutt*, 51 Ind. 535; *Fort Stannix Bank v. Leggett*, 41 N. Y. 552; *Brown v. Woods*, 48 Mo. 330;

*McGonigal v. Colter*, 32 Wis. 614; *Aucker v. Adams*, 23 Ohio St. 543.

<sup>5</sup> *Lucas v. Johnson*, 8 Barb. 244; *Darter v. Troy Turnpike Co.*, 2 Hill, 629.

<sup>6</sup> *McCoon v. Smith*, 3 Hill, 147; 38 Am. Dec. 623; *Marshall v. Wing*, 50 Me. 62.

<sup>7</sup> *Nims v. Sabine*, 44 How. Pr. 252; *Wheelwright v. Freeman*, 12 Met. 154.

<sup>8</sup> *Dolby v. Miller*, 2 Gray, 135.

<sup>9</sup> *Rand v. Robinson*, 11 Cush. 289; *Knox v. Cleveland*, 13 Wis. 245.

they may be sued separately.<sup>1</sup> The practice under the reformed procedure as to intervention or substitution or addition of parties defendant is as applicable to actions of ejectment and for the recovery of land as to other actions, and it is a common practice to add several fictitious names as defendants, under which persons claiming to be interested may come in and defend.<sup>2</sup>

§ 3712. **Defenses.**—Where the controversy depends upon the title, or a superior right of present possession, the defendant is at liberty to show a better title in himself; but as by reason of his possession he has a *prima facie* right, the burden of proof is on the plaintiff to overcome it, and in the event of his doing so, the defendant may maintain his superior title or right to possession by any competent evidence, as that of adverse possession or a government patent; but as a rule, where the possession was originally obtained by leave and license for the plaintiff, adverse possession cannot be set up.<sup>3</sup> As the plaintiff must recover upon the strength of his own title, and not on the weakness of the defendant's, the latter may set up an outstanding title in some third party, unconnected with his own possession; but it must appear that such title existed at the commencement of the action, and is of such a nature as such third party could recover on it at his own instance.<sup>4</sup> Where a tenant, subsequent to the lease, has purchased the premises at an execution

<sup>1</sup> Dillaye v. Wilson, 43 Barb. 261; Keene v. Barnes, 29 Mo. 377; Edwards v. Farmers' Fire Ins. Co., 21 Wend. 467.

<sup>2</sup> McFadden v. Wallace, 38 Cal. 51; Shaver v. McGraw, 12 Wend. 558; Richardson v. Harvey, 37 Ga. 224; Mitchell v. Baratta, 17 Gratt. 455; Minke v. McNamee, 30 Md. 294; 96 Am. Dec. 577; State v. Orwig, 34 Iowa, 112; Jackson v. Stiles, 2 Cow. 585; Fitch v. Cornell, 1 Saw. 156; Stribbling v. Prettyman, 57 Ill. 371.

<sup>3</sup> Luce v. Carley, 24 Wend. 451; 35 Am. Dec. 637; Catlin v. Decker, 38 Conn. 262; Babcock v. Utter, 1 Abb.

App. 27; Tyler v. Heidorn, 46 Barb. 439.

<sup>4</sup> Brumbalo v. Baxter, 33 Ga. 81; Townsend v. Downer, 32 Vt. 183; Love v. Simins, 9 Wheat. 515; Sharp v. Johnson, 22 Ark. 79; Stuart v. Dutton, 39 Ill. 91; Raynor v. Timerson, 46 Barb. 518; Nixon v. Porter, 38 Miss. 401; Atkins v. Lewis, 14 Gratt. 30. And compare Perkins v. Blood, 36 Vt. 273. See also Cobb v. Lavalle, 89 Ill. 331; 31 Am. Rep. 91; Trenouth v. Gordon, 63 Cal. 379; Hogans v. Carruth, 18 Fla. 587; Bear Valley Coal Co. v. Dewart, 95 Pa. St. 72.

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sale thereof, or under a decree of court, or at a tax sale, he may plead the title thereby acquired in an action brought against him by his landlord, or he may show that by virtue of such a sale the title has come into the hands of a third party.<sup>1</sup> But where a vendee has gone into possession under a contract of purchase, which has subsequently been rescinded, he cannot plead his vendor's want of title, or set up an outstanding title in a third person.<sup>2</sup> And where the action is brought by the purchaser of the defendant's rights at an execution sale, he cannot set up an outstanding title in a third person.<sup>3</sup> And in California, where neither party had title to a mining claim in controversy, it was held that the defendant could not set up the legal title of the United States.<sup>4</sup> So in Iowa, a mere trespasser cannot protect himself by showing title in a third person.<sup>5</sup> But in Illinois, if the judgment debtor abandons the premises after an execution sale, and afterwards obtains possession again, he may then set up an outstanding title under which he claims.<sup>6</sup>

At common law, and in the federal courts at the present day, the defendant cannot set up an equitable defense.<sup>7</sup> But there are now, in many of the states, statutory provisions whereby equitable defenses may be pleaded to an action of ejectment or for the recovery of land, and also equitable relief may be demanded against the plaintiff.<sup>8</sup> And where the vendor of real estate brought ejectment against the purchaser in possession, on the ground that the contract was rescinded by reason of payment of part

<sup>1</sup> Russell v. Whitely, 59 Mo. 196; Bedell v. Shaw, 59 N. Y. 46; Oetgen v. Ross, 54 Ill. 79.

<sup>2</sup> Walker v. Williams, 30 Miss. 165.

<sup>3</sup> McDonald v. Badger, 23 Cal. 393; 83 Am. Dec. 123; Parshall v. Shirts, 54 Barb. 99; Sherry v. Denn, 8 Blackf. 542; Arnold v. Gorr, 1 Rawle, 223.

<sup>4</sup> Coryell v. Cain, 16 Cal. 567.

<sup>5</sup> Williams v. Swetland, 10 Iowa, 51.

<sup>6</sup> Hayes v. Bernard, 38 Ill. 297.

<sup>7</sup> Robinson v. Campbell, 3 Wheat.

212; Singleton v. Touchard, 1 Black, 342; Larrivere v. Madegan, 1 Dill. 455; Fleming v. Carter, 70 Ill. 286; Wythe v. Smith, 4 Saw. 17.

<sup>8</sup> Smith v. Tome, 68 Pa. St. 158; Willis v. Wozencraft, 22 Cal. 607; Requa v. Holmes, 26 N. Y. 338; Newsome v. Williams, 27 Ark. 632; Fisher v. Moolick, 13 Wis. 321. Equitable defenses are not allowed in Michigan: McKay v. Williams, 67 Mich. 547; 11 Am. St. Rep. 597.



of the purchase-money being in default, the defendant was permitted to counterclaim on a note he held against the plaintiff, and thereby extinguish the claim for unpaid purchase-money.<sup>1</sup> So where the grantor of a deed made upon trust to secure the payment of a debt brings ejectment against the trustee in possession before the debt is paid, the defendant may set up the facts in answer to the action.<sup>2</sup> And where equitable defenses are allowed, a defendant may set up an equitable title, either in himself or in one through whom he claims, particularly where it is antecedent to the plaintiff's title;<sup>3</sup> and a vendee in possession under a contract of purchase may, where such defenses may be pleaded, set up that he was not in default, and was entitled to a specific performance by the plaintiff, and by proper pleading may enforce it in the same action.<sup>4</sup> Fraud is a good ground of defense in an action of ejectment, and where the defendant was induced to convey the land to the plaintiff by the fraudulent representation of the latter that he was perfecting the title of another, to whom it had been defectively conveyed, he may set up this state of facts in answer to the action.<sup>5</sup> So in an action to recover land purchased at a sheriff's sale, it may be set up by way of defense that the plaintiff fraudulently prevented competition in bidding at such sale;<sup>6</sup> and where the defendant fraudulently conveyed his land to the plaintiff for the purpose of defrauding his creditors, but did not part with the possession, he was allowed to set up his own fraud in an action of ejectment, on the ground that, the parties being *in pari delicto*, the position of the one in

<sup>1</sup> Cavalli v. Allen, 57 N. Y. 508. See also Nat. Fire Ins. Co. v. McKay, 21 N. Y. 191; Leavenworth v. Packer, 52 Barb. 132.

<sup>2</sup> Johnson v. Houston, 47 Mo. 227. See also Cadiz v. Majors, 33 Cal. 288; McFadden v. Drake, 79 Pa. St. 474; Carman v. Johnson, 20 Mo. 108; 61 Am. Dec. 593.

<sup>3</sup> Safford v. Hynds, 39 Barb. 625; McClaue v. White, 5 Minn. 178.

<sup>4</sup> Love v. Watkins, 40 Cal. 547; 6 Am. Rep. 624; Young v. Montgomery, 28 Mo. 604; Cavalli v. Allen, 57 N. Y. 508; Traphagen v. Traphagen, 40 Barb. 537; Warren v. Crew, 22 Iowa, 315; Richards v. Elwell, 48 Pa. St. 381.

<sup>5</sup> Lombard v. Cowhan, 34 Wis. 486; Levick v. Brotherline, 74 Pa. St. 149.

<sup>6</sup> McCaskey v. Graff, 23 Pa. St. 321; 62 Am. Dec. 336.

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possession was the stronger;<sup>1</sup> and it is also a good defense to show that the deed from defendant's ancestor to plaintiff was obtained by fraud.<sup>2</sup> So where ejectment was brought on a deed absolute, but which was in fact given as security for money lent, the defendant may set up the facts and show the repayment of the money for which the security was given;<sup>3</sup> and where the plaintiff represented to the defendant that he would find the means for him to redeem his estate, which was heavily encumbered, and the defendant in consequence, and relying thereon, refrained from endeavoring to obtain the necessary funds elsewhere, and afterwards the plaintiff purchased the encumbrances and cut off the redemption, and then brought ejectment for the possession of the lands, it was held that the defendant might plead these facts as a defense to defeat the action.<sup>4</sup>

And, as a general rule, wherever accident or mistake may be set up as a defense to another action, they will be equally available in an action of ejectment. So the defendant may show that the land was intended to be conveyed to him by a deed from the plaintiff's grantor, but that the land was misdescribed in the deed which was intended to cover the land sued for. But where such a defense is raised, the defendant must show that the plaintiff had notice of the mistake.<sup>5</sup> So possession of real estate by a mortgagee, acquired by force or fraud, and without color of lawful authority, is no defense to an action of ejectment brought by the owner.<sup>6</sup> And if the plaintiff looks on and suffers the defendant to purchase and expend money on land, under an erroneous opinion

<sup>1</sup> *Harrison v. Hatcher*, 44 Ga. 638.

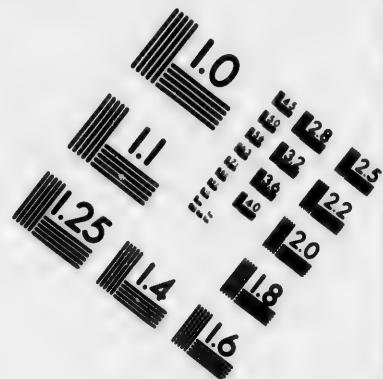
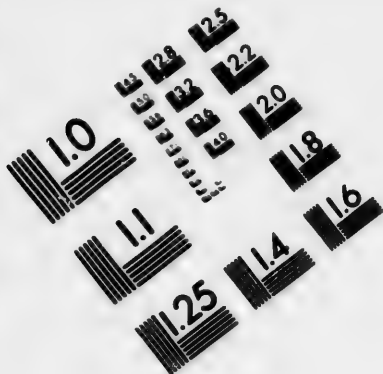
<sup>2</sup> *McCall v. Carpenter*, 18 How. 297.

<sup>3</sup> *Dodge v. Wellman*, 43 How. Pr. 427. See also *Bigelow v. Topliff*, 25 Vt. 273; 60 Am. Dec. 264; *Howe v. Russell*, 36 Me. 115; *Dobbs v. Kellogg*, 53 Wis. 448; *Smith v. Smith*, 80 Cal. 323.

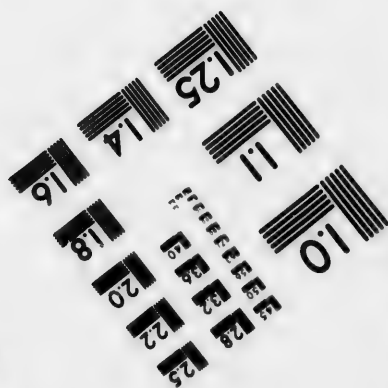
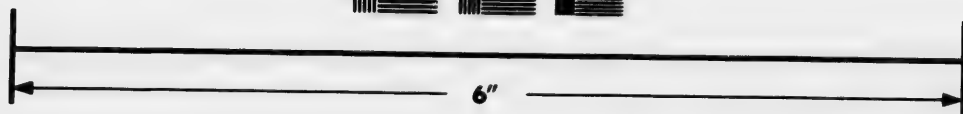
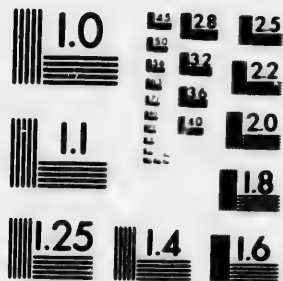
<sup>4</sup> *Wilson v. Eggleston*, 27 Mich. 257.

<sup>5</sup> *Hobbough v. Struble*, 60 N. Y. 430; *Gough v. Dorsey*, 27 Wis. 119; *Lowe v. Alexander*, 15 Cal. 296; *Kaul v. Lawrence*, 73 Pa. St. 410; *A. v. Patterson*, 53 Ga. 309; *Colli. Rogers*, 63 Mo. 515.

<sup>6</sup> *Howell v. Leavitt*, 95 N. Y. 617.



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of title, without making known his own claim, he will not be permitted to afterwards assert his title and recover possession of the property in ejectment;<sup>1</sup> but if the defendant at the time of spending his money knew the state of his own title, this defense will not avail him.<sup>2</sup> Where defendant showed that plaintiff's title was derived from a conveyance to her in fraud of her grantor's creditors, one of whom afterwards obtained a judgment and issued execution, under which the land was sold to defendant's predecessor in title, it was held to be a good defense.<sup>3</sup> But where land was sold under a deed of trust to secure the purchase-money, and repurchased by the vendor, the vendee, having retained possession of the land, cannot defend ejectment by the vendor on the ground of fraudulent misrepresentations by the vendor inducing the first sale, as upon discovery of the fraud he should have repudiated the purchase, and surrendered possession of the land;<sup>4</sup> and as a sale of lands held adversely does not vest in the grantee a right to sue in his own name for their recovery, defendants in ejectment, in possession under claim of right, cannot raise the defense that plaintiff has conveyed all his interest in the premises since the commencement of the suit.<sup>5</sup> Nor can a mortgagor in possession set up the outstanding title of the mortgagee as a defense to an action of ejectment brought against him by a purchaser of the equity of redemption at an execution sale.<sup>6</sup> But where defendant claimed ownership under an oral contract with plaintiff's grantor to convey or devise to her and another the premises in question, in consideration of their moving thereon and taking care of her for the remainder of her life, and proved performance of the contract on their part and a failure by the decedent, it was

<sup>1</sup> *Kirk v. Hamilton*, 102 U. S. 68; *Dickerson v. Colgrove*, 100 U. S. 578. <sup>2</sup> *De Guire v. St. Joseph Lead Co.*, 38 Fed. Rep. 65.

<sup>3</sup> *Crumb v. Wright*, 97 Mo. 13.

<sup>4</sup> *Davis v. Curry*, 85 Ala. 133.

<sup>5</sup> *Cotton v. Carlisle*, 85 Ala. 175; 7

*Am. St. Rep.* 29.

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held that defendant's possession under the contract was a sufficient defense to the action.<sup>1</sup> Where, however, the defendant relies on adverse possession, it may be shown that the continuity of his possession was broken by a judgment of a court of competent jurisdiction in an action of unlawful detainer.<sup>2</sup> In Missouri, a defendant in ejectment may set up his equities as a separate defense in the same suit, and the judgment thereon is final.<sup>3</sup> But an answer setting up a decree in partition, and a deed to defendant pursuant thereto, and praying for a decree that he is the owner and entitled to possession, and for general relief, presents no equitable defense.<sup>4</sup> In Michigan, the equitable defense that an absolute deed was intended and understood by defendant to be only a mortgage, and that plaintiff purchased with notice thereof, cannot be pleaded in an action of ejectment;<sup>5</sup> and in Illinois, evidence of an oral agreement between defendant and one to whom he conveyed the land, and under whom plaintiff claims, that defendant should have the right to redeem on payment of a certain sum per acre, with interest, is not admissible, on the ground that it is incompetent either to show that the conveyance was a mortgage, the action being at law, or to show an agreement to reconvey, which would be invalid under the statute of frauds.<sup>6</sup> But a defendant in possession under a contract of purchase from the beneficiary in a trust deed may set up such title as a defense to an action of ejectment by a *cestui que trust* in a subsequent deed of trust.<sup>7</sup> In California, the fact that plaintiff had recovered a judgment for the same land against the same defendants several years before is no

<sup>1</sup> Kenyon v. Mulan, 53 Hun, 591. Also in Dakota: Suessenbach v. First Nat. Bank, 5 Dak. 477. And see also Rogers v. White, 68 Mich. 10; Schultz v. Hadler, 39 Minn. 191.

<sup>2</sup> Bishop v. Truitt, 85 Ala. 376. And see Martin v. Skipwith, 50 Ark. 141; Hames v. Harris, 50 Ark. 68.

<sup>3</sup> City of St. Louis v. Schulenburg

<sup>4</sup> Hart v. Steedman, 98 Mo. 452.  
<sup>5</sup> Gates v. Sutherland, 76 Mich. 231.  
<sup>6</sup> McGinnis v. Fernandes, 126 Ill. 228.

<sup>7</sup> Collins v. Stocking, 98 Mo. 290.

defense to a subsequent action, the former judgment not having been obeyed, and the rents and profits claimed being for a different period.<sup>1</sup> And in Pennsylvania, a title acquired by adverse possession fully matured after warrant and survey, but before patent issued, may be successfully pleaded in ejectment;<sup>2</sup> and under the general denial in ejectment the defendant may show that the deed under which plaintiff claims is void, because made in violation of the statutes of the United States relating to the disposal of public lands.<sup>3</sup>

§ 3713. **Improvements.** — At common law the defendant could not recover the value of improvements made by him upon the land. But under the modern practice, if he has, in good faith, made permanent and valuable improvements, under color of title, he may, as a general rule, offset their value against the plaintiff's claim for rents and profits, or may bring a separate action for their value.<sup>4</sup> Questions have been raised as to the constitutionality of statutes allowing the claim for improvements, but it is now determined that such statutes are valid.<sup>5</sup> But, notwithstanding the provisions of such a statute, the purchaser of encumbered land making improvements with knowledge of the encumbrance is not entitled to compensation;<sup>6</sup> and in Massachusetts it is held that neither a mortgagee nor his grantee can recover for the

<sup>1</sup> Southern Pac. R. R. Co. v. Purcell, 77 Cal. 69. And see Avery v. Fitzgerald, 94 Mo. 207.

<sup>2</sup> Patten v. Scott, 118 Pa. St. 115; 4 Am. St. Rep. 576.

<sup>3</sup> Sparrow v. Rhoades, 76 Cal. 208; 9 Am. St. Rep. 197.

<sup>4</sup> Carpenter v. Small, 35 Cal. 346; Love v. Shartzer, 31 Cal. 487; Moss v. Shear, 25 Cal. 38; 85 Am. Dec. 94; Lunquest v. Ten Eyck, 40 Iowa, 213; Whitney v. Richardson, 31 Vt. 300; Thomas v. Malcolm, 39 Ga. 328; 99 Am. Dec. 459; Lee v. Bowman, 55 Mo. 400; Ringhouse v. Keener, 63 Ill. 230; Blodgett v. Hitt, 29 Wis. 169; Stark v. Starr, 1 Saw. 15; Carolina

Cent. R. R. Co. v. McCaskill, 98 N. C. 526; McClay v. Arnett, 47 Ark. 445; Barrett v. Strahl, 73 Wis. 385; 9 Am. St. Rep. 795.

<sup>5</sup> Fee v. Cowdry, 45 Ark. 413; 55 Am. Rep. 560; Griswold v. Bragg, 48 Conn. 577; Childs v. Shower, 18 Iowa, 261; Huebschmann v. McHenry, 29 Wis. 655; Pacquette v. Pickness, 19 Wis. 219. In Iowa the party claiming must be in possession of the premises: Webster v. Stewart, 6 Iowa, 401; Clausen v. Rayburn, 14 Iowa, 136; Lunquest v. Ten Eyck, 40 Iowa, 213.

<sup>6</sup> George v. Steam Stone-cutter Co., 20 Fed. Rep. 478.

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value of improvements.<sup>1</sup> The defendant is not limited to the recovery for improvements actually made of himself, but may include those purchased from his predecessor.<sup>2</sup> And in Iowa the claimant for improvements may remain in occupation of and use the land as he deems best, until his claim is satisfied.<sup>3</sup> Where the claimant is a tenant in common with the plaintiff in the ejectment suit, he will be permitted to set off the value of the improvements against his co-tenant.<sup>4</sup> The amount for which recovery may be had is not necessarily the cost of the improvements. It may be more or less, the true measure of damages being the value of the benefit conferred upon the land by the improvements.<sup>5</sup> But the amount allowed must not exceed the rents and profits claimed by the plaintiff.<sup>6</sup> Under the Mississippi statute<sup>7</sup> allowing compensation for improvements, there can be no recovery except where the right to sue for or demand mesne profits exists.<sup>8</sup> Where the right to recover for improvements is allowed by statute, the provisions thereof must be strictly construed, and will not justify the removal of the improvements under the claim of their being personal property.<sup>9</sup> And a claim for improvements in ejectment by a devisee will not be allowed where they were made under a contract with the deceased owner, the proper remedy being against his personal representatives.<sup>10</sup> The time at which the claim is to be made varies in different states. In Iowa it must be after the determination of the question of title,<sup>11</sup> but in Wisconsin it

<sup>1</sup> *Havens v. Allen*, 8 Allen, 363; *Russell v. Blake*, 2 Pick. 505.

<sup>2</sup> *Parsons v. Moses*, 16 Iowa, 440.

<sup>3</sup> *Webster City etc. R. R. Co. v. Newsom*, 70 Iowa, 355. So in Louisiana: *Fletcher v. Cavelier*, 10 La. 116.

<sup>4</sup> *Backus v. Chapman*, 111 Mass. 386; *Davis v. Louk*, 30 Wis. 308.

<sup>5</sup> *McMurray v. Day*, 70 Iowa, 671; *Childs v. Shower*, 18 Iowa, 261; *Pacquette v. Pickness*, 19 Wis. 219.

<sup>6</sup> *Marlow v. Adams*, 24 Ark. 109;

*Wood v. Wood*, 83 N. Y. 575; *Fenwick v. Gill*, 38 Mo. 510.

<sup>7</sup> Miss. Rev. Code 1880, sec. 2512.

<sup>8</sup> *Pass v. McLendon*, 62 Miss. 580.

<sup>9</sup> *Huebschmann v. McHenry*, 29 Wis. 655; *Blanchard v. Ware*, 43 Iowa, 530.

<sup>10</sup> *Van Alen v. Rogers*, 1 Johns. Cas. 281; 1 Am. Dec. 113.

<sup>11</sup> *Fogg v. Holcomb*, 64 Iowa, 621; *Walton v. Gray*, 29 Iowa, 440. And see *Chicago, R. I., etc. R. R. Co. v. Tharnish*, 54 Iowa, 691.



precedes and suspends the judgment, and is after verdict;<sup>1</sup> and a claim for improvements made after the commencement of suit will not be allowed;<sup>2</sup> and street improvements cannot be set off against a claim for mesne profits.<sup>3</sup> But the value of a sidewalk alongside the property, which is necessary, or ordered by statute or ordinance, may be recovered.<sup>4</sup> And compensation for improvements cannot be had when, upon examination of the records, it might have been ascertained that the title was worthless.<sup>5</sup>

§ 3714. **Judgment.**—When the plaintiff recovers judgment in an action of ejectment he does not thereby acquire any new title to the land. He obtains only the enforcement of the title to which he was entitled, whether it be of a freehold or chattel interest, and the judgment should be only for such title or interest as he proves to be his.<sup>6</sup> If he claims more and or a greater interest than he really has, his claim to what is justly his is not thereby defeated, but he is entitled to judgment accordingly; and if his interest in the lands is an undivided one, he is entitled to judgment to that effect.<sup>7</sup> Under the modern practice, the plaintiff recovers not only possession of the lands, but substantial damages for their detention or the withholding of the rents and profits;<sup>8</sup> and he now generally recovers the value of the premises during the period of unlawful detention, except such portion thereof as may

<sup>1</sup> *Hills v. Laporte*, 40 Wis. 113; *Scott v. Riese*, 38 Wis. 636. So also in North Carolina: *Casey v. Cooper*, 99 N. C. 395.

<sup>2</sup> *Russell v. Blake*, 2 Pick. 505; *Welles v. Newsom*, 76 Iowa, 81.

<sup>3</sup> *Stark v. Starr*, 1 Saw. 15.

<sup>4</sup> *Hentig v. Redden*, 38 Kan. 496.

<sup>5</sup> *Parrish v. Jackson*, 69 Tex. 614; *Dawson v. Grow*, 29 W. Va. 333.

<sup>6</sup> *Kennedy v. Reynolds*, 27 Ala. 364; *Winstanley v. Meacham*, 58 Ill. 97; *Minke's Lessee v. McNamee*, 30 Md. 294; 96 Am. Dec. 577; *Ekey v. Inge*, 87 Mo. 496.

<sup>7</sup> *Hayes v. Martin*, 45 Cal. 559; *Van Alstyne v. Spraker*, 13 Wend. 578; *Gray v. Givens*, 26 Mo. 291; *Brown v. Combs*, 29 N. J. L. 36; *Jones v. Walker*, 47 Ala. 175; *Moore v. Abernethy*, 7 Blackf. 442. But see *Riehl v. Bingenheimer*, 28 Wis. 84; *Horne v. Carter's Adm'rs*, 20 Fla. 45; *Morgan v. Eggers*, 127 U. S. 63; *Sexton v. Hollis*, 26 S. C. 231; *Reilly v. Blaser*, 61 Mich. 399.

<sup>8</sup> *Walker v. Mitchell*, 18 B. Mon. 541; *Smith v. Benson*, 9 Vt. 138; 31 Am. Dec. 614; *Karns v. Tanner*, 74 Pa. St. 339; *Sullivan v. Davis*, 4 Cal. 291.

<sup>1</sup> *Hill v. Orleans*, 131 U. S. 280; 18 Holmes 111; *Holmes v. R. R. Co.*, 131 U. S. 280; 18 Holmes 111.

be barred by the statute of limitations.<sup>1</sup> In some of the states the common-law practice of giving merely nominal damages in an action of ejectment, and leaving the plaintiff to recover the actual damages in an action of trespass for mesne profits, still exists; and when the latter action is between the same parties as the action in ejectment, and the plaintiff claims only for the profits accrued since the date of the alleged lease, the judgment in the ejectment action is conclusive evidence of the plaintiff's title, and the defendant's entry and possession since such date.<sup>2</sup> If the plaintiff is a tenant in common of the premises, he can recover only his proportionate share of the mesne profits.<sup>3</sup> And the measure of damages in an action for the mesne profits of a ferry has been held to be the receipts, less the operating expenses.<sup>4</sup> Where the plaintiffs are devisees, they can recover only from the time their title accrued, as the rents and profits previous thereto would belong to the testator's general estate.<sup>5</sup> And where the defendant died during the pendency of the ejectment suit, and his heirs were substituted as defendants, it was held that they were liable for the rents and profits only since the death of their ancestor.<sup>6</sup> So if the plaintiff is only a lessee, he can recover only the value of the lease during the period he has been deprived of possession.<sup>7</sup> And damages for withholding possession can be recovered only up to the time of their surrender.<sup>8</sup> A verdict in ejectment for the land in dispute, without describing it, is sufficient.<sup>9</sup> But where the title is put in issue, and the verdict and judgment operate as an estoppel on the par-

<sup>1</sup> *Hill v. Meyers*, 46 Pa. St. 15; *New Orleans v. Gaines*, 15 Wall. 624; *Blodgett v. Hitt*, 29 Wis. 169; *Budd v. Walker*, 9 Barb. 493.

<sup>2</sup> *Chirac v. Rheinicker*, 11 Wheat. 280; *Dewey v. Osborn*, 4 Cow. 329; *Holmes v. Dairs*, 19 N. Y. 488; *Battin v. Bigelow*, 1 Pet. 452; *Van Alen v. Rogers*, 1 Johns. Cas. 281; 1 Am. Dec. 113.

<sup>3</sup> *Miller v. Myles*, 46 Cal. 535; *Clark v. Huber*, 20 Cal. 196.

<sup>4</sup> *Averett v. Brady*, 20 Ga. 523.

<sup>5</sup> *Hotchkiss v. R. R. Co.*, 26 Barb. 600.

<sup>6</sup> *Cavender v. Smith*, 8 Iowa, 360.

<sup>7</sup> *Holmes v. Davis*, 19 N. Y. 488.

<sup>8</sup> *Gilman v. Gilman*, 111 N. Y. 265. And see *Meier v. R. R. Co.*, 16 Or. 500.

<sup>9</sup> *Grace v. Martin*, Sup. Ct. Ga., 1889.

ties as to title, it is the better practice to define in the verdict the extent of the plaintiff's interest, either by metes and bounds or as an undivided fractional interest.<sup>1</sup> And where it appears that the parties are tenants in common, the judgment should be that the plaintiff be let into possession, with defendant as tenant in common to the extent of his interest.<sup>2</sup> And a verdict not stating the quantity of plaintiff's estate will not support a judgment.<sup>3</sup> Judgment for possession, damages, and costs against one who was never in possession, though his wife was a tenant in common with the person in possession, is erroneous.<sup>4</sup> Where a claim is made to the premises under an after-acquired title, the judgment in a previous action of ejectment does not work an estoppel.<sup>5</sup> And a recovery in ejectment merely determines that the plaintiff has the better title at law, and in no way affects the equitable rights of the defendant.<sup>6</sup> But a judgment by default is conclusive, and a bar which estops the party against whom it was rendered.<sup>7</sup> Though where the record shows that all claims for damages were withdrawn, judgment in ejectment does not preclude the plaintiff from maintaining a subsequent action to recover damages for withholding possession of the premises.<sup>8</sup> And a stranger in title cannot invoke an equitable estoppel against plaintiff in ejectment.<sup>9</sup>

<sup>1</sup> *Allen v. Salinger*, 103 N. C. 14.

<sup>2</sup> *Allen v. Salinger*, 103 N. C. 14.

<sup>3</sup> *Lungren v. Brownlie*, 22 Fla. 491.

<sup>4</sup> *La Riviere v. La Riviere*, 97 Mo. 182.

<sup>5</sup> *Barrows v. Kindred*, 4 Wall. 125;

*Barrett v. Birge*, 50 Cal. 655; *Hawley*

*v. Simons*, 102 Ill. 116.

<sup>6</sup> *Boro v. Harris*, 13 Lea, 36.

<sup>7</sup> *Secrist v. Zimmerman*, 55 Pa. St.

446; *Sheridan v. Linden*, 81 N. Y.

182.

<sup>8</sup> *Coburn v. Goodall*, 72 Cal. 498; 1

Am. St. Rep. 75.

<sup>9</sup> *Blodgett v. Perry*, 97 Mo. 263; 10

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TITLE XXXVII.  
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## TITLE XXXVII.

# CONFLICT OF LAWS.

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### CHAPTER CLXXXVII.

#### CONFLICT OF LAWS.

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- § 3716. Contracts in general.
- § 3717. Real property — Personal property.
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- § 3737. Judicial proceedings.
- § 3738. Limitations.
- § 3739. Evidence.
- § 3740. Interest.

§ 3715. **Conflict of Laws — In General.** — The subject of conflict of laws rests entirely upon the comity of nations. The law of one state has, *proprio vigore*, no force

or authority beyond the jurisdiction of its own courts.<sup>1</sup> Whatever effect is given to it by the courts of foreign countries or other states is the result of that international comity which is the product of modern civilization. It is left to each nation to say how far it will recognize this comity, and to what extent it will be permitted to control its own laws. And because the effect of a foreign law depends so largely upon state comity, there is, as would naturally be expected, considerable conflict in the authorities where the laws conflict. But it is a well-established principle that the rule of comity, where there is a conflict of laws, cannot prevail so as to allow a foreign law to counteract a general prohibitory law which regulates the policy of the state, or in which all the citizens of the state are interested.<sup>2</sup> The principle of comity between foreign states does not extend to the recognition of liens given by foreign law, when it would operate prejudicially to the rights of others in the country where such lien is asserted.<sup>3</sup> A statute law of another state will be enforced, if not against public policy, when such law has entered into a contract.<sup>4</sup> Comity is overruled by positive law, and it is only in the silence of any particular rule affirming, denying, or restraining the operation of foreign laws that courts of justice presume a tacit adoption of them by

<sup>1</sup> *People v. McLeod*, 1 Hill, 377; 25 Wend. 483; 37 Am. Dec. 328; *Dearing v. Bank*, 5 Ga. 497; 48 Am. Dec. 300; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *Roche v. Washington*, 19 Ind. 53; 81 Am. Dec. 376. It follows that the title to property located in one state cannot be passed by force of the laws of another, except in virtue of the comity or courtesy which prevails among different nations and states by force of international law: *State Bank Receiver v. Plainfield Bank*, 34 N. J. Eq. 450. Agreements in violation of revenue laws of foreign nations may be enforced in our courts: *Kohn v. Schooner Renaissance*, 5 La. Ann. 25; 52 Am. Dec. 577.

<sup>2</sup> *Mahorner v. Hooe*, 9 Smedes & M. 247; 48 Am. Dec. 706; *State Bank v. Plainfield Bank*, 34 N. J. Eq. 450.

<sup>3</sup> *Donald v. Hewitt*, 33 Ala. 534; 73 Am. Dec. 431. A lien given by the statute of another state on the estate of the husband for the support of the widow after his death cannot, as against the heir, be enforced by the widow on the real estate of the decedent in Kentucky. To allow the enforcement of such a lien would be to permit the statute of another state to alter the laws of descent of Kentucky: *Short v. Galway*, 83 Ky. 501; 4 Am. St. Rep. 168.

<sup>4</sup> *Bancher v. Gregory*, 9 Mo. App. 102.

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their own government.<sup>1</sup> The laws of another place or country than that where a contract is made may be substituted by parties, both in relation to the legality and extent of the original obligation and in relation to the respective rights of the parties for a violation of its terms, where the subject-matter of the contract is not *malum in se*, immoral, or contrary to the local policy, or dangerous to the peace and good order of the particular community in which it is sought to be enforced. This is part of the *jus gentium*, and is enforced *ex comitate*, when the enforcement of the contract is sought in the courts of a country governed by a different rule than the local or adopted law of that contract.<sup>2</sup> As a general rule, the courts of a state from which a statute is taken will follow the construction placed upon a statute by the courts of the state enacting it.<sup>3</sup> The law of other states will be presumed to be the common law.<sup>4</sup>

**ILLUSTRATIONS.**—A citizen of Chicago made with the agents of a line of British steamers a contract to carry cattle from Baltimore to Liverpool. It was stipulated that any questions arising should be determined by English law in England. *Held*, that a federal court sitting in Maryland would recognize this stipulation, and would apply the English rule of law to the solution of the questions in controversy under the contract: *The Oranmore*, 24 Fed. Rep. 922.

**§ 3716. Contracts in General.**—The validity of a contract, its interpretation and enforcement, are to be determined by the *lex loci contractus*, or law of the place where it is made,<sup>5</sup> unless it is to be performed in another

<sup>1</sup> *Smith v. McAttee*, 27 Md. 420; 92 Am. Dec. 642.

<sup>2</sup> *McAllister v. Smith*, 17 Ill. 328; 65 Am. Dec. 651.

<sup>3</sup> *Jessup v. Carnegie*, 80 N. Y. 441; 36 Am. Rep. 643. See *post*, Chapter CXI., Statutes.

<sup>4</sup> *Carpenter v. R. R. Co.*, 72 Me. 388; 39 Am. Rep. 340. See Lawson on Presumptive Evidence.

<sup>5</sup> *Harrison v. Sterry*, 5 Cranch, 289; *Aymar v. Sheldon*, 12 Wend. 439; 27

Am. Dec. 137; *Larid v. Hodges*, 26 Ark. 356; *Gilman v. Stevens*, 63 N. H. 342; *Marvin Safe Co. v. Norton*, 43 N. J. L. 415; 57 Am. Rep. 566; *Pritchard v. Norton*, 106 U. S. 124; *Warder v. Arell*, 2 Wash. (Va.) 282; 1 Am. Dec. 488; *Smith v. Smith*, 2 Johns. 235; 3 Am. Dec. 410; *Thompson v. Ketcham*, 8 Johns. 190; 5 Am. Dec. 332; *Touro v. Cassin*, 1 Nott & McC. 173; 9 Am. Dec. 683; *Lynch v. Postlethwaite*, 7 Mart. 69; 12 Am. Dec. 495; *Baldwin*

*Smedes & M. State Bank v. Eq.* 450. Ala. 534; 73 given by the on the estate support of the cannot, as forced by the e of the deced- To allow the en would be to other state to of Kentucky: y. 501; 4 Am. 9 Mo. App.



country, in which case it will be governed by the law of the place of performance.<sup>1</sup> Where a contract is made in one country, to be performed in a second, and is enforced in a third, the law of the last alone will govern the case as to the remedy.<sup>2</sup> The law of the place where the contract is made and to be performed governs not only as to its execution, authentication, and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, satisfaction, or discharge.<sup>3</sup> The law of the place where the contract is made will ordinarily govern its interpretation and the rights of the parties thereunder. But when a question arises under the common law or law merchant, not modified by local custom or statute, the courts of the particular state will declare for themselves what the rule in such case is, and are not concluded by what the courts of the state where the contract was made have decided relative thereto.<sup>4</sup> The validity of an instrument the parties to which were domiciled in another state at the time of its execution is to be determined according to the law of the state where

*v. Gray*, 4 Martin, N. S., 192; 16 Am. Dec. 169; *Thorn v. Morgan*, 4 Martin, N. S., 292; 16 Am. Dec. 173; *Dougherty v. Snyder*, 15 Serg. & R. 84; 16 Am. Dec. 520; *Miles v. Oden*, 8 Martin, N. S., 214; 19 Am. Dec. 177; *Malpica v. McKown*, 1 La. 248; 20 Am. Dec. 279; *Arayo v. Currell*, 1 La. 528; 20 Am. Dec. 286; *Clague v. Creditors*, 2 La. 114; 20 Am. Dec. 300; *King v. Harman*, 6 La. 607; 26 Am. Dec. 485; *Suffolk Bank v. Kidder*, 12 Vt. 464; 36 Am. Dec. 354; *Harrison v. Edwards*, 12 Vt. 648; 36 Am. Dec. 365; *Buckner v. Watt*, 19 La. 216; 36 Am. Dec. 671; *Lane v. Levillian*, 4 Ark. 76; 37 Am. Dec. 769; *Whidden v. Seelye*, 40 Me. 247; 63 Am. Dec. 661; *Spear v. Shropshire*, 11 La. Ann. 559; 66 Am. Dec. 206; *Speed v. May*, 17 Pa. St. 91; 55 Am. Dec. 540; *King v. Sarria*, 69 N. Y. 24; 25 Am. Dec. 128.

<sup>1</sup> *Story's Conflict of Laws*, sec. 280; *Andrews v. Pond*, 13 Pet. 65; *Wardler v. Arell*, 2 Wash. (Va.) 282; 1 Am. Dec. 488; *Smith v. Smith*, 2 Johns. 235; 3

Am. Dec. 410; *De Sobry v. De Laistre*, 2 Har. & J. 191; 3 Am. Dec. 535; *Smith v. Mead*, 3 Conn. 253; 8 Am. Dec. 183; *Baxter v. Willey*, 9 Vt. 276; 31 Am. Dec. 623; *Larrabee v. Talbot*, 5 Gill, 426; 46 Am. Dec. 637; *Strawbridge v. Robinson*, 5 Gilm. 470; 50 Am. Dec. 420; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62; *Wyse v. Dandridge*, 35 Miss. 672; 72 Am. Dec. 149; *Kennedy v. Knight*, 21 Wis. 340; 94 Am. Dec. 543; *Dunn v. Welsh*, 62 Ga. 241; *Clampson v. Wilson*, 64 Ga. 184. The presumption is that the place of performance is the place of execution; *Allshouse v. Ramsay*, 6 Whart. 331; 37 Am. Dec. 417; *Jones v. Perkins*, 20 Miss. 139; 64 Am. Dec. 136. See *Schuessler v. Watson*, 37 Ala. 98; 76 Am. Dec. 348.

<sup>2</sup> *Davis v. Morton*, 5 Bush, 160; 96 Am. Dec. 345.

<sup>3</sup> *May v. Breed*, 7 Cush. 15; 54 Am. Dec. 700.

<sup>4</sup> *Franklin v. Twogood*, 25 Iowa, 520; 96 Am. Dec. 73.

executed.<sup>1</sup> A claim under a contract for services made in another state must be determined by the laws of that state.<sup>2</sup> The law of the donee's residence determines the validity of a gift delivered to him there by the donor residing in another state.<sup>3</sup> A contract to pay generally is governed by the law of the place of its execution, though collectible elsewhere.<sup>4</sup> A plea in avoidance of a note, made in another state, on the ground of unlawful consideration, must aver that the object for which it was given was prohibited by the laws of that state.<sup>5</sup> A contract to pay money made and to be performed in New York will be governed by the laws of that state relating to usury, although the loan is secured by a mortgage upon lands in Ohio.<sup>6</sup> The contract of a traveling agent, which requires ratification by his principal, is presumed to have been made at the place where the ratification was given.<sup>7</sup> The effect of the indorsement and delivery, in one state, of a private warehouse receipt for goods stored in another state, is to be determined by the law of the latter state.<sup>8</sup> A policy of insurance signed in Baltimore, but sent in blank to the agent in Washington, and by him countersigned and delivered in Washington, is a contract made in Washington, and not in Baltimore.<sup>9</sup> The right of a surety on a note to discharge his liability by notice to the creditor to pursue the principal debtor is determinable by the law of the place of the contract, and not by the law of the forum. If the place of the contract requires a written notice, a verbal notice will not avail, although such a notice would be good in the state where suit is brought.<sup>10</sup>

<sup>1</sup> *Graves v. Roy*, 13 La. 454; 33 Am. Dec. 568.

<sup>2</sup> *Brackett v. Norton*, 4 Conn. 517; 10 Am. Dec. 179.

<sup>3</sup> *Weatherby v. Covington*, 3 Strob. 27; 49 Am. Dec. 623.

<sup>4</sup> *Bryant v. Edson*, 8 Vt. 325; 30 Am. Dec. 472.

<sup>5</sup> *Bradshaw v. Newman, Breese*, 133; 12 Am. Dec. 149.

<sup>6</sup> *Lockwood v. Mitchell*, 7 Ohio St. 387; 70 Am. Dec. 78.

<sup>7</sup> *Shuenfeldt v. Junkerman*, 20 Fed. Rep. 357.

<sup>8</sup> *Hallgarten v. Oldham*, 135 Mass. 1; 46 Am. Rep. 433.

<sup>9</sup> *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; 33 Am. Rep. 258.

<sup>10</sup> *Tenant v. Tenant*, 110 Pa. St. 478.

But a contract *contra bonos mores*, though legal in the country where it was made, will not be enforced in the courts of another state or country;<sup>1</sup> nor where it is contrary to the statute or public policy of the latter state, or is to the detriment of its citizens.<sup>2</sup> A state will not enforce contracts made elsewhere by its citizens, if they are in violation and fraud of its laws.<sup>3</sup> A contract void where made is void everywhere.<sup>4</sup> A contract to be wholly executed in one state, in violation of a statute thereof, will not be enforced in another state, nor will an account of profits of such contract there be decreed.<sup>5</sup>

ILLUSTRATIONS. — An offer made in Massachusetts was accepted by telegraph from Rhode Island. The contract was to be performed in Massachusetts. *Held*, a Rhode Island contract: *Perry v. Iron Co.*, 15 R. I. 380; 2 Am. St. Rep. 902. A bond was dated in North Carolina and delivered in Virginia. No place of payment was specified. *Held*, that the usury laws of North Carolina applied: *Morris v. Hockaday*, 94 N. C. 286; 55 Am. Rep. 607. A life insurance policy was issued by a New York

<sup>1</sup> De Sobry v. De Laistre, 2 Harr. & J. 191; 3 Am. Dec. 535; Phinney v. Baldwin, 16 Ill. 108; 61 Am. Dec. 63; Smith v. Godfrey, 28 N. H. 379; 61 Am. Dec. 617.

<sup>2</sup> Parsons v. Trask, 7 Gray, 473; 66 Am. Dec. 502; Kanaga v. Taylor, 7 Ohio St. 134; 70 Am. Dec. 62; Walters v. Whitlock, 9 Fla. 86; 76 Am. Dec. 607; Stricker v. Tinkham, 35 Ga. 176; 89 Am. Dec. 280; Galliano v. Pierre, 18 La. Ann. 10; 89 Am. Dec. 643; Thurston v. Rosenfield, 42 Mo. 474; 97 Am. Dec. 351; Ivey v. Lalland, 42 Miss. 444; 97 Am. Dec. 475; Mumford v. Cary, 50 Ill. 370; 99 Am. Dec. 525; Donovan v. Pitcher, 53 Ala. 411; 25 Am. Rep. 634. A contract made in a foreign country, valid by its laws, and to be there executed, may be enforced in another state, although not valid by the laws of the latter state, or prohibited to its citizens, except when the state or its citizens may suffer injury by enforcing it, or when it would have the effect of a pernicious and detestable example: Greenwood v. Curtis, 6 Mass. 358; 4 Am. Dec. 145. A Sunday contract, valid by the law of the state where made, will be

enforced by the courts of another state, by the laws of which such contract would be void: Swann v. Swann, 21 Fed. Rep. 299. A contract for speculating in stocks upon margins, made in another state, where they are presumed to be lawful, will not be enforced in New Jersey, where they are unlawful: Flagg v. Baldwin, 38 N. J. Eq. 219; 48 Am. Rep. 308.

<sup>3</sup> Hinds v. Brazeale, 2 How. (Miss.) 837; 32 Am. Dec. 307.

<sup>4</sup> Kanaga v. Taylor, 7 Ohio St. 134; 70 Am. Dec. 62; Ivey v. Lalland, 42 Miss. 444; 97 Am. Dec. 475; Ford v. Ins. Co., 6 Bush, 133; 99 Am. Dec. 663; Blackwell v. Webster, 23 Blatchf. 537; Satterthwaite v. Doughty, Bush. 314; 59 Am. Dec. 554. When foreign contract itself is void under foreign law, it is void everywhere, and it will not be enforced in the home courts, although it is valid under the home law. And home courts will not administer the mere penal sanctions of a foreign law by forfeitures: McAllister v. Smith, 17 Ill. 328; 65 Am. Dec. 651.

<sup>5</sup> Chambers v. Church, 14 R. I. 398; 51 Am. Rep. 410.

company to a citizen of Missouri, on an application made in Missouri and accepted in New York, where the policy was drawn and signed, but delivered in Missouri. Premiums were payable in New York as well as the loss. *Held*, that the policy was governed by the Missouri statute relating to policies delivered in that state: *Wall v. Equitable Life Assurance Society*, 32 Fed. Rep. 273. A statute of Connecticut prohibits secular business on Sunday between sunrise and sunset. A statute of Rhode Island prohibits business in one's ordinary calling during the whole day of Sunday. *Held*, that a contract made in Connecticut in the plaintiff's ordinary calling after sunset on Sunday could be enforced in Rhode Island: *Brown v. Browning*, 15 R. I. 422; 2 Am. St. Rep. 908. The agents of a New York company, at the request of its Canadian agent, insured a Canadian vessel. The premium note was given and made payable in Canada, and the policy was delivered there. *Held*, that the contract was a Canadian, not a New York, contract: *In re State of Pennsylvania Ins. Co.*, 22 Fed. Rep. 109. A contract of guaranty was, in 1870, signed in Massachusetts by a married woman, domiciled there, and sent by mail to Maine, and assented to and acted on there for the price of goods sold there. The law of Maine, but not that of Massachusetts, then allowed her to make such contract. *Held*, 1. That the contract was made in Maine; 2. That an action lay against her thereon in a Massachusetts court: *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241.

§ 3717. **Real Property—Personal Property.**—Title to land is determined by the *lex rei sitæ*,<sup>1</sup> and a conveyance of realty is governed by the law of the *situs*.<sup>2</sup> A tax deed of land in Wisconsin is governed, in the Indiana courts, by the law of Wisconsin.<sup>3</sup> In determining whether a conveyance of real estate contains a covenant that runs with the land, the *lex rei sitæ* governs.<sup>4</sup> So the *lex rei sitæ* governs in actions for breach of covenant of warranty. In an action for a breach of covenant of warranty, where the grantor resides in Vermont, the grantee in New Hampshire, and the land is situated in Minnesota, the construction and force of the contract, including the rule as to

<sup>1</sup> *Baxter v. Willey*, 9 Vt. 276; 31 Am. Dec. 623; *Chapman v. Robertson*, 6 Paige, 627; 31 Am. Dec. 264; *Depas v. Mayo*, 11 Mo. 314; 49 Am. Dec. 88; *Hawley v. James*, 7 Paige, 213; 32 Am. Dec. 623.

<sup>2</sup> *Donaldson v. Phillips*, 18 Pa. St. 170; 55 Am. Dec. 614; *Ross v. Barclay*, 18 Pa. St. 179; 55 Am. Dec. 616.

<sup>3</sup> *Wines v. Woods*, 109 Ind. 291.

<sup>4</sup> *Fisher v. Parry*, 68 Ind. 465.

damages, must be governed by the law of Minnesota. And if the referee fails to find what the law of Minnesota is, the supreme court of Vermont will decline to presume that the law of Minnesota is the same as that of Vermont, but will recommit the case to the court below to determine the damages according to the rule in Minnesota.<sup>1</sup>

When the subject-matter of a suit in Illinois is land situated in another state, and a suit in relation thereto is pending between the same parties in such other state, and the court of that other state is in a situation to do justice to all parties, and the court in Illinois has not jurisdiction of all the necessary parties, it will refuse to entertain jurisdiction, but leave the parties to the decision of the court in the other state.<sup>2</sup> A court in one state may restrain a person over whom it has jurisdiction from commencing suits in a foreign state; but after a suit has been commenced by such person in such foreign state, the courts of such state will not interfere with the prosecution of it.<sup>3</sup>

The legal *situs* of personalty follows the domicile of the owner,<sup>4</sup> and the character of property as real or personal is to be determined by the laws of the state into which it is removed.<sup>5</sup> As to a contract in relation to personal property situated at the date thereof in a foreign jurisdiction, the *lex loci* governs. Thus a contract made in Michigan for the purchase of a piano, construed by the courts

<sup>1</sup> Tillotson v. Prichard, 60 Vt. 94; 6 Am. St. Rep. 95. A deed was executed in Indiana, between citizens of that state, conveying land in Missouri. No covenant was expressed, and by the law of Indiana none was implied. The land was never in the possession of either party. In an action for a breach of a covenant of seisin, held, that as the grantor did not deliver possession, a covenant of seisin was at once broken and did not run with the land, and that, therefore, the plaintiff's right was to be determined solely by the law of Indiana, and not by the law of Missouri, where a covenant was implied: Bethell v. Bethell, 54 Ind. 428; 23 Am. Rep. 650.

<sup>2</sup> Harris v. Pullman, 84 Ill. 20; 25 Am. Rep. 416.

<sup>3</sup> Harris v. Pullman, 84 Ill. 20; 25 Am. Rep. 416.

<sup>4</sup> Speed v. May, 17 Pa. St. 91; 55 Am. Dec. 540.

<sup>5</sup> Minor v. Cardwell, 37 Mo. 350; 90 Am. Dec. 390. Bringing a wife's property from Mississippi into Alabama could not convert an equitable title into a legal one: Gluck v. Cox, 75 Ala. 310. The law of New Jersey governs as to property brought into that state and the construction of contracts made elsewhere for its disposal: The Marina, 19 Fed. Rep. 760.

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of that state to be a mere bailment, giving the buyer no right to mortgage it, will be so construed by the courts of Illinois upon his removal to this state and attempting to mortgage it.<sup>1</sup>

§ 3718. **Contracts of Carriage.**—A contract of carriage of goods from one country to another is governed by the laws of the country where it is made.<sup>2</sup> So far as the contract is to be performed in one state, it is to be governed by the laws of that state.<sup>3</sup> A contract of carriage valid in the state where it is entered into by the consignor will bind a consignee residing in another state.<sup>4</sup> Although where a contract is made in one state, and suit is brought in another state, the validity of the contract will be determined by the law of the state where it is

<sup>1</sup> *Waters v. Cox*, 2 Ill. App. 129.

<sup>2</sup> *Cantu v. Bennett*, 39 Tex. 303; *Peninsular etc. Steam Nav. Co. v. Shand*, 11 Jur., N. S., 771; *Pennsylvania Co. v. Fairchild*, 99 Ill. 266. A steamboat was in the business of transporting goods from New York to Providence. The plaintiff owned carriages, which he wished to have transported to Boston. The carriers received them in New York, to convey them to Providence or Boston, and they were lost in the sound, near Huntington, Long Island. Held, that the contract by the parties was to be governed by the laws of New York: *Hale v. N. J. Steam Nav. Co.*, 15 Conn. 539; 39 Am. Dec. 398. A bill of lading executed in Ohio, of merchandise there shipped to be transported to a place in New York, which bill is delivered, in pursuance of a contract made in and by residents of Ohio to one there making advances upon the faith thereof, and to secure drafts drawn for such advances upon parties in New York, is an Ohio contract, and is to be construed by and under the laws and commercial usages of that state: *First Nat. Bank v. Shaw*, 61 N. Y. 283; *Talbot v. Merchants' Dispatch Co.*, 41 Iowa, 247; 20 Am. Rep. 589. The rights of the parties are to be governed by the laws of the state in

which the loss happens: *Gray v. Jackson*, 51 N. H. 9; 12 Am. Rep. 1; *Barter v. Wheeler*, 49 N. H. 9; 6 Am. Rep. 434.

<sup>3</sup> *Rixford v. Smith*, 52 N. H. 355; 13 Am. Rep. 42; *Brown v. R. R. Co.*, 83 Pa. St. 316. In *Hoadley v. Northern Transportation Company*, 115 Mass. 304, 15 Am. Rep. 106, the jury found that by the law of Illinois, where the goods were shipped, the mere receipt without objection of a bill of lading which limits the carrier's liabilities for loss by fire would not raise a presumption that its terms were assented to. In Massachusetts, where the cause was tried, the law is, that a bill of lading or shipping receipt taken by a consignor without dissent at the time of the delivery of the property for transportation, by the terms of which the carrier stipulates against such liability, will exempt the carrier when the loss is not caused by his own negligence. The court held that the rule of law laid down in Illinois affected the remedy only, and that the law of the forum as to the implied assent of the shipper to conditions of lading must prevail.

<sup>4</sup> *Robinson v. Merchants' Dispatch Co.*, 45 Iowa, 476; *Talbot v. Trans. Co.*, 41 Iowa, 247; 20 Am. Rep. 589.

made, yet it has been held that an agreement exempting a carrier from liability for negligence, made in New York, and to be executed there, but invalid by the common law of Ohio, cannot, in the latter state, be converted into a cause of action merely by the fact that the parties have subsequently come within the jurisdiction.<sup>1</sup> Where a contract under which a common carrier seeks to limit his liability is made in Missouri for the carriage of goods from Missouri to Texas, and such a contract is valid under the Missouri law, but not under the Texas law, the law of Missouri prevails.<sup>2</sup> The American rule—that stipulations of a common carrier exempting himself from consequences of his own negligence are void as against public policy—controls in suits brought here upon shipments made here on board foreign ships, under bills of lading signed by foreign masters, though such stipulations be valid by the law of the ship's flag.<sup>3</sup>

§ 3719. **Negotiable Instruments.**—The validity of a bill or note, as regards its requisites of form, is to be determined by the law of the place of issue,<sup>4</sup> and the validity of supervening contracts, as acceptance or indorsement, by the law of the place where such contract is made.<sup>5</sup> The contract of the drawer of a bill of exchange is governed by the law of the place where the bill is made.<sup>6</sup> The contract of the acceptor of a bill of exchange binds him to pay at the place of acceptance or that named for payment; his con-

<sup>1</sup> Knowlton v. R. R. Co., 19 Ohio St. 260; 2 Am. Rep. 395.

<sup>2</sup> Ryan v. R. R. Co., 65 Tex. 13; 57 Am. Rep. 589.

<sup>3</sup> The Brantford City, 29 Fed. Rep. 373.

<sup>4</sup> Benjamin's Chalmers's Digest, art. 59; Ticknor v. Roberts, 11 La. 14; 30 Am. Dec. 706; Smith v. Blatchford, 2 Ind. 184; 52 Am. Dec. 504. Where the residence of the payee of a note dated in West Virginia, and made payable to a resident thereof, does not appear, the note will be treated as a

West Virginia contract; Heflebower v. Detrick, 27 Ga. 16.

<sup>5</sup> Benjamin's Chalmers's Digest, art. 59; Mondelain v. Gately, 18 Ind. 149; Carnegie v. Morrison, 2 Met. 381; Phinney v. Baldwin, 16 Ill. 108; 61 Am. Dec. 62; Scudder v. Union Bank, 91 U. S. 406; Mason v. Dousay, 35 Ill. 424; 85 Am. Dec. 368. But see Stanford v. Pruett, 27 Ga. 243; 73 Am. Dec. 734.

<sup>6</sup> Hunt v. Standart, 15 Ind. 33; 77 Am. Dec. 79.

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tract is therefore governed by the law of the place of payment.<sup>1</sup> The contract of indorsement of a promissory note is governed by the law of the place where made, and not by that of the place where the note is payable, whether the note is payable in the state where made or in another.<sup>2</sup> The liability of the indorser is governed by the law of the place where the indorsement is made, which is the place of effectual transfer, not the place of the mere act of writing.<sup>3</sup> The contract and responsibility of one who indorses an accommodation note in one state, but which is subsequently delivered to a person in another, is governed by the law of the latter state.<sup>4</sup> Where an indorsement is written on a note by the payee thereof in one state, and a sale and delivery of the note is made in another state, the contract of indorsement must be regarded as made and consummated in the place where the sale and delivery occurred, rather than where it was written.<sup>5</sup>

So the instrument is to be interpreted, and the rights, duties, and obligations growing out of it determined, according to the law of the country where the contract is made.<sup>6</sup> The place of execution of a joint promissory note, where the first maker signs in Massachusetts, the second in New Hampshire, will be the former state, where, in addition to the fact of its execution there by the first maker, the note bears date in that state, and it

<sup>1</sup> *Hunt v. Standart*, 15 Ind. 33; 77 Am. Dec. 79.

<sup>2</sup> *Hunt v. Standart*, 15 Ind. 33; 77 Am. Dec. 79. Note made in Indiana and payable in New York, and indorsed in both states, is governed by the law of New York as to the maker and New York indorsers, and by the law of Indiana as to the Indiana indorsers; and the latter cannot be sued until after suit against the maker, unless there is a sufficient excuse for its omission: *Rose v. Park Bank*, 29 Ind. 84; 83 Am. Dec. 306. Where a note is made in North Carolina and indorsed in Virginia, the indorsee may sue the

maker or indorser in North Carolina without proving that the note was negotiable in Virginia: *Reddick v. Jones*, 6 Ired. 107; 44 Am. Dec. 68.

<sup>3</sup> *Rose v. Park Bank*, 20 Ind. 94; 83 Am. Dec. 306.

<sup>4</sup> *Young v. Harris*, 14 B. Mon. 556; 61 Am. Dec. 170.

<sup>5</sup> *Briggs v. Latham*, 36 Kan. 255; 59 Am. Rep. 546.

<sup>6</sup> *Peck v. Hibbard*, 26 Vt. 698; 62 Am. Dec. 605; *Emerson v. Patridge*, 27 Vt. 8; 62 Am. Dec. 617; *Kuenzi v. v. Elvers*, 14 La. Ann. 391; 74 Am. Dec. 434; *Ayer v. Tilden*, 15 Gray, 178; 77 Am. Dec. 355.



was there that its consideration passed.<sup>1</sup> A promissory note is controlled as to the defense of usury by the laws of the state where it is made, dated, and payable, and not by the laws of the state where it is negotiated.<sup>2</sup> Where an agreement for the loan of money is made in New York, and the money there advanced, a note payable in New York, and given as security pursuant to the terms of the agreement, though made in Nebraska, is an incident of the agreement, and is governed by the laws of New York, and therefore it may be void by reason of the usury laws of that state, though valid according to the laws of Nebraska.<sup>3</sup> Where a bill is drawn in one country and payable in another, expressions as to time and mode of payment are interpreted by the law of the place of payment.<sup>4</sup> The state in which a note was made payable, and where it was delivered in consummation of a bargain, is the place of contract, though it was executed in another state,<sup>5</sup> and the contract is governed by the law of the place of payment.<sup>6</sup> A promissory note made and payable in Kentucky, although sent by mail to the payee in Massachusetts, is executed in and to be governed by the law of Kentucky.<sup>7</sup> A promissory note written in Maine, but signed in Massachusetts by citizens there, and then returned by mail to the payee in Maine, is a note made in Maine, and to be construed by the laws thereof.<sup>8</sup> But

<sup>1</sup> *Bryant v. Edson*, 8 Vt. 325; 30 Am. Dec. 472. Where a maker's note to himself is made payable in another state, and there indorsed to another party, may not the rights of the parties be controlled by the laws of such state, *quere*: *Muhling v. Sattler & Co.*, 3 Met. (Ky.) 285; 77 Am. Dec. 172.

<sup>2</sup> *Jewell v. Wright*, 30 N. Y. 259; 86 Am. Dec. 372.

<sup>3</sup> *Sands v. Smith*, 1 Neb. 108; 93 Am. Dec. 331.

<sup>4</sup> *Benjamin's Chalmers's Digest*, art. 60; *Skelton v. Duston*, 92 Ill. 49.

<sup>5</sup> *Johnston v. Gawtry*, 83 Mo. 339.

A promissory note made in Oregon and payable in Scotland is to be considered as if made in Scotland. But

the validity of a mortgage upon real property in Oregon to secure the payment of such a note is to be tested by the laws of Oregon: *Oregon and Wash. Trust etc. Co. v. Rathbun*, 5 Saw. 32.

<sup>6</sup> *Hunt v. Standart*, 15 Ind. 33; 77 Am. Dec. 79; *City of Aurora v. West*, 22 Ind. 88; 85 Am. Dec. 413; *Lewis v. Headley*, 36 Ill. 433; 87 Am. Dec. 227; *Carlisle v. Chambers*, 4 Bush, 268; 96 Am. Dec. 304; *Odell v. Gray*, 15 Mo. 337; 55 Am. Dec. 147; *Bowman v. Miller*, 25 Gratt. 331; 18 Am. Rep. 686; *Joslin v. Miller*, 14 Neb. 91.

<sup>7</sup> *Shoe and Leather Bank v. Wood*, 142 Mass. 563.

<sup>8</sup> *Bell v. Packard*, 69 Me. 105; 31 Am. Rep. 251.

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where a bill drawn and payable in one country is negotiated in another, it is sufficient if such negotiation be valid in point of form according to the law of the place where it is drawn and payable.<sup>1</sup> Where notes are made in one state for delivery in another, the law of the latter state governs the contract.<sup>2</sup>

The days of grace are regulated by the *lex loci contractus*.<sup>3</sup> The measure of damages against the drawer is determined by the law of the place where it was drawn,<sup>4</sup> and against an indorser by the law of the place where he indorsed it.<sup>5</sup> The measure of damages against the acceptor is determined by the law of the place of payment.<sup>6</sup> The validity and effect of a discharge is determined by the *lex loci contractus* of the party sought to be charged.<sup>7</sup> The validity of a protest is determined by the law of the place where the protest is made.<sup>8</sup> Notice of the dishonor of a note should be governed by the law of the place where it is made payable, not by the law of the place where the note is indorsed.<sup>9</sup> Where a bill drawn and payable in countries where the French law prevails is indorsed in New York, in order to charge the indorser presentment for payment and protest must be made according to the French law, but notice must be given according to the New York law.<sup>10</sup> The validity of a notice of dishonor is determined by the law of the place where the notice is given.<sup>11</sup>

<sup>1</sup> Benjamin's Chalmers's Digest, art. 59.

<sup>2</sup> Commercial Bank v. Simpson, 90 N. C. 467.

<sup>3</sup> Bryant v. Edson, 8 Vt. 325; 30 Am. Dec. 472.

<sup>4</sup> Benjamin's Chalmers's Digest, art. 222; Freese v. Brownell, 35 N. J. L. 285; 10 Am. Rep. 239; Crawford v. Bank, 6 Ala. 12; 41 Am. Dec. 33.

<sup>5</sup> Benjamin's Chalmers's Digest, art. 222.

<sup>6</sup> Benjamin's Chalmers's Digest, art. 214; Campbell v. Nichols, 33 N. J. L. 81; Watt v. Riddle, 8 Watts, 545; Hunt v. Staudart, 15 Ind. 33; 77 Am. Dec. 79.

<sup>7</sup> Benjamin's Chalmers's Digest, art. 231; Van Raugh v. Van Arsdaln, 3 Caines, 154; 2 Am. Dec. 259.

<sup>8</sup> Benjamin's Chalmers's Digest, art. 180; Carter v. Burley, 9 N. H. 558. *Contra*, Allen v. Merchant's Bank, 22 Wend. 215; 34 Am. Dec. 289.

<sup>9</sup> Wooley v. Lyon, 117 Ill. 244; 57 Am. Rep. 867.

<sup>10</sup> Aymer v. Sheldon, 12 Wend. 439; 27 Am. Dec. 137.

<sup>11</sup> Benjamin's Chalmers's Digest, art. 202; Aymer v. Sheldon, 12 Wend. 439; 27 Am. Dec. 137; Nat. Bank v. Green, 33 Iowa, 140. *Contra*, Ellis v. Com. Bank, 7 How. (Miss.) 294; 40 Am. Dec. 63.

**ILLUSTRATIONS.**—A promissory note was made in Kansas, payable in Missouri, and contained a stipulation to pay attorney's fees if suit should be instituted on the note. The note was indorsed and transferred before maturity to the bank at which it was made payable. *Held*, that the maker was liable to the bank on the note, although the supreme court of Missouri held that such a note was not negotiable, the note being negotiable in Kansas: *Howenstein v. Barnes*, 5 Dill. 482. A, residing in Mississippi, sold cotton to B, a resident of Tennessee, and received therefor the note of B, under seal, dated in Mississippi, but payable in Tennessee to the order of D, a resident of Mississippi, who indorsed it. It was a condition of the sale that the note should be indorsed by the defendant, a resident of Tennessee. The defendant, with knowledge of the facts, indorsed the note in Tennessee, and it was there delivered to A, and by him sold to plaintiff who was ignorant of the facts. The defendant was the last indorser. The note bore a rate of interest lawful in Mississippi, but not in Tennessee. *Held*, that the note, so far as related to the defendant, was governed by the laws of Mississippi, and was valid. There was an implied warranty on defendant's part that the note was a valid contract, and executed in a state where the interest demanded was lawful: *Overton v. Bolton*, 9 Heisk. 762; 24 Am. Rep. 367.

§ 3720. **Sales.**—Where the subject of and the parties to a sale of personal property are within the jurisdiction of another state, and the contract is made and executed according to the laws of that state, the validity of the sale must be tested by the laws of the place where the contract is made, and no subsequent removal of the property outside the state for a lawful purpose divests the jurisdiction.<sup>1</sup> If a vendor has no lien or privilege on goods at the place where he sells them, he acquires none by their removal elsewhere.<sup>2</sup> The sale of a vessel then at sea, valid by the law where the sale was made, and where the vendor and vendee reside, is valid although the law of the forum controlling transfers was not complied with.<sup>3</sup> Where an article is sold and delivered in one state, to be paid for

<sup>1</sup> *Born v. Shaw*, 29 Pa. St. 288; 72 Am. Dec. 633.

<sup>2</sup> *Whiston v. Stodder*, 8 Mart. 95-13 Am. Dec. 281.

<sup>3</sup> *Thuret v. Jenkins*, 7 Mart. 318; 12 Am. Dec. 508.

<sup>1</sup> *Hough*  
59 Am. Dec.  
<sup>2</sup> *Green*  
307.

upon its arrival in another state, the provision respecting payments serves only to designate the time of payment, and does not subject the contract to the operation of the laws of the latter state.<sup>1</sup> The effect of a sale of personal property, under proceedings in attachment, must be determined by the *lex fori*.<sup>2</sup>

**ILLUSTRATIONS.**—An agent sold goods to a person in Connecticut, subject to the approval of his principal, who resided in New York. The principal approved the contract, and the goods were delivered in Connecticut, where payment was expected to be made to the agent. *Held*, that the contract was governed by the laws of the latter state: *Lewis v. McCabe*, 49 Conn. 140; 44 Am. Rep. 217. The agent of a Pennsylvania firm went to Rhode Island, and there effected a sale of whisky by sample to a citizen of Rhode Island, to whom the whisky was sent and delivered. *Held*, in a suit in Massachusetts on an acceptance given by the buyer, that the illegality of the transaction was determinable by the Rhode Island law: *Weil v. Golden*, 141 Mass. 364. A, a citizen of New Jersey, went to Pennsylvania, and there bought a safe on conditional sale, it being agreed that the title should remain in the seller until the safe was paid for. A took the safe to New Jersey, and there sold it to B, who purchased in good faith. Under the Pennsylvania law, B could not hold the safe against the original owner. Under the New Jersey law he could. The original owner sued B in trover in New Jersey. *Held*, that the action could not be maintained: *Marvin Safe Co. v. Norton*, 48 N. J. L. 412; 57 Am. Rep. 566.

§ 3721. **Transfer of Stock.**—A transfer of stock is governed by the *lex fori* as to the form of the transfer, but not as to the rights of parties under it.<sup>3</sup>

§ 3722. **Voluntary Assignments—Personal Property.**—Voluntary general assignments of property, if valid under the laws of the state where the assignor resides, will be valid everywhere, and will pass the assignor's personal property, wherever situated, unless limited or restrained by some law of the state where the property is found,<sup>4</sup> or unless injurious to the citizens of the latter

<sup>1</sup> *Houghtaling v. Ball*, 19 Mo. 84; 59 Am. Dec. 331.

<sup>2</sup> *Green v. Van Buskirk*, 5 Wall. 307.

<sup>3</sup> *Burr v. Sherwood*, 3 Bradf. 85.

<sup>4</sup> *Hanford v. Paine*, 32 Vt. 442; 78 Am. Dec. 586; and see note to this case in 78 Am. Dec. 594-597; *Train v.*

state.<sup>1</sup> And assignments have been sustained in Texas, even against the attachments of local creditors;<sup>2</sup> but the contrary has been held in Massachusetts.<sup>3</sup> Where preferences are invalid under the statute of the state where the property is situated, they will not be upheld by the courts of that state, although valid under the law of the state in which they were made.<sup>4</sup> And an assignment of personal property, valid where made, but invalid under the law of the place where the property is situated, will not, as a general rule, be sustained as against creditors who reside in the latter place.<sup>5</sup> In Minnesota it is held that the character of a conveyance of personal property as to whether it is an act of insolvency must be determined

Kendall, 137 Mass. 366; *In re Waite*, 99 N. Y. 433; *Smith's Appeal*, 104 Pa. St. 381; *Holmes v. Remsen*, 4 Johns. Ch. 460; 8 Am. Dec. 581; *Livermore v. Jenckes*, 21 How. 126; *Askew v. La Cygne Exchange Bank*, 83 Mo. 366; 53 Am. Rep. 590; *Chaffee v. Bank*, 71 Me. 514; 36 Am. Rep. 345; *Walters v. Whitlock*, 9 Fla. 86; 76 Am. Dec. 606; *Weider v. Maddox*, 66 Tex. 372; 59 Am. Rep. 617; *Greene v. Sprague Mfg. Co.*, 52 Conn. 330. An assignment made in another state for the equal benefit of all creditors of the assignor is operative on property in Missouri; and this is so, although the courts of such other state would not give a similar effect to an assignment made in Missouri: *Zuppann v. Bauer*, 17 Mo. App. 678. Non-resident creditors cannot in New Jersey impeach voluntary assignment of property in that state, made by a non-resident debtor, which is valid by the law of the place where made, on the ground that such assignment is incompatible with the New Jersey statute. And this rule obtains with respect to real estate as well as to personal property, provided the form of the assignment is such as is required by the laws of New Jersey: *Bentley v. Whittemore*, 19 N. J. Eq. 462; 97 Am. Dec. 671.

<sup>1</sup> *Warner v. Jaffray*, 96 N. Y. 248; 48 Am. Rep. 616; *Mumford v. Canty*, 50 Ill. 370, 375; 99 Am. Dec. 525; *Zipcey v. Thompson*, 1 Gray, 243; *Le Roy v. Crownshield*, 2 Mason,

157; *Guillander v. Howell*, 35 N. Y. 657; *Martin v. Potter*, 11 Gray, 37; 71 Am. Dec. 689. An assignment for the benefit of creditors executed in New York does not confer title to personal property in another state in contravention of the laws of that state: *Warner v. Jaffray*, 96 N. Y. 248; 48 Am. Rep. 616.

<sup>2</sup> *Weider v. Maddox*, 66 Tex. 372; 59 Am. Rep. 617. A voluntary assignment for creditors made in the assignor's state (Kansas), of a debt due from a citizen of Missouri, confers a superior title to that of a subsequent attaching creditor in Missouri: *Askew v. La Cygne Exchange Bank*, 83 Mo. 366; 53 Am. Rep. 590.

<sup>3</sup> *Faulkner v. Hymen*, 142 Mass. 53; *Pierce v. O'Brien*, 129 Mass. 314; 37 Am. Rep. 360; and *Illinois v. Rhawn v. Pearce*, 110 Ill. 350; 51 Am. Rep. 691; and *South Carolina v. Ex parte Dickinson*, 29 S. C. 453; 13 Am. St. Rep. 749.

<sup>4</sup> *Varnum v. Camp*, 13 N. J. L. 326, 329; 25 Am. Dec. 476; *Bryan v. Brisbin*, 26 Mo. 423; 72 Am. Dec. 219; *Boyd v. Rockport Mills*, 7 Gray, 406.

<sup>5</sup> *Bryan v. Brisbin*, 26 Mo. 423; 72 Am. Dec. 219; *Herchfeld v. Drexel*, 12 Ga. 582; *Moore v. Bonnell*, 31 N. J. L. 90; *Beirne v. Patton*, 17 La. 589; *Rice v. Curtis*, 32 Vt. 460; 78 Am. Dec. 597; *Guillander v. Howell*, 35 N. Y. 657. Compare *Wales v. Alden*, 22 Pick. 245; *Speed v. May*, 17 Pa. St. 91; 55 Am. Dec. 540; *Mowry v. Crocker*, 6 Wis. 326, 331.

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<sup>3</sup> Donn  
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<sup>4</sup> Moor  
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<sup>5</sup> Walte  
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48 Me. 9;  
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by the law of the jurisdiction where the insolvency proceedings are instituted and the property is situated, and not by the law of the domicile of the debtor, where the conveyance was executed.<sup>1</sup>

### § 3723. Voluntary Assignments — Real Property. —

An assignment of real estate for the benefit of creditors, which is invalid by the laws of the place where the land is situated, will not convey it, even though the assignment be valid under the law of the place of its execution;<sup>2</sup> for conveyances of land are governed by the *lex loci rei sitæ*.<sup>3</sup> It has been held in Iowa that where real property situated in Iowa is assigned in New York, the validity of the assignment is to be determined by the laws of Iowa.<sup>4</sup>

### § 3724. Involuntary Assignments — Bankruptcy and Insolvency Laws. —

Involuntary assignments under foreign bankrupt and insolvent laws have no effect outside of their own state.<sup>5</sup> An assignment for the benefit of creditors

<sup>1</sup> In re Peck, Sup. Ct. Minn., 1888.

<sup>2</sup> Loving v. Pairo, 10 Iowa, 282; 77 Am. Dec. 108; Gardner v. Bank, 95 Ill. 298; Shortwell v. Jewett, 9 Ohio, 180. But see Bentley v. Whittemore, 19 N. J. Eq. 462; 97 Am. Dec. 671; Chaffee v. Bank, 71 Mo. 514; 36 Am. Rep. 345.

<sup>3</sup> Donaldson v. Phillips, 18 Pa. St. 170; 55 Am. Dec. 614; Depas v. Mayo, 11 Mo. 314; 49 Am. Dec. 88; Ross v. Barclay, 18 Pa. St. 179; 55 Am. Dec. 617; Swank v. Huftagle, 111 Ind. 453. <sup>4</sup> Moore v. Church, 70 Iowa, 208; 59 Am. Rep. 439. But see *contra*, Butler v. Wendell, 57 Mich. 62; 58 Am. Rep. 329; Chaffee v. Bank, 71 Mo. 514; 36 Am. Rep. 345.

<sup>5</sup> Walters v. Whitlock, 9 Fla. 86; 76 Am. Dec. 607; Milne v. Moreton, 6 Binn. 353; 6 Am. Dec. 466, 469; Moselman v. Caew, 34 Barb. 66; Ogden v. Saunders, 12 Wheat. 213; Crapo v. Kelly, 16 Wall. 610; Felch v. Bugbee, 48 Me. 9; 77 Am. Dec. 203; Wait on Fraudulent Conveyances, secs. 294, 346; Burrell on Assignments, sec. 303; Rhawn v. Pearce, 110 Ill. 350; 51 Am.

Rep. 691; McClure v. Campbell, 71 Wis. 350; 5 Am. St. Rep. 220. A citizen of Rhode Island attached in Connecticut a debt due from a citizen of Connecticut to a corporation of Pennsylvania. That corporation had become insolvent, and, under the laws of Pennsylvania, had made an assignment for the benefit of creditors, of which the Connecticut debtor had had notice. Held, that the lien of the attachment was valid against the claim of the trustee in the assignment: Paine v. Lester, 44 Conn. 196; 26 Am. Rep. 442. The rules to be deduced from the cases of Sturges v. Crownshield, 4 Wheat. 122, Ogden v. Saunders, 12 Wheat. 213, Boyle v. Zacharie, 6 Pet. 643, Cook v. Moffatt, 5 How. 308, Springer v. Foster, 2 Story, 308, Poe v. Duck, 5 Md. 1, Anderson v. Wheeler, 25 Conn. 607, Woodhull v. Wagner, Bald. 300, Stoddard v. Harrington, 100 Mass. 87, 1 Am. Rep. 829, are summed up as follows in a note to Norton v. Cook, in 23 Am. Dec. 353: "1. Insolvent laws may be passed by the several states; 2. State insolvent laws

under the insolvent laws of another state vests such title in the assignee as to property of the debtor situate in Missouri as to defeat an attaching creditor who is a citizen of and resides in such other state, but sues in the courts of Missouri to gain a preference over creditors in the other state, where all of the parties reside, and where the debt sued upon was contracted and made payable.<sup>1</sup> An assignment of personal property and choses in action by an insolvent debtor for the benefit of creditors, in conformity to the laws of the state of New York, where such debtor resided and did business, operates to transfer the right of action to recover said choses in action to the assignee, and he may maintain an action as such assignee in the courts of Ohio to collect the same, although said assignment, as authorized by the laws of New York, gives preference to certain of the creditors.<sup>2</sup> Foreign bankrupt or insolvency laws and discharges in bankruptcy proceedings have no extraterritorial force.<sup>3</sup> A decree in bankruptcy in a district court of the United States was held not to affect the title of the debtor to land without the United

which discharge from contracts made antecedently are unconstitutional; 3. State insolvent laws apply to contracts to be performed in the state, made by persons resident in the state at the time when the state court acquires jurisdiction of creditors in proceedings instituted under those laws. . . . 4. The insolvent laws of a state do not apply to citizens of other states, nor to a resident creditor whose claims arose on a contract to be performed outside the state; 5. A creditor upon whom the insolvent laws would not otherwise be binding may waive his rights, and by voluntarily becoming a party to the insolvency proceedings, render them obligatory upon him: *Burpie v. Sparhawk*, 108 Mass. 111; 3 Am. Rep. 320; *Baldwin v. Hale*, 1 Wall. 223." A discharge in insolvency is a defense to a suit on a note made in California to a citizen there, and indorsed by him to a citizen of another state after the discharge in California: *Thomas v.*

*Crow*, 65 Cal. 470. A note not specifying a place of payment was executed in California after the enactment of the insolvent law of that state, in favor of a citizen and resident of another state. Held, that a discharge under the insolvent law did not bar an action on the note: *Rhodes v. Borden*, 67 Cal. 7.

<sup>1</sup> *Einer v. Beste*, 32 Mo. 240; 82 Am. Dec. 129.

<sup>2</sup> *Fuller v. Steiglitz*, 27 Ohio St. 355; 22 Am. Rep. 312.

<sup>3</sup> *Fitch v. Bugbee*, 48 Me. 9; 77 Am. Dec. 203; *Pratt v. Chase*, 44 N. Y. 597; 4 Am. Rep. 718; *Hills v. Charlton*, 74 Me. 156; *Guernsey v. Wood*, 130 Mass. 503; *Hale v. Baldwin*, 1 Cliff. 511; 1 Wall. 223; *McDougall v. Page*, 55 Vt. 187; 45 Am. Rep. 602; *Rhodes v. Borden*, 67 Cal. 7; *Thelps v. Portland*, 103 N. Y. 406; 57 Am. Rep. 755; *Crow v. Coons*, 27 Mo. 512; *Newton v. Hagerman*, 22 Fed. Rep. 525.

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States, although the territory in which it lay was afterwards annexed.<sup>1</sup> But a discharge in bankruptcy will operate as a bar to a non-resident creditor who voluntarily participates in the proceedings and receives dividends.<sup>2</sup>

§ 3725. **Marriage.**—As a general rule, a marriage valid where it is celebrated is valid everywhere;<sup>3</sup> and if the marriage is invalid in the country where it is celebrated, it is invalid everywhere.<sup>4</sup> And all rights dependent on the nuptial contract are to be governed by the *lex loci contractus*;<sup>5</sup> but the mode of determining whether the *lex loci* was complied with is necessarily regulated by the *lex fori*.<sup>6</sup>

This rule, says Mr. Bishop, covers both the forms by which the marriage is contracted, and, subject to an

<sup>1</sup> *Oakey v. Bennett*, 11 How. 33.

<sup>2</sup> *Phelps v. Borland*, 103 N. Y. 406; 57 Am. Rep. 755; *Clay v. Smith*, 3 Pet. 411.

<sup>3</sup> *Bishop on Marriage and Divorce*, sec. 125; *Story's Conflict of Laws*, secs. 79-81; *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395; *Herbert v. Herbert*, 2 Hagg. Const. 271; *Warrender v. Warrender*, 9 Bligh, 89; *Munro v. Saunders*, 6 Bligh, 468; *Commonwealth v. Hunt*, 4 Cush. 49; *Sutton v. Warren*, 10 Met. 451; *Wall v. Williamson*, 8 Ala. 48; *Morgan v. McGhee*, 5 Humph. 13; *Phillips v. Gregg*, 10 Watts, 153; 28 Am. Dec. 158; *Fornhill v. Murray*, 1 Bland, 479; *Patte v. Gaines*, 6 How. 550; *Dumaresly v. Fishly*, 3 A. K. Marsh. 368; *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 699; 2 Parsons on Contracts, 593 et seq.

<sup>4</sup> *Medway v. Needham*, 16 Mass. 157; 8 Am. Dec. 131; *Putnam v. Putnam*, 8 Pick. 433; *West Cambridge v. Lexington*, 1 Pick. 506; 11 Am. Dec. 241; *Ryan v. Ryan*, 2 Phil. Ecc. 332; *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54; *Ruding v. Smith*, 2 Hagg. Const. 390, 391; *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395; *Munro v. Saunders*, 6 Bligh, 473; *Ilberton v. Ilberton*, 2 H. Black. 145; *Middleton v. Janverin*, 2 Hagg. Const. 437; *Lacon v. Higgins*, 3 Stark. 178; *Kent v. Burgess*, 11 Sim. 361. But where a for-

eign statute upon the subject of marriage is in direct conflict with our established policy, it will not be regarded as binding in our courts. Thus it was held during the days of slavery that a statute of a slave state forbidding slaves to marry would not be regarded by our courts where the marriage is good at common law: *Phila. v. Williamson*, 30 Leg. Int. 45; 5 Leg. Gaz. 42; *People v. Cooper*, 8 How. Pr. 288. In New York, where marriage is simply a civil contract, it is held that if a resident thereof contracts marriage *per verba de presenti* in a foreign country, with another competent person, with a view to a further residence in New York, the presumption is in favor of its validity: *Hynes v. McDermott*, 91 N. Y. 451; 43 Am. Rep. 677.

<sup>5</sup> *Decouche v. Savatier*, 3 Johns. Ch. 190; 8 Am. Dec. 478; *Crosby v. Berger*, 3 Edw. Ch. 588. Where parties, married in a state of the Union, entered into an antenuptial contract with reference to the laws of France as their intended domicile, those laws were held to govern in the construction of the contract, so far as their rights of personal property were concerned: *Le Breton v. Miles*, 8 Paige, 261.

<sup>6</sup> *Caujolle v. Ferrie*, 26 Barb. 177; *Patterson v. Gaines*, 6 How. 550.



exception or two, mentioned by and by, the personal capacity of the parties to enter into marriage.<sup>1</sup> So far as it concerns the form or ceremony of marriage, the decisions seem to be unanimous in favor of adopting the *lex loci contractus*. But there is not the same unanimity in its application to the question of capacity of the parties; for while the majority of the American cases sustain this position,<sup>2</sup> there are others which conflict with it.<sup>3</sup> Though a person divorced from a first wife is rendered by the law of the place incapable of contracting a second marriage, yet a marriage entered into by him in another state, where no such disability exists, will be valid.<sup>4</sup> Although it is laid down in some cases that where the parties go abroad for the purpose of evading the marriage law of their domicile, the marriage thus contracted is void,<sup>5</sup> the prevailing rule seems to be, that where parties resident in one state, to avoid the laws of their place of domicile, go to another state and are married, the marriage, if valid in the country where celebrated, will be held to be

<sup>1</sup> See Bishop on Marriage and Divorce, sec. 125.

<sup>2</sup> Story's Conflict of Laws, secs. 110-112; Ponsford v. Johnson, 2 Blatchf. 51. Where a statutory prohibition in respect to marriage relates to form, ceremony, and qualification merely, compliance with the law of the place of marriage is sufficient, and the validity of the marriage will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere for the purpose of avoiding the laws of their domicile: Pennegar v. State, 87 Tenn. 244; 10 Am. St. Rep. 648.

<sup>3</sup> Conway v. Beasley, 3 Hagg. Const. 639; Brook v. Brook, 27 L. J. Eq. 400; Warrender v. Warrender, 9 Bligh, 89; 2 Clark & F. 488. And this seems to be the rule in England. In Williams v. Oates, 5 Ired. 535, the supreme court of North Carolina held that a statutory prohibition forbidding the

marriage of the guilty party in a divorce for adultery followed him wherever he went, and affected the validity of any marriage contract he might enter into elsewhere. In Louisiana it is also decided that the marriage of a white person and a negro will not be held valid in that state, even though it is contracted in a country where such marriages are permissible: Dupre v. Bonard, 10 La. Ann. 411.

<sup>4</sup> Putnam v. Putnam, 8 Pick. 433; Thorp v. Thorp, 90 N. Y. 602; 43 Am. Rep. 189; Van Voorhis v. Brintnall, 86 N. Y. 18; 40 Am. Rep. 505; Moore v. Hegeman, 92 N. Y. 521; 44 Am. Rep. 408; Roberts v. R. R. Co., 34 Hun, 324.

<sup>5</sup> Williams v. Oates, 5 Ired. 535; Marshall v. Marshall, 2 Hun, 238; 4 Thomp. & C. 449; 48 How. Pr. 57; Stevenson v. Gray, 17 B. Mon. 193; Putnam v. Putnam, 8 Pick. 433; Dupre v. Bonard, 10 La. Ann. 411; Le Breton v. Nouchet, 3 Mart. (La.) 60; 5 Am. Dec. 736.

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<sup>2</sup> Wall  
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valid in the country of their domicile.<sup>1</sup> The exceptions referred to by Mr. Bishop to the general rule, stated at the beginning of this section, are the following: 1. Where it is polygamous; 2. Where it is incestuous;<sup>2</sup> 3. Where it is prohibited by the positive law of a country;<sup>3</sup> 4. Where it is celebrated in a foreign country by subjects entitling themselves under special circumstances to the benefits of the law of their own country.<sup>4</sup>

A decree of nullity of a marriage made in a foreign country because the marriage, celebrated in this country, was void by the laws of the foreign country, has been sustained in our courts.<sup>5</sup> A husband and wife, on removing from the country where they were married, are governed

<sup>1</sup> *Decouche v. Savetier*, 3 Johns. Ch. 190; 8 Am. Dec. 478; *Dickson v. Dickson*, 1 Yerg. 110; 24 Am. Dec. 444; *Putnam v. Putnam*, 8 Pick. 433; *West Cambridge v. Lexington*, 1 Pick. 505; 11 Am. Dec. 231; *Sutton v. Warren*, 10 Met. 451; *Stevenson v. Gray*, 17 B. Mon. 193; *Dannelli v. Dannelli*, 4 Bush, 61; *Medway v. Needham*, 16 Mass. 157, 161; 8 Am. Dec. 131; *Pearl v. Hansborough*, 9 Humph. 426; *Phillips v. Gregg*, 10 Watts, 158; 36 Am. Dec. 158; *Morgan v. McGhee*, 5 Humph. 13; *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 609; *Ponsford v. Johnson*, 2 Blatchf. 51; *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602; 43 Am. Rep. 189; *Moore v. Hegeman*, 92 N. Y. 521; 44 Am. Rep. 408.

<sup>2</sup> *Wall v. Williamson*, 8 Ala. 48; *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41; *Sutton v. Warren*, 10 Met. 451; *Greenwood v. Curtis*, 6 Mass. 378; 4 Am. Dec. 145; *Swift v. Kelly*, 3 Knapp, 358, 379; *Hyde v. Hyde*, L. R. 1 Pro. & D. 130; 2 Kent's Com. 81; 1 Bla. Com. 436. But the exception as to incestuous marriages applies only to those deemed incestuous by the universal consent of christendom. Thus in some countries a marriage between a man and his deceased wife's sister is deemed incestuous; in others, not. If marriage is contracted between such per-

sons in a place where it is recognized as valid, it will be so recognized everywhere else: See *Medway v. Needham*, 16 Mass. 157-161; 8 Am. Dec. 131; *Greenwood v. Curtis*, 6 Mass. 378, 379; 4 Am. Dec. 145; *Sutton v. Warren*, 10 Met. 451. But see *Brook v. Brook*, 7 Jur., N. S., 422; 3 Smale & G. 481, 513; 9 H. L. Cas. 193.

<sup>3</sup> But these prohibitions apply only to the subjects of the country in which the laws are enacted: See 2 Kent's Com. 93; 1 Bla. Com. 226.

<sup>4</sup> As to this exception it is said by Story (*Conflict of Laws*, sec. 118): "Where there is a local necessity, from the absence of laws or from the presence of prohibitions or obstructions in a foreign country, not binding upon other countries, or from peculiarities of religious opinion and conscientious scruples, or from circumstances of exemption from the local jurisdiction." In a recent case the exceptions to or modifications of the general rule are said to be, — 1. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries; 2. Marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication: *Pennegar v. State*, 87 Tenn. 244; 10 Am. St. Rep. 648.

<sup>5</sup> *Roth v. Roth*, 104 Ill. 35; 44 Am. Rep. 81.

as to subsequent acquisitions of property by the laws of the country to which they have removed, unless in their contract of marriage they have stipulated that some other law shall prevail.<sup>1</sup> The matrimonial right of the wife will be regulated by the laws of that country into which at the time of the marriage she intended to remove, if such removal is afterwards made.<sup>2</sup> Property acquired by husband and wife while actually *in transitu* from one state to another is governed by the law of the state wherein they take up their residence.<sup>3</sup> The *lex loci contractus* may by positive stipulation in a marriage settlement be made the rule for determining the parties who shall take as heirs or distributees personally settled to the separate use of the wife, upon her failure to dispose of it by will or otherwise, as well as to govern the construction of the contract in all other respects, and especially in respect to its control in the partition and disposal of property acquired after a change of the domicile from that of the marriage.<sup>4</sup>

ILLUSTRATIONS.—In Massachusetts a white person and a negro could not lawfully contract a marriage with each other. Two such parties went, for the express purpose of evading this law, into Rhode Island, where such marriages were permitted, were married, and immediately returned to Massachusetts. *Held*, that the marriage being good according to the law of Rhode Island, the *lex loci contractus* was good in Massachusetts: *Medway v. Needham*, 16 Mass. 157; 8 Am. Dec. 131. The parties, both residents of Massachusetts, and one of them divorced from his first wife for adultery, went into Connecticut to be married. The law of Massachusetts prohibited the guilty party in a divorce suit from contracting a second marriage during the life of the other. The parties to this case went, with the express purpose of escaping this disability, to Connecticut, where there was no such prohibitory law. *Held*, that the marriage was valid: *Putnam v. Putnam*, 8 Pick. 433.<sup>5</sup> An ante-

<sup>1</sup> *Murphy v. Murphy*, 5 Mart. (La.) 83; 12 Am. Dec. 475; *Castro v. Illies*, 22 Tex. 479; 73 Am. Dec. 278.

<sup>2</sup> *Ford's Curator v. Ford*, 2 Martin, N. S., 574; 14 Am. Dec. 201.

<sup>3</sup> *State v. Barrow*, 14 Tex. 179; 65 Am. Dec. 109.

<sup>4</sup> *McLeod v. Board*, 30 Tex. 238; 94 Am. Dec. 301.

<sup>5</sup> This was an extreme case, but the court felt bound by the decision in *Medway v. Needham*, saying: "Comity will not require that the subjects of one country shall be allowed to pro-

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nuptial contract, entered into between a husband whose domicile was in North Carolina, and a wife whose domicile was in New York, and which was duly registered in New York, but not in North Carolina, *held*, good against the creditors of the husband, although the property was removed to North Carolina, and changed from what it originally was when the contract was signed: *Hicks v. Skinner*, 71 N. C. 539; 17 Am. Rep. 16. An antenuptial contract made between parties residing in Switzerland, where they intended to remain, provided that the wife should have half the property acquired during the marriage. Afterwards the parties moved to Illinois, where the husband acquired real property, and the wife died. *Held*, that the real estate was not subject to the contract, and that the wife's heirs could claim nothing thereunder: *Besse v. Pellochoux*, 73 Ill. 285; 24 Am. Rep. 242. A married woman, domiciled with her husband in Maryland, owned shares of a Virginia bank. In Virginia the relations of husband and wife are determined by the rule of the common law. *Held*, that a payment of dividends to the husband discharged the bank from liability: *Graham v. Norfolk Bank*, 84 N. Y. 393; 38 Am. Rep. 528.

§ 3726. **Divorce.**—In respect to divorce, a like rule prevails as to marriage, viz., that a divorce valid where granted is valid everywhere; but every state will protect any of its own citizens against being defrauded by a divorce obtained abroad by fraud, or granted without jurisdiction.'

§ 3727. **Infancy.**—"The capacity, state, and condition of persons according to the law of their domicile will gen-

tect themselves in the violation of its laws by assuming obligations under another jurisdiction purposely to avoid the effect of those laws. The law on this subject having been declared by this court ten years ago, in the case before cited, it is binding upon us and the community, until the legislature sees fit to alter it. If it shall be found inconvenient, or repugnant to sound principle, it may be expected that the legislature will explicitly enact that marriages contracted within another state which, if entered into here, would be void, shall have no force in this commonwealth. But it is a subject which, whenever taken into consideration, will be found to re-

quire the exercise of the highest wisdom." This decision was rendered in 1829. In 1835 the legislature passed the following enactment: "When any persons, resident in this state, shall undertake to contract a marriage contrary to the preceding provisions of this chapter, and shall, in order to evade those provisions, and with an intention of returning to reside in this state, go into another state or country, and there have their marriage solemnized, and shall afterwards return and reside here, such marriage shall be deemed void in this state": Rev. Stats., c. 75, sec. 6.

<sup>1</sup> Rorer on Interstate Laws, 181, 182.

erally be regarded as to acts done, rights acquired, and contracts made in the place of their domicile, touching property situated therein. If these acts, rights, and contracts have validity there, they will be held equally valid everywhere. If invalid there, they will be invalid everywhere. As to acts done and rights acquired and contracts made in other countries touching property therein, the law of the country where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons. . . . Hence we may deduce as a corollary that, in regard to questions of minority or majority, . . . and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made or the act done. Therefore, a person who is a minor until he is of the age of twenty-five years by the law of his domicile, and incapable as such of making a valid contract there, may nevertheless, in another country, where he would be of age at twenty-one years, generally make a valid contract at that age, even a contract of marriage."<sup>1</sup> An illegitimate child made legitimate by the subsequent marriage of his parents, according to the law of the state or country of the marriage and the parent's domicile, is thereafter legitimate everywhere.<sup>2</sup>

§ 3728. **Mortgages.**— If a mortgage be valid where it is made, if it be executed and recorded according to the laws of the state or country of its execution, it will be enforced in the courts of another state or country as a matter

<sup>1</sup> Story's Conflict of Laws, secs. 101-103; Pearl v. Hansborough, 9 Humph. 426; Saul v. His Creditors, 5 Martin, N. S. 569; 16 Am. Dec. 212; Baldwin v. Gray, 4 Martin, N. S., 192; 16 Am. Dec. 169; Andrews v. His Creditors, 11 La. 464; Thompson v. Ketcham, 8 Johns. 190; 5 Am. Dec. 332; Pickering v. Fisk, 6 Vt. 102 Huey's Appeal, 1

Gray, 51; Hiestand v. Kuns, 8 Blackf. 345; 46 Am. Dec. 481; Polydore v. Prince, 1 Ware, 413; 2 Kent's Com. 232, note; Schouler on Domestic Relations, 520; Wharton's Conflict of Laws, sec. 115.

<sup>2</sup> Miller v. Miller, 91 N. Y. 315; 43 Am. Rep. 669.

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of comity, though it is not executed or recorded according to the requirements of the law of the latter state. And this is because of the general principle of law that the law of the place of contract governs as to the nature, validity, construction, and effect thereof.<sup>1</sup> The *lex situs* governs when a mortgage is executed in a state other than that in which the property is situate. Though it be executed according to the requirements of the law of the domicile of the owner in another state, the mortgage will be invalid as against attaching creditors in the state where the property is located, unless the mortgage conforms to the laws of the latter state. The mortgage, to be valid, must be executed, acknowledged, and recorded according to the law of the place where the property is at the time.<sup>2</sup> The

<sup>1</sup> *Edgerly v. Bush*, 81 N. Y. 199; *Martin v. Hill*, 12 Barb. 631; *Feurt v. Rowell*, 62 Mo. 524; *Blystone v. Burgett*, 10 Ind. 28; 68 Am. Dec. 658; *Arnold v. Potter*, 22 Iowa, 194; *Smith v. McLean*, 24 Iowa, 322; *Simms v. McKee*, 25 Iowa, 341; *Hall v. Pillow*, 31 Ark. 32; *Beall v. Williamson*, 14 Ala. 55; *Barker v. Stacy*, 25 Miss. 471; *Langworthy v. Little*, 12 Cush. 109; *Rhode Island Cent. Bank v. Danforth*, 14 Gray, 123; *Ferguson v. Clifford*, 37 N. H. 86; *Offutt v. Flagg*, 10 N. H. 46; *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258; *Wilson v. Carson*, 12 Md. 54; *Ryan v. Clanton*, 3 Strob. 411; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 583; 36 Am. Dec. 502; *Tyler v. Strang*, 21 Barb. 198; *Nichols v. Mase*, 25 Hun, 640; *Whitman v. Connor*, 40 N. Y. Sup. Ct. 339. When not varied by contract, the law of the state where a mortgage is executed, and the mortgaged property situated, furnishes the rule for determining the rights of the mortgagees after condition broken: *Dow v. R. R. Co.*, 20 Fed. Rep. 260. A holder of a mortgage on a horse valid by the laws of Missouri may enforce his rights against the horse when removed into Kansas: *Ramsey v. Glenn*, 33 Kan. 271. A foreclosure by the New York courts of a mortgage of land in Connecticut has no validity in Connecticut: *Farmers' Loan and Trust Co. v. Postal Tel-*

*graph Co.*, 55 Conn. 334. Where the mortgagor and mortgagee reside in Georgia, and all the transactions between them take place in that state, and the mortgage does not designate any particular place of payment, the law of that state determines the validity and operation of the contract, and such contract will be enforced so far, and only so far, as it is valid under the laws of that state, no matter where the enforcement is sought, unless it offends the positive law or violates the public policy of the state in which it is sought: *Cubbege v. Napier*, 62 Ala. 518.

<sup>2</sup> See *Green v. Van Buskirk*, 7 Wall. 139; overruling 2 Keyes, 119; *Golden v. Cockril*, 1 Kan. 259; 81 Am. Dec. 510; *Denny v. Faulkner*, 22 Kan. 89; *Edgerly v. Bush*, 81 N. Y. 199; *Clark v. Tarbell*, 58 N. H. 88; *Hardaway v. Semmes*, 38 Ala. 657; *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258; *Guillander v. Howell*, 35 N. Y. 657; *Whitman v. Connor*, 40 N. Y. Sup. Ct. 339; *Runyon v. Groshon*, 12 N. J. Eq. 86; *Rice v. Courtis*, 32 Vt. 460; 75 Am. Dec. 597; *Martin v. Potter*, 34 Vt. 87; *Clark v. Tarbell*, 58 N. H. 88. A chattel mortgage on property in Indiana executed and recorded in another state, but not recorded in Indiana, and never delivered to the mortgagee, is invalid as against attaching creditors: *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258.

*lex loci contractus* governs in all questions regarding the validity, construction, nature, and effect of a chattel mortgage as in respect to other contracts relating to personal property.<sup>1</sup> But the *lex loci fori* governs in the proceedings taken for the enforcement of the mortgage or realization of the security.<sup>2</sup> Where the mortgagor is domiciled in one state, and the chattels are located in another state, and the mortgage is valid under the laws of the former state, it will be invalid as against attaching creditors, citizens of the latter state, unless also valid under the laws of that state,<sup>3</sup> this being an exception to the rule that the *lex domicilii* governs in cases of personal property, and not the *lex situs*.<sup>4</sup> Where nothing appears to the contrary, the presumption of law is, that the mortgage was executed in that state where proceedings are being had under it; but if it is apparent on its face that it was executed in some other state, then, of course, the presumption does not arise.<sup>5</sup> The general rule that a conveyance of land is governed by the law of the place where the land is situated applies equally to the assignment of a mortgage. The rule, however, is not applicable to an equitable assignment of a mortgage and its accompanying notes, in which case the law of the place where the assignment is made will govern.<sup>6</sup> Where a mortgage is executed on land in

<sup>1</sup> *Nichols v. Mase*, 94 N. Y. 160; *Taylor v. Boardman*, 37 N. H. 86; *Feurt v. Rowell*, 62 Mo. 524; *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258; *Cobb v. Buswell*, 37 Vt. 337; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62.

<sup>2</sup> *Ferguson v. Clifford*, 37 N. H. 86; *Whitman v. Conner*, 40 N. Y. Sup. Ct. 339.

<sup>3</sup> *Clark v. Tarbell*, 58 N. H. 88; *Nichols v. Mase*, 94 N. Y. 160; *Smith v. Godfrey*, 28 N. H. 382; 61 Am. Dec. 617; *McCabe v. Blymyre*, 9 Phila. 615; *Boydson v. Goodrich*, 49 Mich. 65. But see *Mumford v. Canty*, 50 Ill. 370; 99 Am. Dec. 525. In Louisiana, where chattel mortgages are unknown to the law, such a mortgage will not be enforced under any circum-

stances: *Delop v. Windsor*, 26 La. Ann. 185.

<sup>4</sup> *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258.

<sup>5</sup> *Franklin v. Thurston*, 8 Blackf. 160; *Blystone v. Burgett*, 10 Ind. 26; 68 Am. Dec. 658.

<sup>6</sup> *Cubbege v. Napier*, 62 Ala. 518; *Mills v. Wilson*, 88 Pa. St. 118; *Hoyt v. Thompson*, 19 N. Y. 207; *Murrell v. Jones*, 40 Miss. 583; *Bank of England v. Tarleton*, 23 Miss. 173; *Griffin v. Griffin*, 18 N. J. Eq. 104; *Dundas v. Bowler*, 3 McLean, 397; *Goddard v. Sawyer*, 9 Allen, 78; *Danner v. Brewer*, 69 Ala. 191; *Chappell v. Jardine*, 51 Conn. 64; *Thompson v. Edwards*, 85 Ind. 414; *Dial v. Gary*, 14 S. C. 573; 37 Am. Rep. 737.

<sup>1</sup> *Fitch v. Moultr*  
<sup>2</sup> *Mills v. Fo*  
*Gilman*, 52  
*Grattan v.*  
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one state for money loaned in another, but which provides that the money shall be paid in the latter, with a rate of interest that would be void in the former, the plaintiff may elect to proceed under the laws of the state where the entire contract is valid.<sup>1</sup>

**ILLUSTRATIONS.**—A mortgage was made of land supposed to be in New York, but by a settlement of the state boundary decided afterwards to be in Connecticut. *Held*, that the incidents of the mortgage were those given it by the New York law, and that no fee was conveyed: *Chappell v. Jardine*, 51 Conn. 64. A conveyed substantially all his property by way of mortgage, including lands in another state. *Held*, that the question whether the mortgage operated as a general assignment as to those lands was governed by the law of the state where they were situated: *Danner v. Brewer*, 69 Ala. 191. A, of Indiana, borrowed in Indiana, on notes secured by a mortgage of land there, money of a citizen of New York. Some of the notes were made payable in New York, and some specified no place of payment. *Held*, that the contract was an Indiana contract, and that the question of its being usurious was to be tested by the law of Indiana: *Thompson v. Edwards*, 85 Ind. 414. A mortgage was executed and recorded in Illinois upon personal property in Indiana, but was not recorded in the latter state, and no delivery was made to the mortgagee. *Held*, that it was invalid as against attaching creditors: *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258.

**§ 3729. Wills.**—There is no doubt but that the *lex domicilii*, or the law of the state in which the testator had his domicile at the time of his death, governs the construction of a will of personal property, even though it is executed within another state or country.<sup>2</sup> But the fact that the testator describes himself as of a certain city and state does not fix his domicile there.<sup>3</sup> There is not, however, the same unanimity among the cases as to what law governs the construction of a will of real property. In England the rule obtains that such will is governed by

<sup>1</sup> *Fitch v. Raner*, 1 Flip. 15.

<sup>2</sup> *Moultrie v. Hunt*, 23 N. Y. 394; *Mills v. Fogal*, 4 Edw. 559; *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502; *Grattan v. Appleton*, 3 Story, 755; *Perin v. McMicken*, 15 La. Ann. 154;

1 Jarman on Wills, Randolph and Talcott's notes, p. 2, and note; 3 Id., pp. 699, 729, and note; *Wood v. Wood*, 5 Paige, 596; 28 Am. Dec. 451. <sup>3</sup> *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502.

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the *lex loci rei sitæ*.<sup>1</sup> And the same rule is held on good authority to govern as to realty in the United States.<sup>2</sup> It is held in Wisconsin, however, that the law of the place where the land lies, in case of a devise, or the law of the testator's domicile, at the time of his decease, in case of a bequest, governs, respectively, the validity of such devise or bequest.<sup>3</sup> But it is also decided, in Iowa, that the validity of a will must be determined by the laws of the state in which it was made.<sup>4</sup> And the effect and interpretation of a will must be determined by the law of the state where it is made, if the property disposed of is located in such state.<sup>5</sup> The courts of Illinois, in construing a devise of land in Illinois, will not be bound by the construction put upon the will by the courts of another state.<sup>6</sup> The law of the place where the land lies, in case of a devise, and the law of the testator's domicile at the time of his decease, control as to the form and mode of the execution of a will, and also the lawful power and authority of the testator to make a testamentary disposition.<sup>7</sup> The validity of a charitable devise, as against the heir at law, depends upon the law of the state where the land lies.<sup>8</sup> A corporation which cannot take real estate by

<sup>1</sup> Jarman on Wills, Randolph and Talcott's notes, p. 703.

<sup>2</sup> Wharton's Conflict of Laws, sec. 597; 1 Redfield on Wills, 398; 1 Jarman on Wills, Randolph and Talcott's notes, p. 1, and note; 3 Id., p. 729, and note. But see Story's Conflict of Laws, 479; and see *ante*, § 3728, Sneed v. Ewing, 5 J. J. Marsh. 460; 22 Am. Dec. 41; Peck v. Cary, 27 N. Y. 9; 84 Am. Dec. 220. Courts of equity in the state in which lands are situated have exclusive jurisdiction as to legacies charged upon them: Williams v. Nichol, 47 Ark. 254. A will executed in France by a citizen of New York temporarily residing in France is to be construed according to the law of New York: Caulfield v. Sullivan, 85 N. Y. 153.

<sup>3</sup> Ford v. Ford, 70 Wis. 19; 5 Am. St. Rep. 117.

<sup>4</sup> Burlington University v. Barrett, 22 Iowa, 60; 92 Am. Dec. 376.

<sup>5</sup> Norris v. Harris, 15 Cal. 226.

<sup>6</sup> McCartney v. Osburn, 118 Ill. 403.

<sup>7</sup> Stimson's American Statute Law, sec. 2653; Ford v. Ford, 70 Wis. 19; 5 Am. St. Rep. 117, 121, 122; Wilson v. Tappan, 6 Ohio, 172; Kerr v. Moon, 9 Wheat. 566; Lapham v. Olney, 5 R. I. 413; Lucas v. Tucker, 17 Ind. 41; 1 Redfield on Wills, 397; United States v. Crosby, 7 Cranch, 115; Potter v. Titcomb, 22 Me. 300; 4 Kent's Com. 513; 1 Jarman on Wills, Randolph and Talcott's notes, p. 1, and note 1; 3 Id., p. 722, and note; Elcock's Will, 4 McCord, 39; 17 Am. Dec. 703. See note to Montgomery v. Millikin, 43 Am. Dec. 518; McCune v. House, 8 Ohio, 144; 31 Am. Dec. 438.

<sup>8</sup> Jones v. Habersham, 107 U. S. 174.

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devise in the state where it was incorporated cannot take by devise in another state.<sup>1</sup> It is said that, in determining the capacity of the testator at the time of making his will, the law of the place where the land is situate governs in case of a devise.<sup>2</sup> The validity of a gift *causa mortis* is to be determined by the law of the place where it is made, without reference to the donor's domicile.<sup>3</sup>

§ 3730. **Descent and Distribution.**—The descent of real estate is governed by the laws of the country within which it is situate,<sup>4</sup> and the succession of personal property is governed by the law of the testator's domicile at the time of his decease;<sup>5</sup> and this is the rule, without regard to the actual *situs* of the personalty at the time of the intestate's death,<sup>6</sup> and the *lex domicilii* governs, although the death occurred in another state.<sup>7</sup> The rule that per-

<sup>1</sup> Starkweather v. American Bible Society, 72 Ill. 50; 22 Am. Rep. 133.

<sup>2</sup> Potter v. Titcomb, 22 Me. 300; Story's Conflict of Laws, sec. 474; 3 Jarman on Wills, Randolph and Talcott's notes, p. 73, and note.

<sup>3</sup> Emery v. Clough, 63 N. H. 552; 56 Am. Rep. 543.

<sup>4</sup> Apperson v. Bolton, 29 Ark. 418; Lingen v. Lingen, 45 Ala. 410; Grumball v. Patton, 70 Ala. 626; Watkins v. Holman, 16 Pet. 25; Keegan v. Geraghty, 101 Ill. 26; De Laurencel v. De Boom, 67 Cal. 362, 363; McCollum v. Smith, Meigs, 342; 33 Am. Dec. 147. The rights of inheritance of a child adopted in Wisconsin, as to real estate in Illinois, the owner whereof was a resident of Illinois, must be determined by the laws of Illinois: Keegan v. Geraghty, 101 Ill. 26.

<sup>5</sup> Gibson v. Dowell, 42 Ark. 164; Lingen v. Lingen, 45 Ala. 410; Leach v. Pillsbury, 15 N. H. 137; Dawes v. Boylston, 9 Mass. 337; 6 Am. Dec. 72; Goodman v. Winter, 64 Ala. 410; Russell v. Madden, 95 Ill. 485; Story's Conflict of Laws, sec. 481 a; Fletcher v. Sanders, 7 Dana, 345; 32 Am. Dec. 96; Gravillon v. Richards, 13 La. 293; 33 Am. Dec. 563; Lowry v. Bradley, 1 Speers Eq. 1; 39 Am. Dec. 142; Atchi-

son v. Lindsey, 6 B. Mon. 86; 43 Am. Dec. 153; Decouche v. Savotier, 3 Johns. Ch. 190; 8 Am. Dec. 478; Holmes v. Remsen, 4 Johns. Ch. 460; 8 Am. Dec. 581; Embry v. Millar, 1 A. K. Marsh. 300; 10 Am. Dec. 732; Dorsey v. Dorsey, 5 J. J. Marsh. 280; 22 Am. Dec. 33; Hicks v. Pope, 8 La. 554; 28 Am. Dec. 142; Lawrence v. Kitteridge, 21 Conn. 577; 56 Am. Dec. 385; Hairston v. Hairston, 27 Miss. 704; 61 Am. Dec. 530; Wheeler v. Hollis, 19 Tex. 522; 70 Am. Dec. 363; Owen v. Miller, 10 Ohio St. 136; 75 Am. Dec. 502; Townes v. Durbin, 3 Met. (Ky.) 352; 77 Am. Dec. 176; Petersen v. Chemical Bank, 32 N. Y. 21; 88 Am. Dec. 298; Apple's Estate, 66 Cal. 432. The succession to personal property is governed by the law of the actual domicile of the intestate at the time of his death, no matter what was the country of his birth or his former domicile, or the actual *situs* of the property at the time of his death: Russell v. Madden, 95 Ill. 485.

<sup>6</sup> Gibson v. Dowell, 42 Ark. 164; Smith v. Eaton, 36 Me. 298; 58 Am. Dec. 746; Williamson v. Smart, N. C. Conf. 146; 2 Am. Dec. 638; Lawrence v. Kitteridge, 21 Conn. 577; 56 Am. Dec. 385.

<sup>7</sup> Johnson v. Copeland, 35 Ala. 621.

sonal property is subject to the law which governs the person of its owner, as to its transmission by intestacy, though founded on international comity, is held in New York to be equally obligatory on its courts as would be a legal rule of purely domestic origin.<sup>1</sup> It is declared in an Illinois case that no person can take land by descent except those who are recognized as heirs by the laws of that country where the land is located, and that they take in the proportions and order prescribed by those laws.<sup>2</sup> But in a Massachusetts case it is held that a child adopted with the consent of its father and the sanction of a judicial decree in another state, where the parties were domiciled at the time, under a statute by which a child so adopted has all the rights of inheritance as legitimate offspring in the adoptive father's estate, is entitled, after the adopting father and child have removed their domicile into another state, to inherit in the latter state the father's real estate as against his collateral heirs, although the statutes of such latter state in the requisites of adoption have not been fully complied with.<sup>3</sup>

<sup>1</sup> *Parsons v. Lyman*, 20 N. Y. 103, 112.

<sup>2</sup> *Stoltz v. Doering*, 112 Ill. 234.

<sup>3</sup> *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321; the court saying: "We are not aware of any case in England or America in which a change of *status* in the country of the domicile with the formalities prescribed by its laws has not been allowed full effect as to the capacity thereby created of succeeding to and inheriting property, real as well as personal, in any other country, the laws of which allow a like change of *status* in a like manner, with a like effect, under like circumstances." "Other questions of a very difficult and embarrassing nature may arise as to the nature and extent of the liability of the heirs to the payment of debts and other charges of the intestate chargeable on his real estate situate in different countries, where different rules prevail as to the nature and extent of the liability of the heirs in respect to such real estate, and the real estate descends to different per-

sons and in a different manner in the respective countries. The question may respect the exclusive or primary applicability of one or more of the real estates to the discharge of such debts or other charges, or the liability of the heirs *in solido* or *pro portione hereditaria*, or the right of the heirs or devisees of the real estates in one country to contribution or indemnity from the heirs or devisees of the real estate in another country, or the right of creditors to proceed against them all *in solido* or *pro portione hereditaria*. Many cases of this sort have been discussed by foreign jurists and decided by foreign tribunals. Thus, for example, where one part of the succession has been situate in a country by whose laws the creditors are permitted to proceed against each heir *in solido*, and another part in the domicile of the intestate, by whose laws the creditors are entitled to proceed against each heir *pro portione hereditaria*, there has been no small diversity of judgment as

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The law of the place where ancillary administration is taken governs the distribution of the assets of the deceased in the payment of debts there. It is only the balance in the hands of the ancillary administrator after the payment of the debts that is subject to the law of the late domicile of the deceased. And this balance may be transmitted to the place of the domicile, or be distributed according to that law in the forum of the ancillary administration.<sup>1</sup> A creditor of an insolvent estate, resident in another state of the Union, is entitled to share in the distribution of the estate *pari passu* with the creditors of the same degree who are residents of the state where the distribution is made, in the absence of evidence that he has received anything from assets elsewhere.<sup>2</sup> An action will lie in Iowa on a claim assigned to the plaintiff by a foreign executor, although there has been no probate or administration in Iowa.<sup>3</sup>

ILLUSTRATIONS—The intestate at his decease was domiciled in Vermont; there was then due him from A, a citizen of Connecticut, a debt of one thousand dollars; original administration was granted on the estate in Vermont, and was nearly completed in that state, the debts due the estate other than that due from A being collected and all claims settled when ancillary administration was granted in Connecticut. A was the only brother of the whole blood, although the deceased left brothers and sisters of the half-blood surviving him in Vermont. Under the statute of distribution in the latter state, brothers and sisters of the whole and half blood were entitled to succeed to the estate equally. An appeal from the probate court granting ancillary administration was taken by a devisee and heir at law of A. *Held*, that the distribution of the debt due from A was governed by the Vermont law: *Lawrence v.*

to the rule which ought to be applied in favor of the creditors, whether the rule of the law *rei sitæ* or of the law of the domicile as to the nature and extent of the liability of the heirs. Perhaps, in such a case, the right of the creditors against the heirs respectively may most properly be deemed to be governed by the *lex rei sitæ*, and the mode of proceeding against them be regulated by the law of the place

where he seeks his remedy"; but this opinion is, however, qualified by the learned author in the same section: Story's Conflict of Laws, secs. 489 a, b, pp. 687, 688.

<sup>1</sup> Goodall v. Marshall, 11 N. H. 88; 35 Am. Dec. 472.

<sup>2</sup> Taylor v. Thompson, 44 Tex. 497; 23 Am. Rep. 600.

<sup>3</sup> Campbell v. Brown, 64 Iowa, 425; 52 Am. Rep. 446.

*Kitteridge*, 21 Conn. 577; 56 Am. Dec. 385. An illegitimate child, son of E., a resident of Kansas, was legitimized by the legislature of that state; subsequently the parties, father and son, went to Louisiana, where the father died, leaving property. *Held*, that E. was the heir in Louisiana to such property: *Scott v. Key*, 11 La. Ann. 232. S. was born in Germany in 1832. Her father, J. D., came to this country in 1834, and settled in Illinois, where he purchased land in 1845. In 1849 he had his child brought to this country. A question arose as to the legitimacy of S. It was contended that she had by reason of certain facts the right of inheritance under the laws of Germany, and in consequence thereby became the heir of J. D., and as such entitled to inherit his property, wherever situate. *Held*, that the descent and heirship of real property situate in Illinois should be governed by the law of that state, and although a bastard might be entitled to inherit from the father in Germany, such child could not inherit real estate from him in Illinois: *Stoltz v. Doering*, 112 Ill. 234. R., a resident of Pennsylvania, adopted an infant, S., in that state by due form of law as his son, by virtue of which adoption in that state he legally became and was entitled to all the rights of a child and heir of R. In the same year R. removed to Massachusetts, where he died a short time thereafter, intestate, seised of real estate, and leaving no other child, but a brother who claimed the estate as against the son. The laws of Massachusetts required the formal consent of the wife to the adoption, which consent was not given. *Held*, that such son inherited the estate to the exclusion of collateral heirs: *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321.

§ 3731. **Penal Laws.**—The penal laws of one country can have no operation in another;<sup>1</sup> and an action to recover a penalty imposed by statute will not lie outside of the state which enacted the law.<sup>2</sup> Therefore it has been held that a person may sue on a chose in action purchased in another state, though the laws of the latter state prohibit such purchases under a penalty.<sup>3</sup>

**ILLUSTRATIONS.**—A promissory note bearing lawful interest was made in New Brunswick, and secured by mortgage on lands in Maine. After the note was due, illegal interest was

<sup>1</sup> *Scoville v. Canfield*, 14 Johns. 338; 7 Am. Dec. 467; *Dickson v. Dickson*, 1 Yerg. 110; 24 Am. Dec. 444; *Suffolk Bank v. Kidder*, 12 Vt. 464; 36 Am. Dec. 334. <sup>2</sup> *First Nat. Bank v. Price*, 33 Md. 487; 3 Am. Rep. 204. <sup>3</sup> *Scoville v. Canfield*, 14 Johns. 338; 7 Am. Dec. 467.

<sup>1</sup> *Cool*  
<sup>2</sup> *Robe*  
203.  
<sup>3</sup> *Chica*  
*Miss.* 977  
<sup>4</sup> *Scott*  
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exacted for forbearance of payment. By the law of New Brunswick usurious contracts were void, and the lender forfeited both principal and interest; but in Maine the rate of interest was not limited. In an action to foreclose the mortgage, *held*, that the mortgagor could not avoid the mortgage, as it was valid in its inception; that the statute imposing a forfeiture of the principal and interest was in the nature of a penalty, and of no effect outside of New Brunswick, and that the extra interest paid was not a set-off: *Lindsay v. Hill*, 66 Me. 212; 22 Am. Rep. 564.

§ 3732. **Torts.**—A tort being personal, redress may be sought wherever the wrong-doer can be found.<sup>1</sup> Thus the courts of California have jurisdiction of an action brought by one resident alien against another resident alien, who is personally served with summons, to recover damages for personal injuries inflicted on the plaintiff in a foreign country.<sup>2</sup> Where a person was killed by a collision on a railroad running through two states, it was held that the right of action was determined by the law of the state where the collision occurred.<sup>3</sup> But to support an action, the act must have been wrongful or punishable where it took place, and whatever would be a good defense to the action, if brought there, must be a good defense everywhere.<sup>4</sup> If an injury is suffered in one state, and an action is brought in another for damages resulting therefrom, the law of the former state, whether statutory or otherwise, determines the plaintiff's right to recover. If an action could not have been sustained in the state where the injury was suffered, none is maintainable elsewhere.<sup>5</sup> The right of a father to maintain an action for

<sup>1</sup> Cooley on Torts, 470.

<sup>2</sup> *Roberts v. Dunsmuir*, 75 Cal. 203.

<sup>3</sup> *Chicago etc. R. R. Co. v. Doyle*, 60 Miss. 977.

<sup>4</sup> *Scott v. Lord Seymour*, 1 Hurl. & C. 219. <sup>5</sup> *Wilson v. Mackenzie*, 7 Hill, 95, 42 Am. Dec. 51, it was held that an action would lie against an officer of the navy for illegally assaulting and imprisoning one of his subor-

dinates on the high seas, though the act was done under color of naval discipline: *Phillips v. Eyre*, L. R. 4 Q. B. 225; L. R. 6 Q. B. 1; *The China*, 7 Wall. 53, 64; *Smith v. Condry*, 1 How. 28; *Stout v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*, 5 Ired. 177; *Mahler v. New York etc. Trans. Co.*, 35 N. Y. 352.

<sup>5</sup> *Bridger v. R. R. Co.*, 27 S. C. 459; 13 Am. St. Rep. 653.

the death of his child in Indiana will be enforced in an Illinois court according to the law of Indiana on the subject, there being nothing therein contrary to public policy.<sup>1</sup> On the trial in South Carolina of an action founded on an accident which occurred in North Carolina, the question of defendant's negligence is determinable by the North Carolina law.<sup>2</sup> In Texas, a master cannot be held liable for the consequences of the negligence of a fellow-servant of plaintiff, the master's servant. In Kansas the rule is otherwise. In a suit brought in Kansas against a railroad corporation, by a brakeman, to recover damages for injuries caused in Texas by the negligence of the employees of the corporation, whose duty it was to give notice of a fall of gravel on the track, the judge presiding at the trial failed to make clear to the jury the distinction between the rule prevailing in Texas and that prevailing in Kansas, and a verdict was rendered for plaintiff. It was held that a new trial should be granted.<sup>3</sup>

But an action for a trespass to lands in a foreign country cannot be sustained.<sup>4</sup> It has been made a question whether, if, by a wrongful act committed in one state, real property is injured in another, action may not be brought in the former for that injury; and in one case Mr. Justice Grier, at the circuit, held that it might.<sup>5</sup> In New Hampshire, however, it is held that suit can be brought only in the jurisdiction where the land lies.<sup>6</sup>

ILLUSTRATIONS. — Defendant's dog, owned and kept in Massachusetts, strayed into an adjoining state and bit plaintiff. In an action of tort in Massachusetts for the injury, there was no

<sup>1</sup> Shedd v. Moran, 10 Ill. App. 618.

<sup>2</sup> Bridger v. R. R. Co., 27 S. C. 459; 13 Am. St. Rep. 653. A suit in a Georgia court was founded on the common-law right of action for an accident which occurred in Alabama. Held, that the Georgia courts were not bound to the rulings of the Alabama courts as to the common law: Krogg v. R. R. Co., 77 Ga. 202; 4 Am. St. Rep. 79.

<sup>3</sup> Atchison etc. R. R. Co. v. Moore, 29 Kan. 632.

<sup>4</sup> Doulson v. Mathews, 4 Term Rep. 503; Livingston v. Jefferson, 1 Brock. 203. *Aliter* in Louisiana: Holmes v. Barclay, 4 La. Ann. 63.

<sup>5</sup> Rundle v. Canal Co., 1 Wall. Jr. 275; Thayer v. Crooks, 17 Ohio, 459; 49 Am. Dec. 474.

<sup>6</sup> Worster v. Lake Co., 25 N. H. 525.

<sup>1</sup> Whit 465; Van Barb. 244; 10 Abb. 119; Will 48 Am. R. Co. v. Ea. R. R. Co., son v. R. R. ard v. R. Needham State v. R. etc. R. R. Mackey v. Armstrong ter v. R. R. Rep. 105; 1 N. Y. 465;

evidence that the statute of such adjoining state made the injury actionable, nor was it proved that the defendant had knowledge that his dog was accustomed to bite mankind, and therefore liable at common law. *Held*, that the action would not lie, although the statute of Massachusetts gives an action for such injuries within the state: *Le Forest v. Tolman*, 117 Mass. 109; 19 Am. Rep. 400. A resident of Vermont came to New York, bought liquor of A, got drunk, went home, and did damage to B's property. *Held*, that the New York civil-damage act, having no extraterritorial effect, could not be invoked by B against A: *Goodwin v. Young*, 34 Hun, 252.

§ 3733. **Statutory Action for Causing Death.**—The remedy under the statutes giving a right of action for an injury causing death is purely local, and the action can only be brought in the state whose statutes give it, and where the killing and death took place;<sup>1</sup> and this is so whether the act took place in another of the states of the Union or on the high seas;<sup>2</sup> or the parties were citizens of the state where suit is brought; or that the wrong-doer was a corporation chartered by that state;<sup>3</sup> or that the injury was occasioned by negligence which was a breach of a contract entered into in that state;<sup>4</sup> or that the corporation whose wrongful act inflicted the injury was chartered both in the state where the death occurred and where the suit was brought;<sup>5</sup> or that the person in-

<sup>1</sup> *Whitford v. R. R. Co.*, 23 N. Y. 465; *Vandeventer v. R. R. Co.*, 27 Barb. 244; *Beach v. Bay State etc. Co.*, 10 Abb. Pr. 71; 30 Barb. 433; reversing 27 Barb. 248; 6 Abb. Pr. 415; *Vanderwerken v. R. R. Co.*, 6 Abb. Pr. 239; *Campbell v. Rogers*, 2 Handy, 119; *Willis v. R. R. Co.*, 61 Tex. 432; 48 Am. Rep. 301; *Nashville etc. R. R. Co. v. Eakin*, 6 Cold. 582; *Hover v. R. R. Co.*, 25 Ohio St. 667; *Richardson v. R. R. Co.*, 98 Mass. 85; *Woodard v. R. R. Co.*, 10 Ohio St. 121; *Needham v. R. R. Co.*, 38 Vt. 299; *State v. R. R. Co.*, 45 Md. 41; *Illinois etc. R. R. Co. v. Cragin*, 71 Ill. 177; *Mackey v. R. R. Co.*, 14 Blatchf. 65; *Armstrong v. Beadle*, 5 Saw. 484; *Vawter v. R. R. Co.*, 84 Mo. 679; 54 Am. Rep. 105; *Debevoise v. R. R. Co.*, 98 N. Y. 465; 50 Am. Rep. 683.

<sup>2</sup> *Mahler v. R. R. Co.*, 45 Barb. 226; 35 N. Y. 352.

<sup>3</sup> *Whitford v. R. R. Co.*, 3 Bosw. 67; 23 N. Y. 465; *Crowley v. R. R. Co.*, 30 Barb. 99.

<sup>4</sup> *Id.*

<sup>5</sup> *State v. R. R. Co.*, 45 Md. 41. But see *Berry v. R. R. Co.*, 39 Ga. 554. An action cannot be maintained in Massachusetts against a railroad corporation, operating its road as a continuous line in that state and in Connecticut, under the laws of both, for the death of a person caused by the negligence of the corporation in Connecticut, the laws of the latter state not affording the like remedy: *Davis v. R. R. Co.*, 143 Mass. 301; 58 Am. Rep. 138.



jured was brought into the state before his death, and there died.<sup>1</sup> But causes of action of this character arising under the statutes of one state may be enforced in another state, provided it is made to appear that the maintenance of such action is in conformity with the policy of the state in which the action is brought, or is recognized by the laws of that state.<sup>2</sup> It is not necessary that the statute in the place where the wrong was committed should be precisely the same as that of the state where the action is brought; it is sufficient that it should be of similar import and character, founded upon the same general policy.<sup>3</sup> An administrator appointed in another

<sup>1</sup> Needham v. R. R. Co., 38 Vt. 294; McCarthy v. R. R. Co., 18 Kan. 46; 26 Am. Rep. 742. In an action in Iowa for the death of the plaintiff's intestate by the negligence of the defendant in Missouri, there can be no recovery under the Iowa statute without showing a corresponding statute in Missouri: Hyde v. R. R. Co., 61 Iowa, 441; 47 Am. Rep. 820.

<sup>2</sup> Stallknecht v. R. R. Co., 53 How. Pr. 305; Selma etc. R. R. Co. v. Lacey, 43 Ga. 106; Western etc. R. R. Co. v. Strong, 52 Ga. 461; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48; 38 Am. Rep. 491; Bruce v. R. R. Co., 83 Ky. 174. An action may be maintained in Iowa against a railroad company for negligently killing a mule in Illinois, the remedy being granted by the statutes of both states: Boyce v. R. R. Co., 63 Iowa, 70; 50 Am. Rep. 730. An action may be maintained in Pennsylvania against a foreign corporation served with process in Pennsylvania to recover for negligence in another state, the statute of both states allowing such remedy: Knight v. R. R. Co., 108 Pa. St. 250; 56 Am. Rep. 200.

<sup>3</sup> Stoeckman v. R. R. Co., 15 Mo. App. 503; Morris v. R. R. Co., 65 Iowa, 727; 54 Am. Rep. 39; Burns v. R. R. Co., 113 Ind. 169; Leonard v. Steam Nav. Co., 84 N. Y. 48; 38 Am. Rep. 491. The court in this case say: "At common law, personal actions, whether *ex contractu* or *ex delicto*, are transitory: Bouvier's Law Dict.,

tits. Personal Actions, Transitory Actions. And these actions may be brought anywhere, and are governed by the *lex fori*: Bouvier's Law Dict.; Story's Conflict of Laws, sec. 307 a, e. The cause of action which the statutes of Connecticut created is transitory in its nature, and unless excepted from the general rule as to places where such actions may be brought, can be enforced in the courts of this state or any other forum, provided the laws of that forum do not forbid its maintenance. In this state it is held that actions will lie for injuries to the person committed outside of the territorial limits of the state. In Smith v. Bull, 17 Wend. 323, it was decided that an action for an assault and battery committed in the state of Pennsylvania could be maintained in any court of common pleas of this state. The rule, no doubt, is, that all common-law actions for an injury in a foreign country are transitory in their character, and may be brought in another state or country besides that in which they originated. In contemplation of law the injury arises anywhere and everywhere. The right to recover in such cases rests upon the presumption that the common law prevails in such other state, and that the injured party could have recovered there had the action been brought in such state. The remedy in such cases is given by the courts of one country or state upon the principle of comity which is due by one sovereign state or country to

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state cannot sue in Kansas for the negligent killing of his intestate, where by the laws of the state of his appointment he cannot maintain such an action.<sup>1</sup> In Illinois it is held that a foreign administrator cannot sue under the statute,<sup>2</sup> but in Indiana the general statute permits it.<sup>3</sup> In Alabama, under a statute giving an action against the county where one was killed by lynching, etc., it has been held that aliens, though resident abroad, may sue.<sup>4</sup>

another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this state, it is also held that the statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was not committed in this state, but in a foreign country, unless it is proved that the laws of that country are of a similar character: *Whitford v. R. R. Co.*, 23 N. Y. 465; *Beach v. Bay State Steamboat Co.*, 30 Barb. 433; *Crowley v. R. R. Co.*, 30 Barb. 99; *McDonald v. Mallory*, 77 N. Y. 547; 33 Am. Rep. 664. These decisions rest upon the principle that the statutes of this state can have no operation in a foreign country where similar statutes do not exist, and that it is not a legitimate presumption that the statute laws of other states or countries are similar to our laws. In *Whitford v. R. R. Co.*, 23 N. Y. 465, the injury was done in New Granada. After considering the effect of the statute in a foreign country, Denio, J., remarks: 'Whatever liability the defendant incurred by the laws of New Granada, by the act [facts] mentioned in the complaint, might well be enforced in the courts of this state; . . . but the rule of decision would still be the law of New Granada, which the court and jury must be made acquainted with by the proof exhibited before them.' The doctrine of this case is approved in *McDonald v. Mallory*, 77 N. Y. 547; 33 Am. Rep. 664; and it is laid down by *Rapallo, J.*, that where the wrong is committed in a foreign state or country, no action 'can be maintained here without proof of the existence of a similar statute in the place where the wrong was com-

mitted.' The rule here laid down is just and reasonable; and it is not essential that the statute should be precisely the same as that of the state where the action is given by law, or where it was brought, but merely requires that it should be of a similar import and character. The statute in this state is certainly of the same nature, and the similarity is such as to authorize the conclusion that it is founded upon the same principle and possesses the same general attributes as the statutes of Connecticut which have been cited. The same remedy was to be accomplished, and an examination of the different provisions evinces an agreement in both of the statutes as to their main features, and that they are substantially alike, and to the same effect as to the survivorship of the action. In fact, when there are similar statutes, instead of the common law, the right to recover damages stands precisely the same as if the common law in both states relating to the subject prevailed. The doctrine that an action will lie when the common law or the statutes of different states or countries correspond is sustained by numerous authorities: *Madrazo v. Willes*, 3 Barn. & Ald. 353; *Melan v. Duke De Fitz James*, 1 Bos. & P. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161; 1 *Smith's Lead. Cas.* 963; *Shipp v. McCraw*, 3 Murph. 463; *Wall v. Hoskins*, 5 Ired. 177; *Stout v. Wood*, 1 Blackf. 71."

<sup>1</sup> *Limekiller v. R. R. Co.*, 33 Kan. 83; 52 Am. Rep. 523.

<sup>2</sup> *Illinois etc. R. R. Co. v. Cragin*, 71 Ill. 177.

<sup>3</sup> *Jeffersonville etc. R. R. Co. v. Hendricks*, 26 Ind. 228; 41 Ind. 49.

<sup>4</sup> *Luke v. Calhoun Co.*, 52 Ala. 115.

ILLUSTRATIONS.—The plaintiff's husband received injuries in New Jersey, through the negligence of the defendant, which resulted in his death. Letters of administration were granted plaintiff in New York. The statutes of New Jersey and New York giving a right of action in such cases are substantially the same. *Held*, that plaintiff could maintain an action in the courts of New York against the defendant for causing the death of her husband in New Jersey: *Dennick v. R. R. Co.*, 103 U. S. 11.

§ 3734. Remedies.—The remedy upon a contract, both in substance and form, is regulated by the *lex fori*, and not by the *lex loci contractus*,<sup>1</sup> and this is so even where the contract is to be performed at the place where it was made.<sup>2</sup> The law of the place where the contract is made governs as to the rights and liabilities of the parties; that of the place of performance as to the enforcement.<sup>3</sup> The

<sup>1</sup> *Scoville v. Canfield*, 14 Johns. 338; 7 Am. Dec. 467; *Jones v. Jones*, 18 Ala. 248; *Cox v. Adams*, 2 Ga. 158; *Brent v. Shouse*, 15 La. Ann. 110; 79 Am. Dec. 573; *De Sobry v. De Laistre*, 2 Har. & J. 191; 3 Am. Dec. 535; *Dakin v. Pomeroy*, 9 Gill, 1; *Pitkin v. Thompson*, 13 Pick. 64; *Smith v. Pinella*, 2 Johns. 198; *Watson v. Brewster*, 7 Pa. St. 381; *Gulick v. Loder*, 13 N. J. L. 68; 23 Am. Dec. 711; *Allen v. Watson*, 2 Hill, 319; *McKissick v. McKissick*, 6 Humph. 75; *Atlanta etc. R. R. Co. v. Tanner*, 68 Ga. 384; *Bird v. Caritat*, 2 Johns. 342; 3 Am. Dec. 433; *Holmes v. Remsen*, 4 Johns. Ch. 460; 8 Am. Dec. 581; *Bank of the United States v. Donnelly*, 8 Pet. 361; *Wilcox v. Hunt*, 13 Pet. 378; *Laird v. Hodges*, 26 Ark. 356; *Thornton v. Western Reserve Farmers' Ins. Co.*, 31 Pa. St. 529; *Denny v. Faulkner*, 22 Kan. 89; *Alexandria Canal Co. v. Swann*, 5 How. 83; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Hinkley v. Marean*, 3 Mason, 88; *Willard v. Dorr*, 3 Mason, 91; *Burchard v. Dunbar*, 82 Ill. 450; 25 Am. Rep. 334; *Mumford v. Canty*, 50 Ill. 570; 99 Am. Dec. 525; *Camfrancue v. Burnell*, 1 Wash. C. C. 340; *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Atwater v. Townsend*, 4 Conn. 47; 10 Am. Dec. 97; *Suffolk Bank v. Kidder*, 12 Vt. 464; 36 Am. Dec. 354; *Wood v. Watkinson*, 17 Conn. 500; 44 Am. Dec.

562; *Jordan v. Thornton*, 7 Ark. Rep. 224; 44 Am. Dec. 546; *Roosa v. Crist*, 17 Ill. 450; 65 Am. Dec. 679; *Everett v. Herrin*, 46 Me. 357; 74 Am. Dec. 455; *Hefferlin v. Sinsinderfer*, 2 Kan. 401; 85 Am. Dec. 593; *Coffman v. Bank*, 40 Miss. 29; 90 Am. Dec. 311; *Ivey v. Lalland*, 42 Miss. 444; 97 Am. Dec. 475.

<sup>2</sup> *Harker v. Brink*, 24 N. J. L. 334; *Wood v. Malin*, 10 N. J. L. 208; *Gulick v. Loder*, 1 N. J. L. 68; *Armour v. McMichael*, 36 N. J. L. 92, 94; *Garr v. Stokes*, 1 Harr. (Del.) 403, 405; *Murray v. Gibson*, 2 La. Ann. 311; *Roberts v. Wilkinson*, 5 La. Ann. 370, 379; *Bacon v. Dahlgreen*, 7 La. Ann. 600; *Collins etc. Co. v. Burkam*, 10 Mich. 283.

<sup>3</sup> *Burchard v. Dunbar*, 82 Ill. 450; 25 Am. Rep. 334. The contract of a married woman made in New York, and enforceable in equity there, but presumably not at law, will not be enforced at law in New Jersey: *Bradley v. Johnson*, 46 N. J. L. 271. And see *Bank v. Williams*, 46 Miss. 618; 12 Am. Rep. 319. Where a married woman, having a separate estate in lands in Missouri, makes a contract in another state, her capacity to make the contract, and its validity, are to be determined by the law of Missouri, in a suit in a Missouri court to enforce such contract against her separate estate there: *Johnston v.*

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<sup>1</sup> *Harrison*  
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<sup>2</sup> *Glenn v.*  
But see *Levy*  
21 Am. Rep.  
<sup>3</sup> *Bank of U*  
§ Pet. 361; *L*  
651; *Warren*  
*Andrews v. H*  
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*c. Kerr*, 1 Bos  
<sup>4</sup> *Watson v.*  
*Thrasher v. E*

*lex fori* governs in determining the mode of trial, including the form of pleading, the quality and degree of evidence, and the mode of redress;<sup>1</sup> or whether a suit is to be brought in the name of the assignor of the contract to the use of the assignee, or whether it shall be brought in the name of the assignee.<sup>2</sup> An instrument executed with a scroll seal, though considered a deed in the place of its execution, yet if sued on in a state where scrolls are not treated as seals, the remedy must be as upon an unsealed simple contract.<sup>3</sup> And a note with a scroll seal, although treated as a simple contract in the state where made, yet if sued in a state where the scroll seals are valid, it will be regarded as a specialty.<sup>4</sup>

§ 3735. **Defenses.**—A defense or discharge which is good by the law of the place where the contract is made or to be performed is of equal validity wherever the question may be litigated.<sup>5</sup> It is a well-settled principle that if a party be justified as to a transaction in the country where it took place, he is justified everywhere.<sup>6</sup> Thus if the defense of infancy is valid by the *lex loci contractus*, it is good wherever the contract may be sued on;<sup>7</sup> so of the defense of tender and payment.<sup>8</sup>

Gawtry, 11 Mo. App. 322. Where a contract of an equitable character is made in another state, in which there is no distinction between courts of law and of equity, it can still be enforced in this state only in a court of equity: Borchard v. Dunbar, 82 Ill. 450; 25 Am. Rep. 334.

<sup>1</sup> Harrison v. Edwards, 12 Vt. 648; 36 Am. Dec. 364.

<sup>2</sup> Glenn v. Busey, 5 Mackey, 233. But see Levy v. Levy, 78 Pa. St. 507; 21 Am. Rep. 35.

<sup>3</sup> Bank of United States v. Donnelly, 8 Pet. 361; Le Roy v. Beard, 8 How. 451; Warren v. Lynch, 5 Johns. 239; Andrews v. Herriot, 4 Cow. 508; Meredith v. Hinsdale, 2 Caines, 362; Adam v. Kerr, 1 Bos. & B. 360.

<sup>4</sup> Watson v. Brewster, 7 Pa. St. 381; Thrasher v. Everhart, 3 Gill & J. 234;

Bank of United States v. Donnelly, 8 Pet. 361.

<sup>5</sup> Vermont Bank v. Porter, 5 Day, 316; 5 Am. Dec. 157; Hempstead v. Reed, 6 Conn. 480; Houghton v. Page, 2 N. H. 42; 9 Am. Dec. 30; Dyer v. Hunt, 5 N. H. 401; Hall v. Broodman, 14 N. H. 38; Very v. McHenry, 29 Me. 214; Smith v. Smith, 2 Johns. 235; 3 Am. Dec. 410; McMenomy v. Murray, 3 Johns. Ch. 435; Hicks v. Brown, 12 Johns. 142; Blanchard v. Russell, 13 Mass. 1; 7 Am. Dec. 106.

<sup>6</sup> Shaver v. White, 6 Munf. 110; 8 Am. Dec. 730.

<sup>7</sup> Thompson v. Ketcham, 8 Johns. 190; 5 Am. Dec. 332.

<sup>8</sup> Warder v. Arell, 2 Wash. (Va.) 282; 1 Am. Dec. 488; Gilman v. Stevens, 63 N. H. 342.

§ 3736. **Set-off and Counterclaim.** — At common law, a set-off to an action allowed by the local law is a part of the remedy, and may therefore be admissible by the *lex fori*, although not admissible by the law of the country where the contract was entered into.<sup>1</sup> But where a defense inheres in the transaction itself, and does not arise out of something wholly distinct and independent, it may be set up wherever the contract is put in suit, and its effect must be determined by the *lex loci contractus*, and not by the *lex fori*.<sup>2</sup>

ILLUSTRATIONS. — The plaintiff was located and doing business in Washington city, and recovered judgment in a court of Baltimore. The defendant had a claim for damages growing out of the transaction. *Held*, that the mere fact that the plaintiff was a non-resident of Baltimore did not give the court of equity of that city jurisdiction to restrain the judgment against the defendant and to enforce a set-off: *Smith v. Washington Gas Light Co.*, 31 Md. 12; 100 Am. Dec. 49.

§ 3737. **Judicial Proceedings.** — The regularity of proceedings by which personal property is attached and sold under execution is to be determined by the laws of the state in which such proceedings are had.<sup>3</sup> The form of judgments to be rendered and of executions to be issued must conform to the *lex fori*.<sup>4</sup> In the absence of any finding to the contrary, it will be assumed in favor of a judgment in an action on a contract made in another state that the *lex loci* is the same as the *lex fori*.<sup>5</sup> Fraud practiced in the recovery of a judgment cannot be

<sup>1</sup> *Ruggles v. Keeler*, 3 Johns. 263; 3 Am. Dec. 482; *Carver v. Adams*, 38 Vt. 502; *Harrison v. Edwards*, 12 Vt. 648; 36 Am. Dec. 364; *Gibbs v. Howard*, 2 N. H. 296; *Bliss v. Houghton*, 13 N. H. 126; *Bank of Gallipolis v. Trimble*, 6 B. Mon. 601; *Vermont Bank v. Porter*, 5 Day, 316; 5 Am. Dec. 157.

<sup>2</sup> *Britton v. Bishop*, 11 Vt. 70; *Harrison v. Edwards*, 12 Vt. 648; 36 Am. Dec. 364.

<sup>3</sup> *French v. Hall*, 9 N. H. 137; 32 Am. Dec. 341.

<sup>4</sup> *Woodbridge v. Wright*, 3 Conn. 523, 526; *Atwater v. Townsend*, 4 Conn. 47; 10 Am. Dec. 97; *Smith v. Healy*, 4 Conn. 49; *Hinkley v. Marcan*, 3 Mason, 88; *Titus v. Hobart*, 5 Mason, 378; *Suydam v. Broadnax*, 14 Pet. 67; *Toomer v. Dickerson*, 37 Ga. 440; *Dimick v. Brooks*, 21 Vt. 509; *Batley v. Holbrook*, 11 Gray, 212.

<sup>5</sup> *Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512.

pleaded in an action thereon brought in another state, unless such a defense could be made in the courts of the state where the judgment was rendered.<sup>1</sup> An action lies in Iowa on a judgment rendered by a court of record in Nebraska, which has become dormant by the laws of that state.<sup>2</sup> Where suit is brought on a foreign judgment, containing a provision allowing interest at a specified rate, the New York court will give interest, not at the rate specified, but at the legal rate in New York.<sup>3</sup> Where proceedings upon a judgment are stayed by the law of the forum where it is obtained for a certain period, the judgment creditor will not be allowed, during such period, to proceed in another jurisdiction in an action founded upon such judgment, and the object whereof is to obtain its satisfaction by applying thereto the assets of his debtor within this latter jurisdiction.<sup>4</sup>

§ 3738. **Limitations.**—Where the limitation merely bars the remedy, the *lex fori* governs,<sup>5</sup> and the suit must be brought within the time prescribed by the law of the place where the remedy is sought, even though the law of the country where the contract was entered into may allow a much longer time in which to bring an action;<sup>6</sup> and the statute of limitations of another state, where the contract was made, cannot be pleaded in bar.<sup>7</sup> But where the *lex*

<sup>1</sup> *Barras v. Bidwell*, 3 Woods, 5.

<sup>2</sup> *David v. Porter*, 51 Iowa, 254.

<sup>3</sup> *Wells v. Davis*, 105 N. Y. 670.

<sup>4</sup> *Briggs v. Spencer*, 3 Rob. (La.) 265; 38 Am. Dec. 239.

<sup>5</sup> *Benjamin's Chalmers's Digest*, art. 252; *Don v. Lippman*, 5 Clark & F. 1; *Le Roy v. Crowninshield*, 2 Mason, 151; *Putnam v. Dike*, 13 Gray, 535; *Graves v. Graves*, 2 Bibb, 207; 4 Am. Dec. 697; *Ashton v. Morgan*, 2 Mart. (La.) 336; 5 Am. Dec. 733; *Jones v. Hook*, 2 Rand. 303; 14 Am. Dec. 783. Where one is injured in a railroad accident in Alabama, and the common law gives him a right of action in Georgia, where he begins suit for damages, the statute of limitations of the place of the forum

governs, and not that of the other state: *Krogg v. R. R. Co.*, 77 Ga. 202; 4 Am. St. Rep. 79.

<sup>6</sup> *Paine v. Drew*, 44 N. H. 396; *Nash v. Tupper*, 1 Caines, 402; 2 Am. Dec. 197.

<sup>7</sup> *Pearsall v. Dwight*, 2 Mass. 84; 3 Am. Dec. 35; *Ruggles v. Keeler*, 3 Johns. 263; 3 Am. Dec. 482; *Bulger v. Roche*, 11 Pick. 36; 22 Am. Dec. 359; *Townsend v. Jemison*, 9 How. 407; *Le Roy v. Crowninshield*, 2 Mason, 151; *Egberts v. Dibble*, 3 McLean, 86; *Stillman v. White Rock Mfg. Co.*, 3 Wood. & M. 539. *Contra*, *Gilpin v. Plummer*, 2 Cranch C. C. 54; *Loveland v. Davidson*, 3 Pa. L. J. 377; *Hoag v. Dessan*, 1 Pittsb. Rep. 390.

*loci contractus* declares that all rights to debts due more than a prescribed number of years shall be deemed to be extinguished, or that all titles to real and personal property not pursued within a specified time shall be deemed to fix and rest in the adverse possessor, such laws of limitation will be a bar to an action in another state, where a greater length of time is allowed, or there is no prescription at all.<sup>1</sup> So where a statute gives a right unknown to the common law, and limits the time within which an action shall be brought to assert it, the limitation will be enforced by the courts of any state wherein the plaintiff may sue.<sup>2</sup>

§ 3739. **Evidence.**—Questions of evidence are to be determined exclusively by the *lex fori*.<sup>3</sup> The question whether a contract may be proved by parol or written evidence must be adduced, or whether parol evidence may be received to show the actual agreement of the parties to a blank indorsement of a negotiable instrument, must be determined by the law of the state where the action is brought, and not by that of the state where the contract was made.<sup>4</sup>

§ 3740. **Interest.**—The rate of interest is governed by the *lex loci contractus*,<sup>5</sup> unless the contract is to be performed in another state.<sup>6</sup> A note executed in one state,

<sup>1</sup> *Hamilton v. Cooper*, Walk. 542; 12 Am. Dec. 588; *Brent v. Chapman*, 5 Cranch, 358; *Shelby v. Guy*, 11 Wheat. 361, 371, 372; *Beckford v. Wade*, 17 Ves. 88; *Newby v. Blaky*, 3 Hen. & M. 57; *Huber v. Steiner*, 2 Bing. N. C. 201, 211; *Don v. Lippman*, 5 Clark & F. 1; *Woodbridge v. Austin*, 2 Tyler, 364; 4 Am. Dec. 740; *Broh v. Jenkins*, 9 Mart. 526; 13 Am. Dec. 320.

<sup>2</sup> *Boyd v. Clark*, 8 Fed. Rep. 849.

<sup>3</sup> *Kirtland v. Wanzer*, 2 Duer, 278; *Bloomer v. Bloomer*, 2 Brad. App. 339.

<sup>4</sup> *Downer v. Chesebrough*, 36 Conn. 39; 4 Am. Rep. 29.

<sup>5</sup> *Holley v. Holley*, Litt. Sel. Cas. 505; 12 Am. Dec. 342; *Phinney v. Baldwin*, 16 Ill. 108; 61 Am. Dec. 62; *Sutro Tunnel Co. v. Belcher Mining Co.*, 19 Nev. 121. Interest on a note executed in Georgia, and payable there, but sued in Alabama, is governed by the Georgia law: *Camp v. Randle*, 81 Ala. 240.

<sup>6</sup> *Roberts v. McNeely*, 7 Jones, 500; 78 Am. Dec. 261; *Steward v. Ellice*, 2 Paige, 604; *Thompson v. Ketchum*, 4 Johns. 285; *Fanning v. Consequa*, 17 Johns. 511; 8 Am. Dec. 442; *Murphy v. Gaskins*, 28 Gratt. 207; *Connor v. Bellamont*, 2 Atk. 382; *Story's Con-*

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but payable in another, draws interest after maturity, according to the legal rate allowed in the state in which it is made payable.<sup>1</sup>

Where interest is allowed, not under contract, but as damages, the rate must be according to the *lex fori*.<sup>2</sup> After judgment recovered, the rate of interest is governed by the *lex fori*.<sup>3</sup> When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will be upheld.<sup>4</sup> The fact that the higher rate of interest allowed by the law of the place of the making of the note is specified therein is evidence of the intention of the parties to contract with reference to that law, rather than with reference to the law of the place of payment.<sup>5</sup> A contract made in another state between its citizens, and to be performed there, by which interest beyond six per cent per annum was agreed to be paid, must be governed by the *lex loci contractus*, and will therefore be held void, it being so declared by statute in that state. And such contract, though void by a penal statute, cannot be enforced in the forum.<sup>6</sup>

ILLUSTRATIONS. — The borrower resided in Ohio, the laws of which state, at the time, allowed parties to contract for any rate of interest not exceeding ten per cent, and the lender resided in Pennsylvania, where six per cent was the legal rate of interest. *Held*, that on a loan made in Ohio, the parties had a right to stipulate in the note for interest at ten per cent per annum, payable semi-annually, and make the note payable in Pennsylvania, without thereby rendering the contract usurious: *Kilgore v. Dempsey*, 25 Ohio St. 413; 18 Am. Rep. 306.

Conflict of Laws, sec. 291; 2 Kent's Com. 460. Interest given by way of damage for non-performance of contract, which is made in one place, but to be performed in another, is the interest of the place of payment: *Peck v. Mayo*, 14 Vt. 33; 39 Am. Dec. 205.

<sup>1</sup> *Lapice v. Smith*, 13 La. 91; 33 Am. Dec. 555.

<sup>2</sup> *Goddard v. Foster*, 17 Wall. 123; *Cooper v. Sandford*, 4 Yerg. 452; 26 Am. Dec. 239.

<sup>3</sup> *Hoag v. Dession*, 1 Pittsb. Rep. 390.

<sup>4</sup> *Cromwell v. County of Sac*, 96 U. S. 62; *Miller v. Tiffany*, 1 Wall. 298; *Chapman v. Robertson*, 6 Paige, 627; 31 Am. Dec. 264; *Kilgore v. Dempsey*, 25 Ohio St. 413; 18 Am. Rep. 306; *Peck v. Mayo*, 14 Vt. 33; 39 Am. Dec. 205; *Butlers v. Olds*, 11 Iowa, 1; *Story's Conflict of Laws*, sec. 291.

<sup>5</sup> *New England Mortgage Security Co. v. Vader*, 28 Fed. Rep. 265.

<sup>6</sup> *Houghton v. Page*, 2 N. H. 42; 9 Am. Dec. 30.



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**DIVISION IV.**  
**PUBLIC RIGHTS AND REMEDIES.**

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TITLE XXXVIII.  
CONSTITUTIONAL LAW.

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- PART I.—GENERAL PRINCIPLES, §§ 3741-3747.  
PART II.—LEGISLATIVE POWERS, §§ 3748-3782.  
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# TITLE XXXVIII.

## CONSTITUTIONAL LAW.

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### PART I.—GENERAL PRINCIPLES.

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#### CHAPTER CLXXXVIII.

##### CONSTITUTIONAL LAW—IN GENERAL

- § 3741. Constitutional law — Defined and illustrated.
- § 3742. Construction of constitutions.
- § 3743. Constitutions — How established and amended.
- § 3744. Power of courts as to questions of constitutionality.
- § 3745. When court will not declare statute void.
- § 3746. Rights and liabilities under unconstitutional laws — Private persons
- § 3747. Public officers.

§ 3741. **Constitutional Law — Defined and Illustrated.**  
—The term “constitution” is defined as the body of rules and maxims, whether written or unwritten, in accordance with which the powers of sovereignty are habitually exercised.<sup>1</sup> A law is unconstitutional when it is opposed to the principles or rules of the constitution of the state. Whether it is void or not depends upon whether, according to the theory of the government, any tribunal or officer is empowered to judge of violations of the constitution, and to keep the legislature within the limits of a delegated authority by annulling whatever acts exceed it. According to the theory of British constitutional law, the Parliament possesses and wields supreme power,<sup>2</sup> and if its enactments conflict with the constitution,

<sup>1</sup> Cooley on Constitutional Limits      \* 1 Bla. Com. 161.  
tions, 2.

they are nevertheless valid, and must operate as modifications or amendments of it. But in America the legislature acts under a delegated authority, limited by the constitution itself, and the judiciary is empowered to declare what the law is, and therefore an unconstitutional enactment must fall when it is subjected to the ordeal of the courts.<sup>1</sup> On the other hand, American legislatures have the same unlimited power of legislation as the British Parliament, except where they are restrained by the written constitutions.<sup>2</sup> A person may waive a constitutional provision for his benefit,<sup>3</sup> except where compliance with it is absolutely required.<sup>4</sup> One who procures the passage of an act, or afterwards sanctions it or derives interest or consideration from it, should not be allowed to retain his advantage, or keep his consideration, and then repudiate the act as unconstitutional.<sup>5</sup>

§ 3742. **Construction of Constitutions.** — The rules concerning the construction of statutes apply likewise to the construction of constitutions.<sup>6</sup> The contemporaneous construction of a constitution, as manifested by the legislature, in which were many framers of that instrument, and sanctioned by the acts and acquiescence of subsequent legislatures, and by all the departments of the state government during a period of twenty years, followed by the solemn adjudication of the courts, will not afterwards be departed from.<sup>7</sup> In construing constitutions, no word is to be rejected or disregarded which may have a material

<sup>1</sup> Cooley on Constitutional Law, 24; *Drake*, 46 N. Y. 325; *Vose v. Cockcroft*, 44 N. Y. 423; *Donnelly v. Corbett*, 7 N. Y. 507; *Baker v. Braman*, 6 Hill, 47; 40 Am. Dec. 387.

<sup>2</sup> *Id.*

<sup>3</sup> *Thorpe v. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625.

<sup>4</sup> *Lee v. Tillotson*, 24 Wend. 337; 35 Am. Dec. 624; *Embury v. Conner*, 3 N. Y. 518; 53 Am. Dec. 325; *Smith v. R. R. Co.*, 24 N. Y. 238; *Detmold v.*

*Ferguson v. Landram*, 5 Bush, 230; 96 Am. Dec. 350.

<sup>6</sup> See *post*, Chapter Statutes; *McGinnis v. State*, 9 Humph. 43; 49 Am. Dec. 697.

<sup>7</sup> *Bruce v. Schuyler*, 4 Gilm. 221; 46 Am. Dec. 447.

<sup>1</sup> *Thompson*, 240; 34 Am. Dec. 5  
<sup>2</sup> *People*, 5  
<sup>3</sup> *Morgan*, 68 Am. Dec. 2  
<sup>4</sup> *Page v.*, 2

bearing on the rights of citizens, and such construction should be given as will best protect private rights.<sup>1</sup> Where the framers of an amendment borrow provisions from constitutions of other states, which have received a judicial construction, it is presumed that they adopted such provisions in view of such construction and acquiesced in its correctness.<sup>2</sup> So where the framers of a new constitution adopt a provision substantially the same as one contained in a former constitution, to which a certain construction has been given, they are presumed to have intended that it should have the same meaning which it had under the former constitution.<sup>3</sup> The expression of one thing in a constitution is necessarily the exclusion of things not expressed, and this is especially true of constitutional provisions declaratory in their nature.<sup>4</sup> Inhibitions of a constitution as to legislation are equally effective when they arise by implication, as by expression; and this is the case when the legislative provision is repugnant to some provision of the constitution.<sup>5</sup> Where there is an irreconcilable conflict between two provisions of a constitution, the more comprehensive and specific provision should control.<sup>6</sup> Words used in a constitution will be accorded their popular rather than their technical signification, unless the nature of the subject, or the text, suggests their use in their technical sense. They must be taken in their ordinary and common acceptance, because they are presumed to have been so understood by their framers and by the people.<sup>7</sup> The word "law," as used in a constitution, signifies a statute, bill, or legislative enactment, regardless of its constitutionality or validity.<sup>8</sup>

<sup>1</sup> *Thompson v. Gulf etc. Co.*, 3 *Hew.* 240; 34 *Am. Dec.* 81.

<sup>2</sup> *People v. Coleman*, 4 *Cal.* 46; 60 *Am. Dec.* 582.

<sup>3</sup> *Morgan v. Dudley*, 18 *B. Mon.* 693; 68 *Am. Dec.* 735.

<sup>4</sup> *Page v. Allen*, 58 *Pa. St.* 338; 98 *Am. Dec.* 272.

<sup>5</sup> *Page v. Allen*, 58 *Pa. St.* 338; 98 *Am. Dec.* 272.

<sup>6</sup> *Gulf, Colorado, etc. R. R. Co. v. Rambolt*, 67 *Tex.* 654.

<sup>7</sup> *Miller v. Dunn*, 72 *Cal.* 462; 1 *Am. St. Rep.* 67.

<sup>8</sup> *Miller v. Dunn*, 72 *Cal.* 462; 1 *Am. St. Rep.* 67.



### § 3743. Constitutions—How Established and Amended.

—The written constitutions of the states have been adopted by the people thereof in convention assembled. The people of the territories have the power, through a constitutional convention, to form for themselves state constitutions, with the consent of Congress first obtained by an enabling act, but only in the manner prescribed by such act.<sup>1</sup> Such a constitution is not, however, operative until adopted by the people at an election.<sup>2</sup> The constitution<sup>3</sup> may be amended or revised or altered in the mode prescribed in it by a convention, or by the legislature after the submission of the amendment to a vote of the people.<sup>4</sup> It does not change any rights, duties, requirements, or obligations that were created by or dependent upon any territorial act, until it has received such sanction.<sup>5</sup> And the amendment does not generally become operative by a majority vote in its favor until after the official promulgation of the result.<sup>6</sup> An amendment to a constitution can be made only in the mode provided by the instrument itself, which must be strictly followed.<sup>7</sup> The supreme court has power to determine whether or not amendments to a state constitution have been legally proposed and ratified by the legislature in the manner prescribed by the constitution.<sup>8</sup> Where an amendment, proposed in the legislature, was not entered upon the journal of either house, as required by the constitution of Nevada, such omission was held fatal to its adoption, not-

<sup>1</sup> Cooley on Constitutional Limitations, 30.

<sup>2</sup> *Parker v. Smith*, 3 Minn. 240; 74 Am. Dec. 749. See *Brittle v. People*, 2 Neb. 198.

<sup>3</sup> Or the bill of rights: *State v. Cox*, 3 Ark. 436.

<sup>4</sup> See Stimson's American Statute Law, secs. 990, 994. A general revision, by the constitution of most of the states, must be by a convention and submission. It requires a majority of the electors of Indiana to ratify an amendment to the constitution, but

the whole number of votes cast at the election at which the amendment is submitted may be taken as the number of electors of the state: *State v. Swift*, 69 Ind. 505.

<sup>5</sup> *Parker v. Smith*, 3 Minn. 240; 74 Am. Dec. 749.

<sup>6</sup> *People v. Norton*, 59 Barb. 167; *State v. Morgan City*, 32 La. Ann. 81.

<sup>7</sup> *State v. Tully*, 19 Nev. 391; 3 Am. St. Rep. 895; *In re Constitutional Convention*, 14 R. I. 649.

<sup>8</sup> *State v. McBride*, 4 Mo. 303; 29 Am. Dec. 636.

withstanding a majority of the electors of the state afterwards, at a general election, ratified the amendment.<sup>1</sup> A constitutional provision requiring amendments to the constitution to be entered on the journals of the senate and assembly is satisfied by the entry on such journals of an identifying reference. The amendment need not be copied in full upon such journal.<sup>2</sup> Where the convention is called to amend the constitution in a certain part, amendments to other parts cannot be submitted to the people.<sup>3</sup> The statute calling the convention being the creator, the delegates possess no inherent power, and when convened by law at the time and place fixed in it, sit and act under it as their letter of attorney from the people themselves.<sup>4</sup> A state constitutional convention has no power to pass an ordinance repealing acts of the state legislature, under which private rights have become vested.<sup>5</sup> It has no power to grant new trials.<sup>6</sup> Where the convention has acted within the scope of its powers, errors of procedure cannot afterwards be inquired into by the courts.<sup>7</sup> Where legislation is necessary to give effect to the provision, the laws in force at the time remain in force until such legislation takes place.<sup>8</sup> A prohibition in a constitution against local or special legislation is prospective only, merely imposing restrictions on future legislation, and does not repeal local statutes containing provisions inconsistent therewith, and in force at the time of the adoption of the constitution. Nor is it the intent and meaning of the constitution that all future legislation should be conditioned on the repeal of such local laws.<sup>9</sup> A constitutional convention has full control of all

<sup>1</sup> *State v. Tully*, 19 Nev. 391; 3 Am. St. Rep. 895. See *Koehler v. Hill*, 60 Iowa, 543.

<sup>2</sup> *Oakland Paving Co. v. Tompkins*, 72 Cal. 5; 1 Am. St. Rep. 17.

<sup>3</sup> *Opinion of the Judges*, 6 Cush. 573.

<sup>4</sup> *Wells v. Bain*, 75 Pa. St. 39; 15 Am. Rep. 563.

<sup>5</sup> *Gibbes v. R. R. Co.*, 13 S. C. 228.

<sup>6</sup> *Lawson v. Jeffries*, 47 Miss. 686; 12 Am. Rep. 342.

<sup>7</sup> *Wells v. Bain*, 75 Pa. St. 39; 15 Am. Rep. 563.

<sup>8</sup> *Supervisors v. Stout*, 9 W. Va. 703.

<sup>9</sup> *Evans v. Phillippi*, 117 Pa. St. 226; 2 Am. St. Rep. 655.

its proceedings, and may provide in such manner as it sees fit to perpetuate its record, either by printing or manuscript.<sup>1</sup>

§ 3744. **Power of Courts as to Questions of Constitutionality.** — The courts have the power, and it is their duty, to determine whether a legislative enactment drawn in question in a suit before them is within the power of the legislature, or is repugnant to the federal or the state constitution, and if found to be the latter, to declare it unconstitutional and void.<sup>2</sup> Acts clearly unconstitutional must be declared so by the judiciary, without reference to their expediency; and the pecuniary interests of the people or sympathy for their misfortunes cannot be considered.<sup>3</sup>

<sup>1</sup> Goodrich v. Moore, 2 Minn. 61; 72 Am. Dec. 74.

<sup>2</sup> Bailey v. Gentry, 1 Mo. 164; 13 Am. Dec. 484; Calder v. Bull, 3 Dall. 386; R. R. Co. v. Comm'rs, 1 Ohio St. 77; Dawson v. Shaver, 1 Blackf. 206; Crowse v. Crowse, 54 Pa. St. 255; Norris v. Trustees, 7 Gill & J. 7; Dyer v. Bridge Co., 2 Port. 303; Cotton v. Comm'rs, 6 Fla. 610; Tate v. Bell, 4 Yerg. 202; 26 Am. Dec. 221; Bliss v. Com. 2 Litt. 90; 13 Am. Dec. 251; Phoebe v. Jay, 1 Breese, 209; Dow v. Norris, 4 N. H. 16; 17 Am. Dec. 400; King v. Bank, 15 Mass. 447; People v. Foot, 19 Johns. 58; Bailey v. R. R. Co., 4 Harr. (Del.) 389; 44 Am. Dec. 593; Pacific R. R. Co. v. Governor, 23 Mo. 353; 66 Am. Dec. 673; Denham v. Holeman, 26 Ga. 182; 71 Am. Dec. 198. "The constitution of this state, composed of the declaration of rights and form of government, is the immediate work of the people in their sovereign capacity, and contains standing evidences of their permanent will. It portions out supreme power, and assigns it to different departments, prescribing to each the authority it may exercise, and specifying that from the exercise of which it must abstain. The public functionaries move, then, in a subordinate character, and must conform to the fundamental laws or precepts of the creating power. When they transcend defined limits their acts

are unauthorized, and being without warrant, are necessarily to be viewed as nullities. If considered as valid acts, the distinction between unlimited and circumscribed authority is done away; the derivative exerts original power, and of constitutional law nothing is left but the name. The legislative department is nearest to the source of power, and is manifestly the predominant branch of the government. Its authority is extensive and complex, and being less susceptible, on that account, of limitation, is more liable to be exceeded in practice. Its acts out of the limit of authority assuming the garb of law will be pronounced nullities by the courts of justice, it being their province to decide upon the law arising in questions judicially before them, and upon the constitution as the paramount law; but this is more in fulfillment of their own duty than to restrain the excesses of a co-ordinate department of the government. The check to legislative encroachments is to be found in the declaration that the legislative, executive, and judicial powers ought to be kept separate and distinct, and in the solemn obligations of fidelity to the constitution under which all legislative functions are performed"; Crane v. Meginnis, 1 Gill & J. 463; 19 Am. Dec. 238.

<sup>3</sup> Coffman v. Bank, 40 Miss. 29; 90 Am. Dec. 311.

The power to pass upon a question of the constitutionality of a statute belongs to all courts of any grade,<sup>1</sup> though it has been thought in one case that only the superior courts should take upon themselves to deny the validity of a statute.<sup>2</sup> The decision of the court of final resort is binding upon all other courts until reversed. Thus the judgment of the highest court in the state on the constitutionality of a statute of the state under the state constitution is binding on all inferior courts in the state,<sup>3</sup> and upon the federal courts;<sup>4</sup> while the decision of the federal supreme court as to federal questions is binding on all state courts.<sup>5</sup>

§ 3745. When Court will not Declare Statute Void.—

A court will not, as a rule, express an opinion adverse to the validity of a statute, unless it becomes absolutely necessary to the determination of a cause before it;<sup>6</sup> nor where there is not a majority of the judges upon the bench to hear and decide the question;<sup>7</sup> nor in preliminary proceedings in the case;<sup>8</sup> nor at the suit of a mere volunteer, or one whose rights are not affected, and who has no particular interest in defeating it;<sup>9</sup> nor will a court declare a stat-

<sup>1</sup> Cooley on Constitutional Law, 145.

<sup>2</sup> *Ortman v. Greenman*, 4 Mich. 291.

*Contr. v. Maberry v. Kelly*, 1 Kan. 116.

<sup>3</sup> *Palmer v. Lawrence*, 5 N. Y. 389;

*Wheeler v. Rice*, 4 Brewst. 129.

<sup>4</sup> *Atlantic etc. R. R. Co. v. Georgia*,

98 U. S. 359; *Bank v. Bermington*, 16

*Blatchf.* 53; *Dundee Mortgage Co. v.*

*Parish*, 24 Fed. Rep. 197; *Lamborn v.*

*Dickinson County Comm'rs*, 97 U. S.

181; *Davie v. Briggs*, 97 U. S. 628;

*Railroad Companies v. Gaines*, 97

U. S. 697.

<sup>5</sup> *Frey v. Kirk*, 4 Gill & J. 509; 23

Am. Dec. 581; *Linn v. Bank*, 2 Ill. 87;

25 Am. Dec. 71; *Black v. Lusk*, 69

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Ark. 44; 37 Am. Dec. 761; *Bank v.*

*Maugan*, 28 Pa. St. 452; *Bell v. Per-*

*kins*, Peck, 261; 14 Am. Dec. 745;

*Terry v. Bleight*, 3 T. B. Mon. 270; 16

Am. Dec. 101; *Stalker v. McDonald*,

6 Hill, 93; 40 Am. Dec. 389; *Armington*

*v. Barnett*, 15 Vt. 745; 40 Am. 705;

*Larrabee v. Talbott*, 5 Gill, 426; 46 Am.

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Cush. 430; 48 Am. Dec. 610; *Scribner*

*v. Fisher*, 2 Gray, 48; *Baxley v. Linah*,

16 Pa. St. 241; 55 Am. Dec. 494.

<sup>6</sup> Cooley on Constitutional Law, 146;

*Hoover v. Wood*, 9 Ind. 286; *Smith v.*

*Speed*, 50 Ala. 277; *Ireland v. Turn-*

*pike Co.*, 19 Ohio St. 373; *Mobile etc.*

*R. R. Co. v. State*, 29 Ala. 573; *Frees*

*v. Ford*, 6 N. Y. 177.

<sup>7</sup> Cooley on Constitutional Limita-

tions, 161.

<sup>8</sup> *Lothrop v. Stedman*, 42 Conn. 583;

*Deering v. R. R. Co.*, 31 Me. 172;

*Havemeyer v. Ingersoll*, 12 Abb. Pr.,

N. S., 301; *Brien v. Clay*, 1 E. D.

*Smith*, 649.

<sup>9</sup> *Marshall v. Donovan*, 10 Bush, 681;

*Mobile R. R. Co. v. State*, 29 Ala. 573;

*Haskell v. New Bedford*, 108 Mass.

208; *Embury v. Conner*, 3 N. Y. 511;

ute unconstitutional and void when the objection to it is merely that it is unjust and oppressive, and violates rights and privileges of the citizen, unless it can be shown that such injustice is prohibited, or such rights and privileges guaranteed by the constitution.<sup>1</sup> The presumption is in

53 Am. Dec. 325; *Jones v. Black*, 48 Ala. 540; *People v. R. R. Co.*, 89 N. Y. 75; *De Garnett v. Haynes*, 23 Miss. 600; *Williamson v. Carleton*, 51 Me. 449; *Sullivan v. Berry*, 83 Ky. 198; 4 Am. St. Rep. 147; *County Comm'rs v. State*, 24 Fla. 55; 12 Am. St. Rep. 183; *Glynn v. Co. Board*, 72 Ga. 353. The constitutionality of a legislative act cannot be called in question by the people; individuals alleging themselves to be injured thereby alone can raise the question: *People v. R. R. Co.*, 15 Wend. 115; 30 Am. Dec. 33. A law unconstitutional only because impairing the obligation of contracts is not necessarily null as to the rights of persons not concerned in the contracts whose obligations are so impaired: *Moore v. New Orleans*, 32 La. Ann. 726.

<sup>1</sup> Cooley on Constitutional Law, 148; *Stewart v. Supervisors*, 30 Iowa, 9; 1 Am. Rep. 238; *Com. v. R. R. Co.*, 62 Pa. St. 286; 1 Am. Rep. 399; *Hanson v. Vernon*, 27 Iowa, 28; 1 Am. Rep. 215; *Wellington v. Petitioners*, 16 Pick. 87; 26 Am. Dec. 631; *Armington v. Barnett*, 15 Vt. 745; 40 Am. Dec. 705; *Chandler v. Douglass*, 8 Blackf. 10; 44 Am. Dec. 732; *Beebe v. State*, 6 Ind. 501; 63 Am. Dec. 391; *Madison etc. R. R. Co. v. Whiteneck*, 8 Ind. 222; *Lafayette etc. R. R. Co. v. Geiger*, 34 Ind. 199; *Sears v. Cottrell*, 5 Mich. 258; *Com. v. McCloskey*, 2 Rawle, 374; the court saying: "If the legislature should pass a law, in plain and unequivocal language, within the general scope of their constitutional powers, I know of no authority in this government to pronounce such an act void, merely because in the opinion of the judicial tribunals it was contrary to the principles of natural justice; for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments dangerous to the well-being of society, or at least

not in harmony with the structure of our ideas of natural government." So in *County Court of St. Louis v. Griswold*, 58 Mo. 175, the court says: "Upon principle and authority the rule is settled that acts of the legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the constitution that they can be declared void. For that reason, wherever there is a doubt, it is to be construed in favor of the validity of the enactment: *State v. R. R. Co.*, 48 Mo. 468. That the law is unjust, or impolitic, or oppressive, will not authorize a court to declare it illegal, unless it violates some specific provision of the constitution. The subject was thoroughly discussed by Mr. Justice Gamble in *Hamilton v. St. Louis County Court*, 15 Mo. 3, where, in conformity with all the authorities, he stated the true doctrine that no court was authorized to declare an act of the legislature void without being able to point out some specific clause of the constitution to which it was repugnant. A law may be unjust in its operation, or even in the principles upon which it was founded, but that would not justify a court in expanding the prohibitions in the constitution beyond their natural and original meaning in order to remedy an evil in any particular case": *Moor v. Veazie*, 32 Me. 343; 52 Am. Dec. 655; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379; *Sharpless v. Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759; *Thorpe v. San Francisco*, 4 Cal. 157; *Thompson v. Williams*, 6 Cal. 89; *People v. Rogers*, 13 Cal. 165; *Ex parte Yale*, 24 Cal. 244; 85 Am. Dec. 62; *Stockton R. R. Co. v. Stockton*, 41 Cal. 162; *Boston v. Cummins*, 16 Ga. 102; 60 Am. Dec. 717; *Donahoe v. Richards*, 38 Me. 379; 61 Am. Dec. 256; *Louisville etc. R. R. Co. v. County Court*, 1 Sneed, 637; 62 Am. Dec. 424; *Taylor v. Comm'rs*, 2 Jones Eq. 141; 64 Am. Dec. 507; *Rison*

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favor of the validity of statutes, and they should not be declared void for a mere doubt;<sup>1</sup> but only when they are clearly, and beyond reasonable doubt, in violation of the constitution.<sup>2</sup>

*r. Farr*, 24 Ark. 161; 87 Am. Dec. 52; *State v. Posey*, 17 La. Ann. 252; 87 Am. Dec. 525; *Darlington v. Mayor*, 31 N. Y. 164; 88 Am. Dec. 248; *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711. But in *Loan Ass'n v. Topeka*, 20 Wall. 655, Mr. Justice Müller says: "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depositary of power, is after all but a despotism. It is true, it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, — implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D; or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B; *Whiting v. Fond*

*du Lac*, 25 Wis. 188; *Cooley on Constitutional Limitations*, 129, 175, 487; *Dillon on Municipal Corporations*, sec. 587." And see, to the same effect, *Campbell's Case*, 2 Bland, 209; 20 Am. Dec. 360; *Bank v. Cooper*, 2 Yerg. 599; 24 Am. Dec. 517; *Flint River Steam Co. v. Roberts*, 2 Fla. 102; 48 Am. Dec. 178; *Mayor of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 573.

<sup>1</sup> *Ogden v. Saunders*, 12 Wheat. 213; *Com. v. R. R. Co.*, 62 Pa. St. 286; 1 Am. Rep. 399; *State v. Reid*, 1 Ala. 612; 35 Am. Dec. 44; *Bourland v. Hildreth*, 26 Cal. 228; *Twitchell v. Blodgett*, 15 Mich. 151; *Williamson v. Williamson*, 3 Smedes & M. 715; 41 Am. Dec. 636; *Flint River Steam Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Baughner v. Nelson*, 9 Gill, 299; 52 Am. Dec. 694; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379; *Wright v. Wright*, 2 Md. 429; 56 Am. Dec. 723; *Sharpless v. Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759; *Boston v. Cummins*, 16 Ga. 102; 60 Am. Dec. 717; *Louisville etc. R. R. Co. v. County Court*, 1 Sneed, 637; 62 Am. Dec. 424; *Santo v. State*, 2 Iowa, 165; 63 Am. Dec. 487; *Mayor of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572; *Harrison v. State*, 22 Md. 468; 85 Am. Dec. 658; *Olmstead v. Camp*, 33 Conn. 532; 89 Am. Dec. 221; *Fletcher v. Peck*, 6 Cranch, 87; the court saying: "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other"; *Davis v. Helbig*, 27 Md. 452; 92 Am. Dec. 646; *Miller v. Dunn*, 72 Cal. 462; 1 Am. St. Rep. 67; *Bush v. Indianapolis*, 120 Ind. 447.

<sup>2</sup> *Stewart v. Supervisors*, 30 Iowa, 9; 1 Am. Rep. 238; *Hanson v. Vernon*, 27 Iowa, 28; 1 Am. Rep. 215; *Adams v. Howe*, 14 Mass. 340; 7 Am. Dec. 216; *Hoke v. Henderson*, 4 Dev. 1;

§ 3746. **Rights and Liabilities under Unconstitutional Laws—Private Persons.**—A statute which has been declared invalid can support no contract, can create no right, can give protection to no one who has acted under it, can make no one an offender who has refused obedience to it. And so of any particular provision of a statute which proves invalid while the remainder is sustained.<sup>1</sup> The parties who procure the issuance of a warrant in compliance with an unconstitutional statute, and its execution by a sheriff, are trespassers.<sup>2</sup> When a statute has been held unconstitutional by the supreme court, it is inoperative while such decision is maintained; but a later decision sustaining such statute gives it vitality from the time of its enactment, and it is so to be treated as having been constitutional from the beginning.<sup>3</sup> But it is held in California that an unconstitutional law will protect citizens dealing under its provisions until it is adjudged unconstitutional by the courts, and hence that the legislature may authorize the payment of a claim created under such a law, although the constitution declares that it shall have no power to authorize the payment of any claim created without express authority of law.<sup>4</sup>

§ 3747. **Public Officers.**—Where a court or office is established by a legislative act apparently valid, and the court has gone into operation, or the office is filled and exercised under the act, it is a *de facto* court or office,

25 Am. Dec. 677; *Lane v. Dorman*, 4 Ill. 238; 36 Am. Dec. 543; *Prettyman v. Supervisors*, 19 Ill. 406; 71 Am. Dec. 230; *Chicago etc. R. R. Co. v. Smith*, 62 Ill. 271; *City of Louisville v. Hyatt*, 2 B. Mon. 177; 36 Am. Dec. 594.

<sup>1</sup> *Astrom v. Hammond*, 3 McLean, 107; *Poindexter v. Greenhorn*, 114 U. S. 270; *Sumner v. Beeler*, 50 Ind. 341; 19 Am. Rep. 718; *Kelly v. Bemis*, 4 Gray, 83; 64 Am. Dec. 50; *Osborn v. Bank*, 9 Wheat. 738; *Ely v. Thompson*, 3 A. K. Marsh. 70; *Molsey v.*

*Bank*, 6 McLean 142; *Campbell v. Sherman*, 35 Wis. 103; *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381; *Storey v. Storey Co.*, 5 Nev. 244; *Hall v. Hall*, 43 Ala. 488; 94 Am. Dec. 703.

<sup>2</sup> *Merritt v. City of St. Paul*, 11 Minn. 223. See *Crumpton v. Newman*, 21 Ala. 199; 46 Am. Dec. 251; *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381.

<sup>3</sup> *Pierce v. Pierce*, 46 Ind. 86.

<sup>4</sup> *Miller v. Dunn*, 72 Cal. 462; 1 Am. St. Rep. 67.

and its legality cannot be called in question collaterally, or except in a direct proceeding by the state for state purposes.<sup>1</sup> Judges of courts of superior or general jurisdiction are never liable in civil actions for any act done in their judicial capacity, even though the act be in excess of their jurisdiction.<sup>2</sup> But judicial officers of inferior or limited jurisdiction are civilly liable whenever they act in excess of their jurisdiction.<sup>3</sup> When a court of inferior jurisdiction issues process in excess of its authority, its judge and the party at whose instance he acted are trespassers with respect to all acts done in execution thereof.<sup>4</sup> A void statute can afford no protection to those who execute it; and when there is no adequate remedy at law, such persons may be enjoined from acting thereunder.<sup>5</sup> The officer who executes process issued under unconstitutional statutes, as he acts without authority, is a trespasser, and liable as such to persons injured thereby.<sup>6</sup>

<sup>1</sup> Commonwealth v. McCombs, 56 Pa. St. 436; Meagher v. Storey Co., 5 Nev. 244. See State v. Williams, 17 Rep. 432. But see Van Slyke v. Trempealeau etc. Ins. Co., 39 Wis. 390; 20 Am. Rep. 50.

<sup>2</sup> Borden v. State, 11 Ark. 519; 54 Am. Dec. 217, 229; Yates v. Lansing, 9 Johns. 395; 6 Am. Dec. 290.

<sup>3</sup> Borden v. State, 11 Ark. 519; 54 Am. Dec. 217; Piper v. Pearson, 2 Gray, 120; 61 Am. Dec. 438, note 441; Clarke v. May, 2 Gray, 410; 61 Am. Dec. 470, note 473.

<sup>4</sup> Fisher v. McGirr, 1 Gray, 1; 61 Am. Dec. 381; Barkeloo v. Randall, 4 Blackf. 476; 32 Am. Dec. 46; Crump-

ton v. Newman, 12 Ala. 199; 46 Am. Dec. 251.

<sup>5</sup> Osborn v. Bank of U. S., 9 Wheat. 723, 868; Astrom v. Hammond, 3 McLean, 107; Woolsey v. Com. Bank, 6 McLean, 142; Strong v. Daniels, 5 Ind. 348.

<sup>6</sup> Fisher v. McGirr, 1 Gray, 1; 61 Am. Dec. 381; Ely v. Thompson, 3 A. K. Marsh. 70; Campbell v. Sherman, 35 Wis. 103; Sumner v. Beeler, 50 Ind. 341; 19 Am. Rep. 718. See note to Savacool v. Boughton, 21 Am. Dec. 199. *Contra*, Henke v. McCord, 55 Iowa, 378. In Sessions v. Botts, 34 Tex. 335, the statute is held to be a protection until it is adjudged void.

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## PART II.—LEGISLATIVE POWERS.

## CHAPTER CLXXXIX.

## LEGISLATIVE POWERS GENERALLY.

- § 3748. Powers of the federal government.
- § 3749. Conflict between statutes and treaties.
- § 3750. Conflict between state and federal laws.
- § 3751. Powers of the states.
- § 3752. Interference with executive power.
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- § 3757. Grants of special privileges to individuals.

§ 3748: Powers of the Federal Government.—The federal government created by the constitution of the United States is one of limited and enunciated powers, and the constitution is the measure and the test of the powers conferred. Whatever is not conferred is withheld, and belongs to the several states or to the people thereof.<sup>1</sup> Therefore, any enactment of Congress which is opposed to its provisions, or is not within the grant of powers made by it, is unconstitutional.<sup>2</sup> The powers granted to the federal government by the states, as expressed in the constitution, vest in that government, with respect to such powers, the supreme, irresistible, absolute, uncontrolled authority over the people of the respective states, so as to act efficiently and directly upon them as individuals.<sup>3</sup> The United States, in its political capacity, may enter into contracts, take bonds, receive real or other property as

<sup>1</sup> Const. U. S., 10th amendt.; *United States v. Cruikshanks*, 92 U. S. 421; *Calder v. Bull*, 3 Dall. 386; *Gibbons v. Ogden*, 9 Wheat. 1, 187; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Gilman v. Philadelphia*, 3 Wall. 713; *Slaughter House Cases*, 16 Wall. 36; *U. S. v. Cruikshanks*, 92 U. S. 421.

<sup>2</sup> *Ableman v. Booth*, 21 How. 506;

<sup>3</sup> *U. S. v. Cruikshanks*, 92 U. S. 421.

<sup>4</sup> *Chancery v. Bailey and Cleveland*, 37 Ga. 532; 95 Am. Dec. 330.

<sup>1</sup> *Dikes v. 78 Am. Dec.*  
<sup>2</sup> *Foster v. 78 Am. Dec.*  
<sup>3</sup> *Braden, 1 78 Am. Dec.*  
<sup>4</sup> *Foster v. 78 Am. Dec.*  
<sup>5</sup> *The Che 616; Ropes*  
<sup>6</sup> *Taylor v. M. 616; Ropes*  
<sup>7</sup> *Gray v. Cl 616; Ropes*  
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security for deeds, and the like, in cases not previously provided for by law; and no legislative authorization is required therefor, but the power exists as incident to the general right of sovereignty; the government, as a body politic, being authorized, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, to enter into contracts not prohibited by law, and appropriate to the just exercise of those powers.<sup>1</sup>

**§ 3749. Conflicts between Statutes and Treaties.—**

Where a statute of the United States and a treaty conflict, the one last in time prevails.<sup>2</sup> A treaty may therefore supersede a prior act of Congress;<sup>3</sup> and, on the other hand, an act of Congress may supersede a prior treaty.<sup>4</sup> A treaty is the supreme law of the land, and is obligatory on all departments of the government, and on all parties litigating in the courts.<sup>5</sup>

**§ 3750. Conflict between State and Federal Laws.—**

A state law must yield to the supreme law, whether expressed in the constitution of the United States or in any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the "supreme law" was adopted, or enacted afterwards.<sup>6</sup> So of any provision in the constitution of any state which is found to be repugnant to the constitution of the Union.<sup>7</sup> State laws are not binding upon officers of the federal government, and a sale made by a United States marshal will

<sup>1</sup> *Dikes v. Miller*, 25 Tex. Sup. 281; 73 Am. Dec. 571.

<sup>2</sup> *Foster v. Nelson*, 2 Pet. 253; *Doe v. Braden*, 16 How. 635.

<sup>3</sup> *Foster v. Neilson*, 2 Pet. 253.

<sup>4</sup> *The Cherokee Tobacco*, 11 Wall. 616; *Ropes v. Clinch*, 8 Blatch. 304; *Taylor v. Morton*, 2 Curt. C. C. 454; *Gray v. Clinton Bridge*, 1 Woolw. 150.

<sup>5</sup> *Howell v. Fountain*, 3 Ga. 176; 46 Am. Dec. 415.

<sup>6</sup> *Ware v. Hylton*, 3 Dall. 199.

<sup>7</sup> *Dodge v. Woolsey*, 18 How. 331; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Cummings v. Missouri*, 4 Wall. 277; *Railroad Co. v. McClure*, 10 Wall. 511; *White v. Hart*, 13 Wall. 646; *Pacific R. R. Co. v. Maguire*, 20 Wall. 36; *Gunn v. Barry*, 15 Wall. 610.

be deemed valid until set aside by the federal court.<sup>1</sup> A state constitution cannot, any more than a state statute, prohibit judges of the federal courts from charging juries with regard to matters of fact.<sup>2</sup>

§ 3751. **Powers of the States.**—The powers and rights of the states are those rights which belonged to the states when the constitution was formed, and have not by that instrument been granted to the federal government or prohibited to the states.<sup>3</sup> Prior to the adoption of the federal constitution, the states possessed unlimited and unrestricted sovereignty, and retained the same ever afterwards, except so far as they granted powers to the general government or prohibited themselves from doing certain acts. Every state reserved to itself the exclusive right of regulating its own internal government and police.<sup>4</sup> The legislative power of the state embraces all the powers which the king and Parliament of England exercised before the Revolution, subject to the restrictions imposed by the constitution of the state and of the United States.<sup>5</sup> When a particular power is found to belong to the states, they are entitled to the same complete independence in its exercise as is the national government in wielding its own authority. Each within its sphere has sovereign powers.<sup>6</sup> A grant of power to Congress excludes the right of the state over the same subject only when the grant is in express terms an exclusive authority to the Union, or where the grant to Congress is coupled with a prohibition to the states to exercise the same power, or where the grant to the one would be repugnant to the exercise of a

<sup>1</sup> Kennerly v. Shepley, 15 Mo. 640; 57 Am. Dec. 219.

<sup>2</sup> St. Louis etc. R. R. Co. v. Vickers, 122 U. S. 360.

<sup>3</sup> Cooley on Constitutional Law, 34; People v. Coleman, 4 Cal. 46; 60 Am. Dec. 581; Moore v. Smaw, 17 Cal. 199; 79 Am. Dec. 123.

<sup>4</sup> Blair v. Ridgely, 41 Mo. 63; 97 Am. Dec. 248.

<sup>5</sup> Lansing v. Smith, 4 Wend. 9; 21 Am. Dec. 89.

<sup>6</sup> Golden v. Prince, 3 Wash. C. C. 313; Calder v. Bull, 3 Dall. 386; Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397, 406; Chaneely v. Bailey, 37 Ga. 532; 95 Am. Dec. 350.

similar authority by the other.<sup>1</sup> The supreme court of the United States is the chosen arbiter to determine such disputes and controversies as may arise between the respective states.<sup>2</sup>

§ 3752. **Interference with Executive Power.**—The powers or duties conferred by the constitution upon the executive department,<sup>3</sup> or upon any designated officer, the legislature cannot interfere with in any way.<sup>4</sup> Where the power of appointment is conferred by the constitution upon the executive, the legislature cannot exercise it.<sup>5</sup>

§ 3753. **Delegation of Legislative Power.**—No legislative body can delegate to another department of the government, or to any other authority, the power, either

<sup>1</sup> *Weaver v. Fegely*, 29 Pa. St. 27; 70 Am. Dec. 151; *Slinger v. Crowninshield*, 4 Wheat. 122; *Thames Bank v. Lowell*, 18 Conn. 500; 46 Am. Dec. 332. In *Commonwealth v. Kimball*, 24 Pick. 359, 35 Am. Dec. 326, it is said: "In considering the constitution and laws of the United States and those of the several states, and deciding whether their respective provisions do come in conflict or not, and to what extent, it is proper and absolutely necessary to have a just regard to the laws and institutions of the country and of the respective states, as they existed before the formation and adoption of the constitution of the United States, and to the objects and purposes had in view by that constitution. The great and leading object of this complex system of government was to select a few great and important subjects of administration in which all the states, and the people of all the states, had a common interest, to confide them to the general government, with all the collateral, incidental, and implied powers, proper and requisite to enable that government to conduct and administer them, in all their details, and to organize a system with all the executive, legislative, and judicial powers and functions necessary to the full and entire performance of all the duties of such a government. All other powers of sovereign government, necessary or

proper to provide for the peace, safety, health, morals, and general welfare of the community, remain entire and uncontrolled to the state government; and in the exercise of them they have the right and power to resort to all adequate and appropriate means for carrying these powers into effect, unless they shall happen in any particular instance to come directly in conflict with the operation of some law of the United States made in pursuance of its enumerated powers. In the latter case, inasmuch as it is declared and admitted that the constitution of the United States and all laws and treaties made in pursuance of its just powers shall be the supreme law of the land, it follows as a necessary consequence that to the extent of such collision and repugnancy the law of the state must yield, and to that extent, and no further, it is rendered by such repugnancy inoperative and void."

<sup>2</sup> *Chancery v. Bailey and Cleveland*, 37 Ga. 532; 95 Am. Dec. 350.

<sup>3</sup> As to the judicial department, see Chapter Courts.

<sup>4</sup> *Cooley on Constitutional Limitations*, 115.

<sup>5</sup> *State v. Kennon*, 7 Ohio St. 546; *Taylor v. Com.*, 3 J. J. Marsh. 404; *Davis v. State*, 7 Md. 151; 61 Am. Dec. 331; *Wood v. United States*, 15 Ct. of Cl. 151; *Dearing v. Bank*, 5 Ga. 497; 48 Am. Dec. 300.

generally or specially, to enact laws.<sup>1</sup> The legislature has no authority to submit a law to the decision of the people.<sup>2</sup> Judge Cooley says: "If the decision of these questions is to depend upon the weight of judicial authority up to the present time, it must be held that there is no power to refer the adoption or rejection of a general law to the people of the state, any more than there is to refer it to any other authority. The prevailing doctrine in the courts appears to be, that, except in those cases where by the constitution the people have expressly reserved to themselves a power of decision, the functions of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration."<sup>3</sup> But this principle does not preclude conferring local powers of government, or *quasi*

<sup>1</sup> Cooley on Constitutional Limitations, 120; State v. Field, 17 Mo. 529; 59 Am. Dec. 275; Santo v. State, 2 Iowa, 165; 63 Am. Dec. 487.

<sup>2</sup> Santo v. State, 2 Iowa, 165; 63 Am. Dec. 487; State v. Beneke, 9 Iowa, 203; Barto v. Himrod, 12 N. Y. 483; 59 Am. Dec. 506; State v. Copeland, 3 R. I. 33; People v. Collins, 3 Mich. 343.

<sup>3</sup> Cooley on Constitutional Limitations, 122; Santo v. State, 2 Iowa, 165; 63 Am. Dec. 487; Geebrick v. State, 5 Iowa, 492; Rice v. Foster, 4 Harr. (Del.) 479; Meshmeier v. State, 11 Ind. 482; Houghton v. Austin, 47 Cal. 646; Thorne v. Cramer, 15 Barb. 112; Bradley v. Baxter, 15 Barb. 123; Bank etc. v. Brown, 26 N. Y. 472; State v. Copeland, 3 R. I. 33; People v. Stout, 23 Barb. 349; Peterson v. Society etc., 4 Barb. 385; State v. Swisher, 17 Tex. 441; Parker v. Commonwealth, 6 Pa. St. 507; State v. Beneke, 9 Iowa, 203; Ex parte Wall, 28 Cal. 279. — a case in which the local-option statute of that state was before the court, — the court saying: "The statute under consideration simply permits a species of *plebiscitum* with reference to a particular subject in which the only option of the people of a township is to say 'yes' or 'no' to

a complicated project." And again he says: "The legislature cannot transfer to others the responsibility of deciding what legislation is expedient and proper, with reference either to present condition or future contingencies. To say that the legislators may deem a law to be expedient, provided the people shall deem it expedient, is to suggest an abandonment of the legislative function by those to whose wisdom and patriotism the constitution has intrusted the prerogative of determining what is or is not expedient." In Barto v. Himrod, 8 N. Y. 492, 59 Am. Dec. 506, Chief Justice Ruggles says: "If the legislature cannot delegate to an individual the authority to determine by the mere exercise of his judgment whether a statute ought to take effect or become a law, it follows as a necessary consequence that they cannot delegate it to the whole people. The constitution has no more authorized it in the latter case than in the former. The people have limited the exercise of their own power to the modes pointed out in the constitution. And although they hold the ultimate sovereignty of the state, they are subject, like other sovereigns, to established fundamental law."

<sup>1</sup> Dur Mills v. Am. Re. Cal. 470 44; 9 Am. 114 Ma W. Va. Ala. 287  
<sup>2</sup> Farr  
<sup>3</sup> Rob  
207.  
<sup>4</sup> Hop Ohio St. 5 Cow. 161; De 643; Sav Thomps

legislative functions, upon the local authorities.<sup>1</sup> Thus the legislature may delegate to village boards the power to grant franchises for the collection of wharfage for the use of piers on navigable waters,<sup>2</sup> or may delegate to school trustees of cities power to levy school taxes.<sup>3</sup> But such power must be exercised only by the organized authority to which it is intrusted; it cannot be redelegated at the will of the trustee to any other body, or to the body of the people.<sup>4</sup> It may, at any time, be resumed or terminated by the legislative body which was the author of the grant in the first instance.<sup>5</sup> And a law is valid the going into effect of which shall be conditioned upon the happening of some event *in futuro*. But such a law must be a completed rule of action when it leaves the state-house door. The happening of the event may be the circumstance decisive of whether the power of the law shall be exercised or not; but the vitality of the enactment, the question of it being law or no law, is the province of the legislature, and not of the electors.<sup>6</sup>

A law is not invalid which provides for the creation of a railroad commission to fix reasonable tolls for freight and passenger transportation;<sup>7</sup> nor a statute which makes the adoption of a city charter dependent on the consent of the resident tax-paying house-holders;<sup>8</sup> nor a statute which makes a police law take effect upon local adoption;<sup>9</sup>

<sup>1</sup> Durach's Appeal, 62 Pa. St. 491; Mills v. Charleston, 29 Wis. 400; 9 Am. Rep. 578; People v. Kelsey, 34 Cal. 470; People v. Hurlbut, 24 Mich. 44; 9 Am. Rep. 103; Stone v. Charleston, 114 Mass. 417; Cross v. Hopkins, 6 W. Va. 323; Stanfill v. Dallas Ct., 80 Ala. 287.

<sup>2</sup> Farnum v. Johnson, 62 Wis. 620.

<sup>3</sup> Robinson v. Schenck, 102 Ind. 307.

<sup>4</sup> Hopple v. Brown Township, 13 Ohio St. 324; Dunham v. Rochester, 5 Cow. 465; Reed v. Toledo, 18 Ohio, 161; Douglass v. Placerville, 18 Cal. 643; Savannah v. Hartridge, 8 Ga. 23; Thompson v. Shermerhorn, 6 N. Y.

92; 55 Am. Dec. 385; Clark v. Washington, 12 Wheat. 54.

<sup>5</sup> State v. Graves, 19 Md. 51; Goszler v. Georgetown, 6 Wheat. 597; Coates v. Mayor, 7 Cow. 605.

<sup>6</sup> Cass v. Dillon, 2 Ohio St. 607; Thompson v. Kelley, 2 Ohio, 647; Trustees v. Cherry, 8 Ohio St. 568; State v. Com. of Perry County, 5 Ohio St. 497.

<sup>7</sup> Georgia R. R. and Banking Co. v. Smith, 70 Ga. 694; McWhorter v. R. R. Co., 24 Fla. 417; 12 Am. St. Rep. 220.

<sup>8</sup> People v. City of Butte, 4 Mont. 179; 47 Am. Rep. 346.

<sup>9</sup> Boyd v. Bryant, 35 Ark. 60; 37 Am. Rep. 6.

nor a statute authorizing the establishment and maintenance of high schools upon a vote of the people of a township;<sup>1</sup> nor a statute conferring on the judges power to fix the times for holding court in newly organized counties;<sup>2</sup> nor a statute referring the question of imposing a tax to the people of the county;<sup>3</sup> nor a statute giving authority to an officer to issue a certificate of incorporation upon the compliance of the incorporators with the statutory requirements;<sup>4</sup> nor a statute providing that certain persons shall select a site for a public building proposed to be constructed.<sup>5</sup> But the legislature cannot confer upon a board of commissioners, or upon an officer thereof, power to declare what acts shall constitute a misdemeanor.<sup>6</sup> An act submitted to the people for ratification, and approved, may be amended by the legislature without submitting the amendment to them.<sup>7</sup>

ILLUSTRATIONS.—A statute empowered townships to decide by a popular vote whether or not the sale of spirituous liquors should be allowed within their precincts, such vote to be taken at a special election, to be called, on petition, by the board of supervisors of the county. *Held*, unconstitutional: *Ex parte Wall*, 48 Cal. 279; 17 Am. Rep. 425.<sup>8</sup> A statute provided that the county court of any county may submit to the voters of the county the question of restraining domestic animals, and that if a majority of the votes is in favor of restraint, it shall be unlawful in that county for animals to roam at large. The act gives the voters in each county the authority once in each year to determine whether they will enact the law for their county. *Held*, that the act is void: *Lammert v. Lidwell*, 62 Mo. 188; 21

<sup>1</sup> *Richards v. Raymond*, 92 Ill. 612; 34 Am. Rep. 151.

<sup>2</sup> *Ex parte Mato*, 19 Tex. App. 112.

<sup>3</sup> *Louisville etc. R. R. Co. v. County Court*, 1 Sneed, 637; 62 Am. Dec. 424.

<sup>4</sup> *Granby Mining Co. v. Richards*, 95 Mo. 106.

<sup>5</sup> *People v. Dunn*, 80 Cal. 211; 13 Am. St. Rep. 118.

<sup>6</sup> *Ex parte Cox*, 63 Cal. 21.

<sup>7</sup> *Reaper's Bank v. Willard*, 24 Ill. 433; 76 Am. Dec. 755.

<sup>8</sup> Similar rulings as to "local-option laws" have been made in other states:

See *State v. Weir*, 33 Iowa, 134; 11 Am. Rep. 115; *Parker v. Commonwealth*, 6 Pa. St. 507; 47 Am. Dec. 480. *Contra*, *Sanford v. Morris Co.*, 36 N. J. L. 72; 13 Am. Rep. 422; *Commonwealth v. Bennett*, 108 Mass. 27; *Locke's Appeal*, 72 Pa. St. 491; 13 Am. Rep. 716; *State v. Wilcox*, 42 Conn. 364; 19 Am. Rep. 536; *Fell v. State*, 42 Md. 71; 20 Am. Rep. 83; *State v. Francis*, 95 Mo. 44. And the weight of authority now supports the latter view: See *Cooley on Constitutional Limitations*, 152.

<sup>1</sup> *Cooley v. Wright*, Dec. 72.

<sup>2</sup> *Cooley v. Bloomer*, Stat. 99; 73.

<sup>3</sup> *Stimson*, sec. 39.

Am. Rep. 411. A statute authorized towns in which manufacturing establishments should be located to exempt the same, by vote of the town, from taxation for a term of years. *Held*, unconstitutional, as delegating to a municipal corporation its power of determining upon what property taxes shall or shall not be imposed: *Brewer Brick Co. v. Inhabitants of Brewer*, 62 Me. 62; 16 Am. Rep. 395. A statute provided that an insurance corporation of another state seeking to do business here shall pay to the superintendent of the insurance department, for taxes, fines, etc., an amount equal to that imposed by the "existing or future laws" of the state of its origin upon companies of this state seeking to do business there, when such amount is greater than that required for such purposes by the then existing laws of this state. *Held*, not an unlawful delegation of legislative power: *People v. Philadelphia Fire Ass'n*, 92 N. Y. 311; 44 Am. Rep. 380.

§ 3754. **Legislature cannot Bind its Successors.**—No legislative body under its general authority can pass any act which shall limit or be derogatory to the authority of its successors.<sup>1</sup> Therefore, a legislature cannot pass an irrevocable law.<sup>2</sup> But a state may make a contract which will bind it *in futuro*.<sup>3</sup>

§ 3755. **Special Legislation.**—In many of the states the constitution provides that there shall be no special, local, or private law passed by the legislature in any case for which provision has been or may be made by a general law, or, in several, where the relief sought can be given in any state court.<sup>4</sup> In a number of states local or special laws on certain subjects set out in detail are prohibited.<sup>5</sup> In a number of states all general laws or laws of a public nature must be uniform in their operation throughout the state.<sup>6</sup> Laws public in their objects may be confined to a particular class of persons, if they be gen-

<sup>1</sup> Cooley on Constitutional Law, 98; *Wright v. Wright*, 2 Md. 429; 56 Am. Dec. 723.

<sup>2</sup> Cooley on Constitutional Law, 98; *Bloomer v. Stolley*, 5 McLean, 161.

<sup>3</sup> *State v. Bank of Smyrna*, 2 Houst. 99; 73 Am. Dec. 699.

<sup>4</sup> *Stimson's American Statute Law*, sec. 394. The prohibition in a con-

stitution against the passage of special laws does not affect special laws passed prior to the adoption of the constitution: *Ex parte Burke*, 59 Cal. 6.

<sup>5</sup> *Stimson's American Statute Law*, sec. 395.

<sup>6</sup> *Stimson's American Statute Law*, sec. 396.



eral in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy.<sup>1</sup> A statute is not within the inhibition against local laws if general in terms, although the conditions of things are such that it can apply to but one office in one county only.<sup>2</sup> The distinction necessary to mark a class for legislation, and thus to render the law a special law, and unconstitutional, must be something in the circumstances which would render like powers, if granted, inappropriate to and unavailable for other like political districts.<sup>3</sup> Thus the following statutes have been sustained: A statute applicable to all cities of the first grade of the first class;<sup>4</sup> an act which applies to fifty-eight of the sixty counties of the state;<sup>5</sup> a statute creating a new county by a special act;<sup>6</sup> a statute providing a special mode of service on a given railroad;<sup>7</sup> a statute which provides that where a defendant is in actual military service, any action against him shall stand continued during the period of such service;<sup>8</sup> a special act fixing a lower rate of compensation to be paid by a certain boom company to the surveyor-general of logs for surveying logs coming within the boom of that company than the rate fixed by the general law;<sup>9</sup> a statute which applies to every member of a class,—to all railroad companies, for example;<sup>10</sup> a statute which classifies railroads, and operates uniformly on each class;<sup>11</sup> a statute providing for a penalty when a railroad company overcharges for carriage, and includes in the penalty a reasonable attorney's fees;<sup>12</sup> an act providing for holding terms of the cir-

<sup>1</sup> *Allen v. Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707.

<sup>2</sup> *State v. Govern*, 47 N. J. L. 368.

<sup>3</sup> *State v. Bloomfield*, 47 N. J. L. 442.

<sup>4</sup> *State v. Hawkins*, 44 Ohio St. 98; *State v. Hudson*, 44 Ohio St. 137.

<sup>5</sup> *People v. Newburgh and Shawangunk Plank Road Co.*, 86 N. Y. 1.

<sup>6</sup> *State v. Piper*, 17 Neb. 614.

<sup>7</sup> *Nashville and Chattanooga R. R. Co. v. McMahon*, 70 Ga. 585.

<sup>8</sup> *McCormick v. Rusch*, 15 Iowa, 127; 83 Am. Dec. 401.

<sup>9</sup> *Merritt v. Knife Falls Boom Corp.*, 34 Minn. 245.

<sup>10</sup> *Little Rock and Fort Smith R. R. Co. v. Hanniford*, 49 Ark. 291.

<sup>11</sup> *Dow v. Beidelman*, 49 Ark. 325.

<sup>12</sup> *Dow v. Beidelman*, 49 Ark. 455.

<sup>1</sup> *Coo* 350.

<sup>2</sup> *In r* N. J. L.

<sup>3</sup> *Van* 123; 29

<sup>4</sup> *Ex* 550.

<sup>5</sup> *Stat*

<sup>6</sup> *Stat*

<sup>7</sup> *Stat*

cuit court of a certain county at a certain place;<sup>1</sup> an act which applies only to cities.<sup>2</sup> A statute professing in general terms to repeal all acts appointing commissions to regulate municipal affairs is general, and is not rendered local or special by the fact that there is but one commission to which it can apply.<sup>3</sup>

A law is not "general," within the meaning of the constitution, simply because it bears equally upon all persons to whom it is applicable. A "general law" must be as broad as its object.<sup>4</sup> A statute which selects particular individuals from a general class, and subjects them to peculiar rules, from which others in the same class are exempt, is a special law.<sup>5</sup> Special legislation being prohibited by the constitution, courts will not sustain statutes of which the form alone is general, but whose operation and effect are special.<sup>6</sup> A statute applicable to cities of a named population is a special law, when it obviously operates only upon a present state of facts, and cannot, by possibility, apply to other cities that may in future attain the named population.<sup>7</sup> So where it is apparent that a statute can apply to one county only (it being made applicable to counties containing a city of more than a certain number of inhabitants, and there being but one such county in the state), it is a local or special law;<sup>8</sup> or a statute which, while purporting to be general, in fact applies to but two of the counties of the state;<sup>9</sup> or a statute which regulates the licensing power in boroughs of a certain class, based on population;<sup>10</sup> or a statute giving

<sup>1</sup> *Cooper v. Mills County*, 69 Iowa, 350.  
<sup>2</sup> *In re Elizabeth Commissioners*, 49 N. J. L. 488.  
<sup>3</sup> *Van Riper v. Parsons*, 40 N. J. L. 123; 29 Am. Rep. 210.  
<sup>4</sup> *Ex parte Westerfield*, 55 Cal. 550.  
<sup>5</sup> *State v. Hermann*, 75 Mo. 340.  
<sup>6</sup> *State v. Hermann*, 75 Mo. 340; *State v. Judges*, 21 Ohio St. 11.  
<sup>7</sup> *State v. Hermann*, 75 Mo. 340; *State v. Hammer*, 42 N. J. L. 435; *Commonwealth v. Patton*, 88 Pa. St. 258; *Devine v. Cook*, 84 Ill. 500; *State v. Anderson*, 44 Ohio St. 247.  
<sup>8</sup> *State v. Jackson County Court*, 89 Mo. 237; *State v. Gaddis*, 44 N. J. L. 363; *Hallock v. Hollingshead*, 49 N. J. L. 64; *Hudson County Freeholders v. Buck*, 49 N. J. L. 228.  
<sup>9</sup> *Woodard v. Brien*, 14 Lea, 520; *State v. Boyd*, 19 Nev. 43.  
<sup>10</sup> *State v. Glenn*, 47 N. J. L. 105.

cities the right to add to their territory, but excepting so many cities as actually to include only three in the state;<sup>1</sup> or a law which, while general in form, serves but to give a salary to a single officer of a single county.<sup>2</sup> In several states corporations (except municipal) must be formed under general laws, and can exercise no powers except such as are conferred by such general laws. The legislature cannot confer on such corporations any powers or grant them any privileges by special act. An act which grants to individuals and their assigns certain powers and privileges, and then provides that the act shall not take effect unless the persons to whom the grant is made shall, within a certain time, organize themselves into a corporation under existing laws, is a grant, not to the individuals as persons, but to the corporation when formed, and is an attempt by the legislature to confer powers and privileges on a corporation by special act, and is void.<sup>3</sup> Where the constitution provides that the legislature "shall pass no special law for any cause for which provision can be made by a general law," the legislature is the sole judge as to whether provision by a general law is possible.<sup>4</sup>

§ 3756. **Local Acts.**—In some of the states the constitution provides that no "private or local" act shall be passed except in a certain manner. Construing this provision, it is held that an act is local which in its subject relates to but a portion of the people of the state or to their property, and may not, either in its subject, operation, or immediate and necessary results, affect the people of the state, or their property in general.<sup>5</sup> But a statute is general, and not "local," although it is local with respect to the violation of it, but which is equally binding upon all persons, whether residing in the particular

<sup>1</sup> *Topeka v. Gillett*, 32 Kan. 431.

<sup>2</sup> *Gibbs v. Morgan*, 39 N. J. Eq. 126; *Ernst v. Morgan*, 39 N. J. Eq. 391.

<sup>3</sup> *San Francisco v. Spring Valley Water Co.*, 48 Cal. 403.

<sup>4</sup> *State v. County Court of Boone County*, 50 Mo. 317; 11 Am. Rep. 415; *State v. Hitchcock*, 1 Kan. 178; 81 Am. Dec. 503.

<sup>5</sup> *People v. Supervisors*, 43 N. Y. 10.

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locality or not.<sup>1</sup> And it is not local, although it may happen that the persons whose operations are controlled by such law are few in number, and all doing business in one or more cities of the state.<sup>2</sup> A statute general in form is not to be treated as local or special simply because of the intervention of some unrepealed local statute which prevents it from having general effect.<sup>3</sup>

§ 3757. **Grants of Special Privileges to Individuals.** — The legislature has no power to grant personal privileges or suspend the operation of general laws in favor of an individual.<sup>4</sup> By the constitution of some states the legislature is prohibited from passing "any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law." The authority of the courts has not been frequently invoked for the enforcement of this provision of the constitution; yet the principle has been often applied in giving effect to another requirement of the same constitution, under which "the law of the land" has been defined to mean laws "which extend to and embrace all persons who are or may come into the like situation and circumstances."<sup>5</sup> But under this special provision, it has been held in Tennessee that the exemption by statute from jury duty of directors in a railroad company is unconstitutional.<sup>6</sup> So is a special statute authorizing the

<sup>1</sup> *Pierce v. Kimball*, 9 Me. 54; 23 Am. Dec. 537.

<sup>2</sup> *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893. A statute giving to counties containing cities with more than one hundred thousand inhabitants power to construct streets in the neighborhood, and to provide for assessing property benefited, is not a local law, and therefore not unconstitutional; *In re Church*, 92 N. Y. 1; 28 Hun, 476.

<sup>3</sup> *Evans v. Phillipi*, 117 Pa. St. 226; 2 Am. St. Rep. 655.

<sup>4</sup> *Holden v. James*, 11 Mass. 396; 6 Am. Dec. 174; *Pierce v. Kimball*, 9 Me. 54; 23 Am. Dec. 537.

<sup>5</sup> *Alexandria v. Dearmon*, 2 Sneed, 121; *Vanzant v. Waddell*, 2 Yerg. 259; *Wally v. Kennedy*, 2 Yerg. 555; 24 Am. Dec. 511; *State Bank v. Cooper*, 2 Yerg. 599; 24 Am. Dec. 517; *Budd v. State*, 3 Humph. 483; 39 Am. Dec. 189; *Pope v. Phifer*, 3 Heisk. 701.

<sup>6</sup> *Neeley v. State*, 4 Lea, 316. Exemptions from jury service have been sustained in many cases: *State v. Whitford*, 12 Ired. 99; *Albert v. White*,

supreme court, in its discretion, to decree a divorce between parties named, which, under the general law, the court had no power to do;<sup>1</sup> so is a special statute authorizing a corporation to take a rate of interest greater than that allowed by the general law;<sup>2</sup> so is a law forbidding the sale of goods on Sunday, but excepting from its operation those keeping their business places closed on Saturday;<sup>3</sup> so is a charter of a money-lending corporation, which authorizes it to foreclose its mortgage without the intervention of a court;<sup>4</sup> so is an act from the operation of which two certain counties are excluded;<sup>5</sup> or an act authorizing a person named to prosecute a particular suit, the plaintiff having died without taking out letters of administration on the estate of the deceased;<sup>6</sup> or a law providing that no costs should be recovered against the city of Janesville in any action to set aside any tax assessment;<sup>7</sup> or a law authorizing an appeal where the time previously allowed for an appeal had expired;<sup>8</sup> or a statute suspending the operation of a general law in favor of an individual;<sup>9</sup> or an act allowing appeals from decisions of a certain road commissioner made before the passage of the act;<sup>10</sup> or a special statute authorizing the execu-

33 Md. 297; *Bloom v. State*, 20 Ga. 443 (firemen); *State v. Williams*, 1 Dev. & B. 372 (postmasters). So of exemption from military duty: *Swindle v. Brooks*, 34 Ga. 67. But it seems clear that all statutory exemptions from public duty are mere privileges, which may be at any time withdrawn by the legislature: *Cooley on Constitutional Limitations*, 383; *Bragg v. People*, 78 Ill. 378; *Ex parte Hurst*, 43 Ga. 209; *State v. Ingraham*, 1 Cheves, 78; *Commonwealth v. Bird*, 12 Mass. 443. The exemption, being but a personal privilege, may be waived by the beneficiary, and does not disqualify him from service if he chooses to waive it: *State v. Forshner*, 43 N. H. 89; 80 Am. Dec. 132; *State v. Wright*, 53 Me. 328; *Munroe v. Brigham*, 19 Pick. 368; *Davis v. People*, 19 Ill. 74; *State v. Adams*, 20 Iowa, 486. One who is under such a statute exempt from reg-

ular service may, however, be required to serve as a talesman: *State v. Hogg*, 2 Murph. 319; *State v. Willard*, 79 N. C. 660.

<sup>1</sup> *Simonds v. Simonds*, 103 Mass. 572; 4 Am. Rep. 576.

<sup>2</sup> *Gordon v. Winchester Building Association*, 12 Bush, 110; 23 Am. Rep. 713.

<sup>3</sup> *City of Shreveport v. Levy*, 26 La. Ann. 671; 21 Am. Rep. 553.

<sup>4</sup> *Kentucky Trust Co. v. Lewis*, 52 Ky. 579.

<sup>5</sup> *Burkholtz v. State*, 16 Lea, 71.

<sup>6</sup> *Officer v. Young*, 5 Yerg. 320.

<sup>7</sup> *Durkee v. City of Janesville*, 28 Wis. 464; 9 Am. Rep. 500.

<sup>8</sup> *Burch v. Newbury*, 10 N. Y. 375.

<sup>9</sup> *Holden v. James*, 11 Mass. 396; 6 Am. Dec. 174.

<sup>10</sup> *Hill v. Town of Sunderland*, 3 Vt. 507.

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tors of A to revive a judgment rendered in favor of B in the same manner as if they were the executors of B.<sup>1</sup>

But a statute authorizing the recovery of five thousand dollars in cases of deaths from the negligence of railroad corporations is not unconstitutional as class legislation;<sup>2</sup> nor a statute making railroads liable for stock killed by reason of neglect to fence their tracks, and for attorneys' fees in addition;<sup>3</sup> nor a statute making railroad companies liable for the negligence of employees resulting in injuries to co-employees;<sup>4</sup> nor a statute giving coal-miners a lien for labor and the land-owners a lien for royalty;<sup>5</sup> nor a statute providing that exempt personal property shall not be exempt in an action for the purchase-money;<sup>6</sup> nor a statute entitled "An act providing for the judicial determination and adjustment of two alleged claims of W. H. Dike";<sup>7</sup> nor a game law which restricts hunting in five counties only.<sup>8</sup>

<sup>1</sup> *Tate's Executors v. Bell*, 4 Yerg. 202; 26 Am. Dec. 221.

<sup>2</sup> *Carroll v. Missouri etc. R. R. Co.*, 88 Mo. 239; 57 Am. Rep. 382.

<sup>3</sup> *Peoria etc. R. R. Co. v. Duggan*, 109 Ill. 537; 50 Am. Rep. 619.

<sup>4</sup> *Missouri etc. R. R. Co. v. Mackey*, 33 Kan. 298.

<sup>5</sup> *Warren v. Sohn*, 112 Ind. 213.

<sup>6</sup> *Rogers v. Brackett*, 34 Minn. 279.

<sup>7</sup> *Dike v. State*, 38 Minn. 366.

<sup>8</sup> *Hayes v. Territory*, 2 Wash. 286.

## CHAPTER CXC.

## STATUTES.

- § 3758. Enactment of statutes — In general.
- § 3759. Reading of bills.
- § 3760. The requisite vote.
- § 3761. Signing of bills.
- § 3762. Approval — Veto.
- § 3763. Publication of statutes.
- § 3764. At what time statutes take effect.
- § 3765. Impeaching the valid enactment of statutes — Evidence.
- § 3766. Reading bills before passage.
- § 3767. The enacting clause.
- § 3768. Preambles — Recitals.
- § 3769. Titles of statutes.
- § 3770. Provisos.
- § 3771. Other provisions as to form.
- § 3772. Private acts.
- § 3773. Construction of statutes.
- § 3774. When mandatory and when permissive.
- § 3775. Statutes adopted from other states.
- § 3776. Statutes valid in part and void in part.
- § 3777. Remedies under statutes.
- § 3778. Amending or repealing statutes.
- § 3779. Inconsistent and repugnant statutes.
- § 3780. Effect of amendment or repeal of statute.
- § 3781. Revival of statutes.
- § 3782. Pleading statutes.

§ 3758. **Enactment of Laws — In General.** — The legislature is not synonymous with the law-making power, and does not include the governor, except as applied to the enactment of laws. The legislature, as a distinct body, consists of the senate and assembly.<sup>1</sup> The word "house," as applied to a branch of the legislature, means a number of members sufficient to constitute a quorum to do business, and a bill passed by two thirds of a majority of all the members elected is passed by two thirds of that house.<sup>2</sup>

<sup>1</sup> Brooks v. Fischer, 79 Cal. 173.

<sup>2</sup> State v. McBride, 4 Mo. 303; 29 Am. Dec. 636.

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By the constitutions of many states, no law can be passed except by bill.<sup>1</sup> The word "act" is generally used to designate the entire bill with all the parts adopted by a single effort of the legislative will; but the word may be referred to a particular section in which it is used, when the context indicates that such was the legislative intent.<sup>2</sup> Every substantial part of a proposed enactment is a "bill," within the constitutional sense of the term, and must pass through all the constitutional stages of enactment before it becomes law.<sup>3</sup> The constitutional provision prescribing the style of laws will not invalidate a body of laws not themselves in such style, if the bill by which they were adopted pursued the prescribed style.<sup>4</sup> The requirement of the constitution that acts of the legislature be in articles and sections, in the same manner as the code is arranged, is directory in form, and looks more to convenience in adopting the law to codification than to its operative effect.<sup>5</sup> The legislature may pass a statute giving the force of law to an instrument, previous statute, or document, without setting it forth at length. It is enough if it can be made certain.<sup>6</sup> Bills may originate in either house of the legislature;<sup>7</sup> and they may be amended, altered, or rejected in the other house,<sup>8</sup> but not in Arkansas, Alabama, Colorado, Missouri, Pennsylvania, or Texas, so as to change the original purpose of the bill. By the constitutions of six states no bill shall be considered for passage unless it has first been referred to a committee and reported upon.<sup>9</sup> The courts may, in some cases, presume the passage of an act of the legislature.<sup>10</sup>

<sup>1</sup> Stimson's American Statute Law, sec. 300.

<sup>2</sup> Satcher v. Satcher, 41 Ala. 26; 91 Am. Dec. 498.

<sup>3</sup> State v. Platt, 2 S. C. 150; 16 Am. Rep. 647.

<sup>4</sup> Dew v. Cunningham, 28 Ala. 466; 65 Am. Dec. 362.

<sup>5</sup> Hardesty v. Taft, 23 Md. 513; 87 Am. Dec. 584.

<sup>6</sup> Bibb County Loan Ass'n v. Richards, 21 Ga. 592.

<sup>7</sup> Stimson's American Statute Law, sec. 300.

<sup>8</sup> Stimson's American Statute Law, sec. 300.

<sup>9</sup> Stimson's American Statute Law, sec. 302.

<sup>10</sup> McCarthy v. McCarthy, 2 Strob. 6; 47 Am. Dec. 585, note.

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§ 3759. **Reading of Bills.**—In most of the states every bill must, by the constitution, be read by sections on three different days in each house.<sup>1</sup> In some states this requirement may be dispensed with on a vote of a certain number of the members.<sup>2</sup> Several states require that the bill shall be read at length at its final passage.<sup>3</sup> A constitutional provision that no bill shall become law until read on three several days in each house of the general assembly does not contemplate that everything which is to become law by the adoption of such bill shall thus be read.<sup>4</sup>

§ 3760. **The Requisite Vote.**—By the constitution of most states no bill can become a law unless it has received on its final passage the vote of a majority of the house, or of the members present or of the members elected.<sup>5</sup> Where the constitution requires that certain laws shall be passed by a two-thirds vote, such a law not showing on its face that it was passed by the vote is void.<sup>6</sup> The authenticity of a statute shown by the journal of each house to have received the concurrence of a sufficient number of members, and to have been duly signed, cannot be impeached by showing that certain of these members were seated, upon the determination of a contested election, by less than a constitutional quorum. Such members are at least *de facto* members.<sup>7</sup> Where the constitution provided that "no bill shall be passed by either branch of the legislature without an affirmative vote of a majority of the members elected thereto," and an act was passed by the affirmative vote of eleven senators, in a body, which consisted, when full, of twenty-two members, one member

<sup>1</sup> Stimson's American Statute Law, sec. 303.

<sup>2</sup> Stimson's American Statute Law, sec. 303.

<sup>3</sup> Stimson's American Statute Law, sec. 303.

<sup>4</sup> *Dew v. Cunningham*, 28 Ala. 466; 65 Am. Dec. 362.

<sup>5</sup> Stimson's American Statute Law, sec. 304.

<sup>6</sup> *People v. Comm'rs of Highways*, 54 N. Y. 276; 13 Am. Rep. 581.

<sup>7</sup> *State v. Smith*, 44 Ohio St. 348.

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<sup>4</sup> Speer  
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<sup>5</sup> Morg  
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having resigned after the opening of the session at which the act was passed, it was held that the court would not declare the act unconstitutional.<sup>1</sup>

**§ 3761. Signing of Bills.**—There are constitutional provisions in most of the states requiring the signatures of the presiding officers of the two houses to be annexed to a bill preparatory to its becoming a law;<sup>2</sup> and where such a provision exists, its observance is essential to the validity of an act;<sup>3</sup> but in the absence of any such provision, signing is not essential.<sup>4</sup> The bill as signed must be the same as it actually passed the two houses, and a material variance is fatal to the validity of the enactment;<sup>5</sup> but a mere clerical error in the title, by which no one could be misled, will not invalidate it.<sup>6</sup>

**§ 3762. Approval — Veto.**—The approval of an act is an essential prerequisite to the enactment of a law, and such approval is performed by the governor in a legislative capacity as part of the law-making power, and not as the law-executing power.<sup>7</sup> Where the governor approves a bill, and the constitution does not require that he should notify either house of the legislature of the fact, or that such notification, if made, should be entered on the journals, the date being no necessary part of the approval, it will be presumed that the bill was signed between the date of its passage and the final adjournment of that session of the legislature.<sup>8</sup> An act passed by both houses

<sup>1</sup> *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640.

<sup>2</sup> See *Evans v. Browne*, 30 Ind. 514; 95 Am. Dec. 710.

<sup>3</sup> *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28; *State v. Glenn*, 17 Nev. 34; *State v. Mead*, 71 Mo. 266; *Legg v. Annapolis*, 42 Md. 203.

<sup>4</sup> *Speer v. Plank Road Co.*, 22 Pa. St. 376.

<sup>5</sup> *Morg v. Randolph*, 77 Ala. 597; *Smithee v. Campbell*, 41 Ark. 471; *Brady v. West*, 50 Miss. 68; *Prescott v. Trustees*, 19 Ill. 324.

<sup>6</sup> *People v. Supervisors of Onondaga*, 16 Mich. 254; *Walnut v. Wade*, 103 U. S. 683; *Ohio v. Frank*, 103 U. S. 693.

<sup>7</sup> *State v. Deal*, 24 Fla. 293; 12 Am. St. Rep. 204. The legislature adjourned before omissions in an act sent to the governor and signed by him were discovered. The presiding officers of each house then signed the bill as it should have read, and the governor approved it. Held, a valid enactment: *Dow v. Beidelman*, 49 Ark. 325.

<sup>8</sup> *State v. Hitchcock*, 1 Kan. 178; 81 Am. Dec. 503.

and signed by the governor is a law, although the governor afterwards sends a message to the legislature notifying that body of his approval, but setting forth objections to the law;<sup>1</sup> or notwithstanding the fact that, when the bill was approved and signed, the legislature had adjourned *sine die*.<sup>2</sup> A court of law is not precluded from informing itself as to the real date of the approval of a statute by the executive. Therefore, when the President's approval of an act of Congress was dated simply "December 4," it was held competent, in order to ascertain the year of its approval, to resort to the records in the Secretary of State's office, and to the journals of Congress.<sup>3</sup> When a bill has passed both branches of the legislature, and been signed by the proper officers, and sent to the governor for approval, it cannot be recalled except by the joint action of both; if the governor sends back the bill on the request of one house, any action it may take thereon is a nullity.<sup>4</sup> In a Virginia case the legislature passed a bill, and presented it to the governor in the manner prescribed by the Virginia constitution. Before the governor had acted upon the bill, a joint resolution was passed, requesting the governor to return the bill. This he did, neither approving nor disapproving it. It was held that the legislature was without power thus to recall the bill; that the return in this manner was nugatory; and that the bill, not having been vetoed, became a law.<sup>5</sup> When an ostensibly perfect bill is submitted to the governor for his action as part of the law-making power, and he approves its several parts collectively, thinking them all valid, and it subsequently appears that some of them are spurious, the whole act will be declared void, unless it clearly appears that the spurious parts are such as not to have influenced the governor in approving the other parts,

<sup>1</sup> State v. Whisner, 35 Kan. 271.

<sup>4</sup> People v. Devlin, 33 N. Y. 269; 83

<sup>2</sup> Seven Hickory v. Ellery, 103 U. S. 423.

Am. Dec. 377.

<sup>3</sup> Gardner v. Collector, 6 Wall, 499.

<sup>5</sup> Wolfe v. McCaull, 76 Va. 876.

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or that the latter are entirely severable, distinct, and independent of the former.<sup>1</sup>

In all the states but four, every bill must be presented to the governor, and if he approves it, he is to sign it.<sup>2</sup> The governor may veto a bill by returning it with his objections,<sup>3</sup> which veto may be overruled by a vote of two thirds of the members of each house.<sup>4</sup> Under a section requiring all bills passed by the legislature to be presented to the governor for his approval to be returned with his objections in case of non-approval, and providing "that if any bill shall not be returned by the governor within ten days after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return," the governor sent to the legislature a bill not approved, with his objections, on the tenth day, and before the usual hour for adjournment. The legislature had, however, adjourned to the day following, and the messenger returned the bill to the governor, who retained it thereafter. It was held that the governor had not returned the bill within the meaning of the constitution; that the legislature had not, by adjournment, prevented such return, the adjournment not being final.<sup>5</sup> Where the constitution makes a bill a law if neither signed by the governor nor returned with his objections within three days, "unless the general assembly by adjournment prevent such return," a bill presented to the governor within the last three days of a session, and neither signed nor returned with objections before the adjournment, becomes a law only in case of its subsequent approval.<sup>6</sup> The legis-

<sup>1</sup> State v. Deal, 24 Fla. 293; 12 Am. St. Rep. 204.

<sup>2</sup> Stimson's American Statute Law, sec. 305.

<sup>3</sup> Stimson's American Statute Law, sec. 305. The ten days "within which" the governor must return a bill are exclusive of the first, and inclusive of the last, — ten times twenty-

four hours: Price v. Whitman, 8 Cal. 412.

<sup>4</sup> Stimson's American Statute Law, sec. 305. In some states a majority is sufficient; in others, three fifths: Stimson's American Statute Law, sec. 305.

<sup>5</sup> Harpending v. Haight, 39 Cal. 189; 2 Am. Rep. 432.

<sup>6</sup> Darling v. Boesch, 67 Iowa, 702.

lature may provide the mode by statute for the authentication of laws returned to the legislature by the governor without his signature, and without reconsideration passed by both houses, when the constitution is silent as to the mode by which the laws shall be authenticated.<sup>1</sup>

§ 3763. **Publication of Statutes.**—The publication of a general law must be according to the provisions of law.<sup>2</sup> But an error in publication which does not change the substance or legal effect of the statute will not invalidate the publication.<sup>3</sup> An incorrect classification by publishing a general law in the volume of special laws does not prevent such publication from taking effect, and the law is operative.<sup>4</sup> But a mere voluntary publication by a private individual, not being authorized thereto, is insufficient.<sup>5</sup> If the time of its taking effect is expressly declared in the act, it will operate at that time, whether it may then have been published or not.<sup>6</sup> Provisions as to form of binding, color of materials, etc., of statutes are directory only, and failure of strict compliance with such provisions will not render the distribution of such statutes as are prepared and distributed any the less a publication of them.<sup>7</sup> The publication of a statute is effected in Indiana when the act is distributed by the secretary of state in a bound volume in all the counties of the state.<sup>8</sup>

§ 3764. **At What Time Statutes Take Effect.**—It was formerly the rule in England that acts of Parliament which were to take effect from and after their passage should

<sup>1</sup> *Pacific R. R. Co. v. Governor*, 33 Mo. 333; 66 Am. Dec. 674.

<sup>2</sup> *Clark v. Janesville*, 10 Wis. 136.

<sup>3</sup> *Smith v. Hoyt*, 14 Wis. 252; *State v. Ellis*, 12 La. Ann. 390.

<sup>4</sup> *In re Boyle*, 9 Wis. 264.

<sup>5</sup> *Clark v. Janesville*, 10 Wis. 136.

<sup>6</sup> *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522. And see *State v. Lean*, 9 Wis. 279; *Peterman v. Heeling*, 31 Pa. St. 432.

<sup>7</sup> *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405.

<sup>8</sup> *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405.

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operate from the first day of the session.<sup>1</sup> But the rule now is, that a statute takes effect from the date of its passage, where no time is fixed, and there is no constitutional provision concerning the matter.<sup>2</sup> In the absence of a law requiring a publication of statutes in a particular manner, they become operative at once on their passage and approval.<sup>3</sup> If a statute is declared to take effect from and after its passage, it goes into operation the very moment it is approved by the governor; and to determine the right to an office, that moment may be inquired into.<sup>4</sup> A law passed to take effect upon a fixed future day must be construed as if passed to take immediate effect on that day.<sup>5</sup> A statute passed to take effect at a future day has no force until such day, not even as notice to persons who will be affected by it.<sup>6</sup> Where a statute provides that it shall take effect "from and after its passage," in computing the time when it takes effect the day of its passage is to be excluded.<sup>7</sup> An act passed February 7, 1843, providing that certain actions must be commenced within ten years, does not bar one of such actions commenced February 7, 1853.<sup>8</sup> When two statutes are approved the same day, they are approved contemporaneously; but when one takes effect on its passage, and the other on the first day of the following January, both amending the general statutes, the act taking effect last is an amend-

<sup>1</sup> *Boston and Gunby v. Cummins*, 16 Ga. 102; 60 Am. Dec. 717. A statute must be construed to speak from the first day of the session at which the act was passed; thus "next January" was held to mean the January following the beginning of the session, though the act was passed in that January: *Weeks v. Weeks*, 5 Ired. Eq. 111; 47 Am. Dec. 358.

<sup>2</sup> *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Matthews v. Zane*, 7 Wheat. 164; *The Ann*, 1 Gall. 62; *Johnson v. Merchandise*, 2 Paine, 601; *Branch Bank of Mobile v. Murphy*, 8 Ala. 119; *Heard v. Heard*, 8 Ga. 380; *Temple v. Hays*, 1 Morris, 9; *Dyer v.*

*State*, 1 Meigs, 237; *Smets v. Weathersbee*, R. M. Charl. 537; *Rathborne v. Bradford*, 1 Ala. 312; *State v. Click*, 2 Ala. 26; *Goodsell v. Boynton*, 2 Ill. 555. A statute takes effect on the day of its approval, unless a different time is expressly prescribed: *Taylor v. State*, 31 Ala. 383.

<sup>3</sup> *Freeman v. Gaither*, 76 Ga. 741.

<sup>4</sup> *People v. Clark*, 1 Cal. 406.

<sup>5</sup> *Rice v. Ruddiman*, 10 Mich. 125.

<sup>6</sup> *Price v. Hopkin*, 13 Mich. 318.

<sup>7</sup> *Parkinson v. Brandenburg*, 35 Minn. 294; 59 Am. Rep. 326.

<sup>8</sup> *Owen v. Slatter*, 26 Ala. 547; 62 Am. Dec. 745.

ment to the statutes as amended by the act taking effect first.<sup>1</sup> In some states the constitution provides that laws shall go into effect immediately upon their publication; in others, a certain number of days after their final passage, or after the end of the session. In some, the legislature may, by a two-thirds vote, provide that they shall go into effect earlier than the prescribed time.<sup>2</sup> A statute takes effect at the time named therein, whether printed or not; and this, notwithstanding the requirement of the constitution that every law shall be printed in due time.<sup>3</sup> The time at which a statute goes into effect is a question for the court, which takes judicial notice of the matter.<sup>4</sup> The existence or the time of taking effect of a public statute cannot be put in issue, or admitted or denied by the pleadings, but must be determined by the judges themselves. Accordingly, an allegation, in answer to *quo warranto*, that a statute under which the defendant claims to hold office was published and went into effect prior to the day of his alleged election is not admitted by a demurrer to such answer.<sup>5</sup>

**§ 3765. Impeaching the Valid Enactment of Statutes — Evidence.** — Where an act has been duly authenticated and published as law by authority, the presumption arises that all the constitutional solemnities and prerequisites to its valid enactment have been complied with.<sup>6</sup> Its invalidity will not be examined or considered by the judiciary on alleged irregularities or informalities committed by the general assembly in passing it.<sup>7</sup> It cannot be impeached by mere parol evidence,<sup>8</sup> nor upon the admission of par-

<sup>1</sup> *Harrington v. Harrington*, 53 Vt. 649.

<sup>2</sup> *Stimson's American Statute Laws*, sec. 309.

<sup>3</sup> *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522.

<sup>4</sup> *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405.

<sup>5</sup> *Attorney-General v. Foote*, 11 Wis. 14; 78 Am. Dec. 689.

<sup>6</sup> *Berry v. R. R. Co.*, 41 Md. 446; 20 Am. Rep. 69.

<sup>7</sup> *Louisiana Lottery Company v. Richoux*, 23 La. Ann. 743; 8 Am. Rep. 602.

<sup>8</sup> *Berry v. R. R. Co.*, 41 Md. 446; 20 Am. Rep. 69; *Louisiana Lottery Co. v. Richoux*, 23 La. Ann. 743; 8 Am. Rep. 602.

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ties that it has not been properly enacted.<sup>1</sup> Where an act of the legislature has been duly signed, certified, and published, evidence is inadmissible to show an error in the engrossing.<sup>2</sup> But the journals of the two houses of the legislature, in connection with other competent evidence upon the subject, may be examined as means of information to aid in arriving at a correct conclusion as to what was the action of the legislature on any particular bill before it.<sup>3</sup> And whenever it appears that the enrolled act differs from the bill as it passed, in a substantial matter, the judiciary department of the state may declare the whole act or the part affected by the change unconstitutional and void.<sup>4</sup> Two theories exist in this country touching the effect as evidence of a document found in the legal depository of laws, and regularly certified by the usual authorities to have become a law. One is, that such a document is conclusive evidence of its being a law, so that no proof can collaterally establish the contrary. If an act is properly enrolled and authenticated, and is deposited with the secretary of state, it is conclusive evidence of the legislative will at the time of its passage, and the courts will not look into the journals of the legislature to see whether or how the bill passed.<sup>5</sup> The other theory is, that a document as above described is *prima*

<sup>1</sup> *Happel v. Brethauer*, 70 Ill. 166; 22 Am. Rep. 70.

<sup>2</sup> *Mayor v. Harwood*, 32 Md. 471; 3 Am. Rep. 161.

<sup>3</sup> *Berry v. R. R. Co.*, 41 Md. 446; 20 Am. Rep. 69; *Osburn v. Staley*, 5 W. Va. 85; 13 Am. Rep. 640; *Spangler v. Jacoby*, 14 Ill. 297; 58 Am. Dec. 571; *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28. See note to *Jones v. Jones*, 12 Pa. St. 350, in 51 Am. Dec. 616-623. *Contra*, *State v. Swift*, 10 Nev. 176; 21 Am. Rep. 721.

<sup>4</sup> *State v. Platt*, 2 S. C. 150; 16 Am. Rep. 647.

<sup>5</sup> *Sherman v. Story*, 30 Cal. 253; 89 Am. Dec. 93; *People v. Burt*, 43 Cal. 560. So in Nevada: *State v. Swift*, 10

Nev. 176; 21 Am. Rep. 721; *State v. Rogers*, 10 Nev. 250; 21 Am. Rep. 738; *State v. Glenn*, 18 Nev. 34. And the theory is sustained in the following cases: *Pac. R. R. Co. v. Governor*, 23 Mo. 353; 66 Am. Dec. 673; *Brodnax v. Groom*, 64 N. C. 244; *Louisiana State Lottery v. Richoux*, 23 La. Ann. 743; 8 Am. Rep. 602; *Swann v. Buck*, 40 Miss. 268; *Duncombe v. Prindle*, 12 Iowa, 1; *Evans v. Browne*, 30 Ind. 514; 95 Am. Dec. 710; *Speer v. Plank Road Co.*, 22 Pa. St. 376; *People v. Comm'rs etc.*, 54 N. Y. 276; 13 Am. Rep. 581; *Pangborn v. Young*, 32 N. J. L. 29; *Jones v. Jones*, 12 Pa. St. 350; 51 Am. Dec. 616, note.



*facie* a law, but that the courts will receive other evidence, such as legislative journals, to ascertain whether the mandates of the constitution as to the mode of enacting laws were observed regarding it, and if they were not, will adjudge it void.<sup>1</sup> That a legislative enactment was passed by bribing members of legislature does not authorize the supreme court to pronounce such enactment invalid.<sup>2</sup> Courts will not inquire into the motives of legislatures or members, even where fraud, bribery, and corruption have been alleged.<sup>3</sup>

§ 3766. **Reading Bills before Passage.**—The constitutional provision that a bill shall be read three times before its passage has been held to be directory merely, and not mandatory, and that a non-compliance with the provision does not invalidate the act so passed;<sup>4</sup> but the opposite view has also been maintained.<sup>5</sup>

<sup>1</sup> Freeholders of Passaic v. Stevenson, 46 N. J. L. 189; Gardner v. Collector, 6 Wall. 499; Ryan v. Lynch, 68 Ill. 160, 164; Miller v. Goodwin, 70 Ill. 659; People v. Lowenthal, 93 Ill. 191, 214. And the possibility of overturning the statute roll by the legislative journals exists in a majority of the states; See Spangler v. Jacoby, 14 Ill. 297; 58 Am. Dec. 571, 574, note; State v. Crawford, 35 Ark. 237; Chicot Co. v. Davies, 40 Ark. 200; Smithee v. Campbell, 41 Ark. 471; Mondy v. State, 48 Ala. 115; Walker v. Griffith, 60 Ala. 367; Moog v. Randolph, 77 Ala. 598; State v. Brown, 20 Fla. 407; Division of Howard Co., 15 Kan. 194; Commonwealth v. Higginbotham, 17 Kan. 62; Taylor v. Wilson, 17 Neb. 88; State v. McLelland, 18 Neb. 236; 53 Am. Rep. 814; Supervisors v. Heenan, 2 Minn. 330; State v. City of Hastings, 24 Minn. 78; People v. Mahaney, 13 Mich. 482; Forlyce v. Godman, 20 Ohio St. 1; Osburn v. Staley, 5 W. Va. 85; 13 Am. Rep. 640; Opinions of Justices, 52 N. H. 622, 625; State v. Platt, 2 S. C. 150; 16 Am. Rep. 647; Berry v. R. R. Co., 41 Md. 446; 20 Am. Rep. 67; Legg v. Mayor etc., 42 Md. 220.

<sup>2</sup> Lynn v. Polk, 8 Lea, 121.

<sup>3</sup> Fletcher v. Peck, 6 Cranch, 87; Ex parte McCordle, 7 Wall. 506; Flint etc. Co. v. Woodhull, 25 Mich. 99; State v. Hays, 49 Mo. 604; Kountze v. Omaha, 5 Dill. 443; People v. Bigler, 5 Cal. 23; Ex parte Newman, 9 Cal. 502; Harpending v. Haight, 39 Cal. 189; Slack v. Word, 8 W. Va. 612; McCulloch v. State, 11 Ind. 424; Baltimore v. State, 15 Md. 376; Johnson v. Higgins, 3 Met. (Ky.) 566; People v. Draper, 15 N. Y. 532; State v. Fagan, 22 La. Ann. 545; State v. Cardoza, 5 S. C. 297; Humboldt Co. v. Churchill Co. Com., 6 Nev. 30; Doyle v. Cont. Ins. Co., 94 U. S. 535; Wright v. Defrees, 8 Ind. 298; Sunbury etc. R. R. Co. v. Cooper, 33 Pa. St. 278.

<sup>4</sup> Miller v. State, 3 Ohio St. 480; Pine v. Nicholson, 6 Ohio St. 178; McGill v. State, 34 Ohio St. 264; Supervisors of Schuyler v. People, 25 Ill. 181; Vincent v. Knox, 27 Ark. 279.

<sup>5</sup> Board of Supervisors v. Heenan, 2 Minn. 330; Stechert v. Eart Saginaw, 22 Mich. 104; Cooley on Constitutional Limitations, 79; Ryan v. Lynch, 68 Ill. 164.

<sup>1</sup> See 115; S. Burnet Ill. 322  
<sup>2</sup> Sta 496.  
<sup>3</sup> Sta

§ 3767. **The Enacting Clause.** — A statute without an enacting clause and without date is void.<sup>1</sup> The enacting clause, however clearly expressed, can have no effect beyond the object expressed in the title.<sup>2</sup> Where the constitution provides that the enacting clause of a statute shall be in a certain form, a departure from that form, it is held in some states, renders the law void.<sup>3</sup> But it has been held in other states that when the constitution provides that statutes shall be preceded by the formal enacting clause, "Be it enacted," etc., the provision is directory merely, and the omission of such clause does not invalidate a statute.<sup>4</sup>

§ 3768. **Preambles — Recitals.** — Effect must be given to the preamble in construing a statute, provided it does not contain expressions contradictory to or irreconcilable with the enacting clause.<sup>5</sup> So effect is to be given to the clear words of an enacting clause, though they may go far beyond the language of the preamble; therefore where the words of an enacting clause are clear and explicit, then their natural and obvious meaning shall not be restricted or cut down by the use of language of less extensive import in the preamble. If the words of the enacting clauses, taken together, are words admitting, according to their natural import, of but one meaning, they must prevail, notwithstanding an argument to the contrary otherwise derivable from the preamble. If, on the other hand, the words are not so clear and explicit as to admit of but one clear and distinct meaning, but reasonable effect may be given to the words used in the enacting clauses by applying to them another meaning,

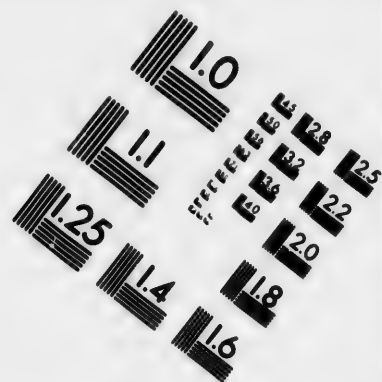
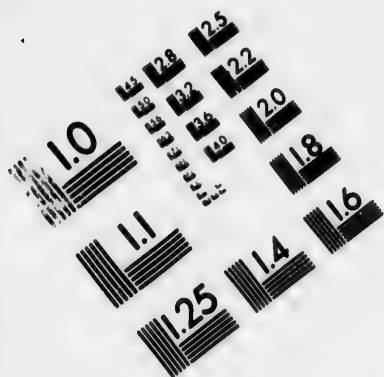
<sup>1</sup> *Seat of Government Case*, 1 Wash. Am. Rep. 738; *Burnett v. State Contract Comm'rs*, 120 Ill. 496; *State v. Patterson*, 98 N. C. 660; *Burnett v. State Contract Comm'rs*, 120 Ill. 322.

<sup>2</sup> *State v. Northampton*, 50 N. J. L. 496.

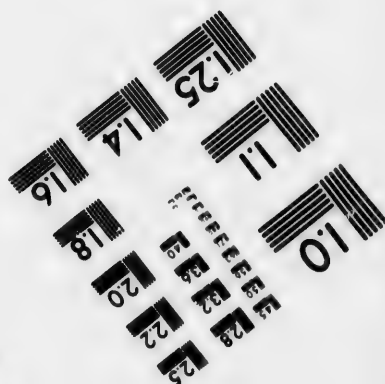
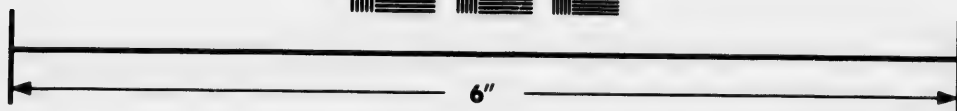
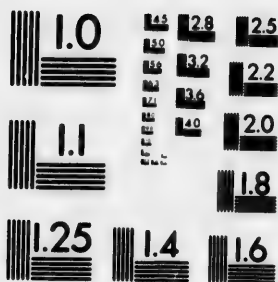
<sup>3</sup> *State v. Rogers*, 10 Nev. 250; 21 Am. Dec. 471.

<sup>4</sup> *Cape Girardeau v. ...* 52 Mo. 424; 14 Am. Rep. 427; *Swain v. Bush*, 40 Miss. 268.

<sup>5</sup> *Montesquieu v. Heil*, 4 La. 51; 23 Am. Dec. 471.



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then the preamble may be looked at to throw light upon the subject.<sup>1</sup> If the language of the enactment is clear, the preamble must be disregarded;<sup>2</sup> but if the language is not clear, the preamble may be resorted to, in order to throw light on the meaning of the enactment.<sup>3</sup> If very general language is used in the enactment, the preamble may indicate in what particular instances the enactment is to apply;<sup>4</sup> but it will always be a question for the court as to whether or not an enactment is sufficiently explicit in itself.<sup>5</sup> But the preamble can never control the obvious meaning of the statute, or supply matter not embraced in its spirit.<sup>6</sup> Recitals of general and public facts in a statute cannot be contradicted, but recitals of a particular fact, to the prejudice of an individual right, are not conclusive.<sup>7</sup>

**§ 3769. Titles of Statutes.** — Under most of the state constitutions it requires both the title and the body of the act to constitute a valid law, and in a consideration of the question as to whether the legislature has observed the forms prescribed by the constitution in the enactment of a law, they must be considered together.<sup>8</sup> The character of a statute is not determined by its title, but by its provisions, unless its language is ambiguous, in which event its title may be considered to assist a correct understanding of its terms.<sup>9</sup> Where the act is broader than its

<sup>1</sup> *Hughes v. R. R. Co.*, 31 L. J. Ch. 100.

<sup>2</sup> *Wilson v. Knubley*, 7 East, 128.

<sup>3</sup> *Crespigny v. Wittenoom*, 4 Term Rep. 793; *Bynum v. Clark*, 3 McCord, 298; 15 Am. Dec. 633; *Sutherland v. De Leon*, 1 Tex. 250; 46 Am. Dec. 100; *United States v. Webster, Davies*, 38; *Bartlett v. Morris*, 9 Port. 266; *James v. Dubois*, 16 N. J. L. 285; *Laidler v. Young*, 2 Har. & J. 69; *Blue v. McDuffie*, 1 Busb. 131; *Jackson v. Gilchrist*, 15 Johns. 89; *Lucas v. McBlair*, 12 Gill & J. 1; *Canal Co. v. R. R. Co.*, 4 Gill & J. 1; *Nichols v. Wells, Sneed*, 301; *Tuff v. Goff*, 15 R. I. 299.

<sup>4</sup> *Apostre v. Le Plaisterer*, 1 P. Wms. 318; *Ryan v. Rowles*, 1 Atk. 174; *Brett v. Brett*, 3 Adams, 219; *R. v. Percy*, L. R. 9 Q. B. 64.

<sup>5</sup> *Copeland v. Davies*, L. R. 5 H. L. 389; *Winn v. Mossman*, L. R. 4 Ex. 299.

<sup>6</sup> *Bynum v. Clark*, 3 McCord, 298; 15 Am. Dec. 633; *Hart v. Mayor*, 9 Wend. 571; 24 Am. Dec. 165.

<sup>7</sup> *Campbell's Case*, 2 Bland, 209; 20 Am. Dec. 360.

<sup>8</sup> *Bush v. City of Indianapolis*, 120 Ind. 477.

<sup>9</sup> *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; *Blakeney v. Blakeney*, 6 Port. 109; 30 Am. Dec. 574.

title, that portion in excess of the title will be declared void; as where the title of the act relates to "all citizens," and the body to "all persons." In such case, in order to entitle a party to the benefits of the act, it must be alleged and proved that he is a citizen.<sup>1</sup>

Most of the states, by their constitutions, provide that no law shall relate to more than one subject or object, which shall be expressed in the title.<sup>2</sup> The constitutional provision only requires that the terms employed in the title of the act should be significant of the subject of its provisions. It does not mean that the word "object" should be understood in the sense of "provision," for that would render the title of the act as long as the act itself. Nor does it intend that no act of legislation shall be constitutional which has reference to the accomplishment of more than one ultimate end.<sup>3</sup> This provision simply requires that the title shall give information of the general subject of the act, and that the act shall not contain provisions in no wise pertaining to the general subject.<sup>4</sup> Its only intention is to prevent the conjoining in the same act of incongruous matters, and of subjects having no legitimate connection or relation to each other; therefore, so long as it is not made a cover to legislation which, by no fair intendment, can be considered as having a necessary or proper connection, the generality of the title would not make it objectionable.<sup>5</sup> It is enough if the title dis-

<sup>1</sup> *Messenger v. State*, 25 Neb. 674.

<sup>2</sup> *Stimson's American Statute Law*, sec. 301. In California, Colorado, Indiana, Illinois, Iowa, West Virginia, Oregon, and Texas, the bill is good as to those subjects expressed in the title. Such a provision does not apply to city ordinances: *Humboldt v. McCoy*, 23 Kan. 249.

<sup>3</sup> *Tadlock v. Eccles*, 20 Tex. 782; 73 Am. Dec. 213.

<sup>4</sup> In *re Burris Co.*, 66 Mo. 442; *State v. Daniel*, 28 La. Ann. 38; *Rader v. Union Township*, 39 N. J. L. 507; *Neuendorff v. Duryea*, 69 N. Y. 557;

25 Am. Rep. 235; *Wulflange v. McCollom*, 83 Ky. 361.

<sup>5</sup> *State v. Miller*, 45 Mo. 495; Ind. etc. *R. R. Co. v. Potts*, 7 Ind. 681; *State v. Lafayette County Court*, 41 Mo. 39; *St. Louis v. Tiefel*, 42 Mo. 578; *State v. Mathews*, 44 Mo. 523; *State v. Bank*, 45 Mo. 528; *State v. Saline County Court*, 51 Mo. 350; *Cooley on Constitutional Limitations*, 141; *Dallas v. Redman*, 10 Col. 297; *People v. Banks*, 67 N. Y. 568; *Adler v. State*, 55 Ala. 16; *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182; *Allen v. Pioneer-Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707.

closes the objects of the act in terms so clear that no one can be misled thereby.<sup>1</sup> If the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary. It need not be an index to the contents.<sup>2</sup> Provisions relating to details need not necessarily be expressed.<sup>3</sup> And a statute embracing only the one general subject indicated by its title is constitutional, no matter how fully it may enter into the details of that subject.<sup>4</sup> Subjects subordinate to and having a necessary or natural connection with the primary or leading subject of a bill may be included.<sup>5</sup> The title of an act must not only embrace its subject, but must express it so clearly as to notify those to be affected of its real purpose.<sup>6</sup> If the title imports one subject, while the bill shows a different subject to be its purpose, the title is misleading.<sup>7</sup> The act does not violate the constitutional provision because it does not mention in its title other acts which it repeals or alters by implication on account of repugnancy or inconsistency, if all its provisions are germane to the subject expressed in its title.<sup>8</sup> The repeal of a statute on a given subject is properly connected with the subject-matter of a new statute

<sup>1</sup> *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743; 8 Am. Rep. 602.

<sup>2</sup> *Allegheny Co. v. Howe's Appeal*, 5 Pittsb. L. J. 65; *Martin v. Broach*, 6 Ga. 21; 50 Am. Dec. 306; *Davis v. State*, 7 Md. 151; 61 Am. Dec. 331.

<sup>3</sup> *Carter County v. Sinton*, 120 U. S. 517.

<sup>4</sup> *Crawfordsville and Southwestern Turnpike Co. v. Fletcher*, 104 Ind. 97; *Golden Canal Co. v. Bright*, 8 Col. 144; *People v. Goddard*, 8 Col. 432.

<sup>5</sup> *Mills v. Charleton*, 29 Wis. 400; 9 Am. Rep. 578.

<sup>6</sup> *In re Phoenixville Road*, 109 Pa. St. 44; *Rogers v. Manufacturers' Improvement Co.*, 109 Pa. St. 109.

<sup>7</sup> *Rogers v. Manufacturers' Improvement Co.*, 109 Pa. St. 109. In a recent case in the supreme court of the United States it is said that the provision does not require that the title

of an act shall embody a detailed statement, nor be an index or abstract of its contents; nor does it prevent the uniting in the same act of any number of provisions having one general object fairly indicated by its title; and that the powers, however varied and extended, which a new township may exercise, constitute but one object which is fairly expressed by a title showing nothing more than the legislative purpose to establish such township. The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it is not sufficiently expressed by the title: *Montclair v. Ramsdell*, 107 U. S. 147.

<sup>8</sup> *City of Winona v. School District*, 40 Minn. 13; 12 Am. St. Rep. 687.

upon the same subject, although the repeal of the former statute is not mentioned in the title of the new enactment.<sup>1</sup> Where the title in the bill as passed is sufficient, the form of the title at any stage during its passage is immaterial.<sup>2</sup>

Therefore it has been held that the following statutes were not invalid under this provision, viz.: "An act to establish a police government in the city of Detroit";<sup>3</sup> an act entitled "An act amendatory of an act to enable the city of St. Louis to procure a supply of wholesome water," which provided that persons who failed to comply with certain provisions in relation to using the water should be subject to certain penalties;<sup>4</sup> a section of an act incorporating a college, prohibiting the sale of ardent spirits within a distance of four miles, although no such object or subject was named in the title of the bill, it being germane to the primary object of the charter;<sup>5</sup> an act entitled "An act to authorize the city of Madison to reassess and collect certain taxes and assessments," and authorizing a special reassessment for the payment of a patent pavement already laid in the city, and also the adoption and use of any patented pavement in the future, and the assessment and collection of taxes therefor;<sup>6</sup> an act entitled "An act to preserve the public peace and order on the first day of the week, commonly called Sunday," but by its terms limited to the city of New York;<sup>7</sup> an act entitled "An act in relation to mortgages against preferred stock in and the delivery of goods by railroad companies";<sup>8</sup> an act entitled "An act to incorporate a certain railroad company," although it authorized county subscriptions to the company's bonds on conditions set forth;<sup>9</sup> an act entitled "A supplement to an act concerning taxes,"

<sup>1</sup> *Gabbert v. R. R. Co.*, 11 Ind. 365; 71 Am. Dec. 358.

<sup>2</sup> *Attorney-General v. Rice*, 64 Mich. 385.

<sup>3</sup> *People v. Mahaney*, 13 Mich. 481.

<sup>4</sup> *St. Louis v. Tiefel*, 42 Mo. 578.

<sup>5</sup> *O'Leary v. County of Cook*, 66 Mo. 442.

<sup>6</sup> *Mills v. Charleton*, 29 Wis. 400; 9 Am. Rep. 578.

<sup>7</sup> *Neuendorff v. Duryea*, 69 N. Y. 557; 25 Am. Rep. 235.

<sup>8</sup> *Attorney-General v. Joy*, 55 Mich. 94.

<sup>9</sup> *Connor v. R. R. Co.*, 23 S. C. 427.



although it deals with several details of the matter of taxes;<sup>1</sup> an act entitled "An act to amend the charter of the city of Jackson," although it changed the office of city attorney from one of appointment to one of election;<sup>2</sup> an act entitled "An act to legalize a certain election therein named";<sup>3</sup> an act entitled "An act in relation to assignments for the benefit of creditors, and to regulate the same and the proceedings thereunder," although it contained a section invalidating all liens on stocks of goods exposed for sale in the usual course of trade;<sup>4</sup> a statute the title of which expresses its object to be to organize a county and two townships in the county.<sup>5</sup> "An act to reorganize the local government of Jersey City," which includes provisions creating machinery for the collection and adjustment of taxes;<sup>6</sup> an act providing for the reassessment of damages and benefits in laying, opening, and grading two roads, included in a scheme for improving any locality;<sup>7</sup> an act whose title expresses its subject to be the taxation of money lent on land, which includes a provision that mortgages covering lands in more than one county shall be void;<sup>8</sup> an act entitled "An act to authorize the town to raise money to construct a town dock," which includes the power to charge and collect wharfage;<sup>9</sup> an act entitled "An act for a homestead exemption," including provisions for the exemption of personal property.<sup>10</sup> The two subjects "debts" and "expenses" are so germane and connected that a legislative provision for a "debt" may be constitutionally made under a title expressing provision for "expenses."<sup>11</sup>

<sup>1</sup> *Kirkpatrick v. New Brunswick*, 40 N. J. Eq. 46.

<sup>2</sup> *Powell v. Jackson Common Council*, 51 Mich. 129.

<sup>3</sup> *Dows v. Elmwood*, 34 Fed. Rep. 114.

<sup>4</sup> *Duncan v. Taylor*, 63 Tex. 645.

<sup>5</sup> *Attorney-General v. Weimer*, 59 Mich. 580.

<sup>6</sup> *Snipe v. Shriner*, 44 N. J. L. 206.

<sup>7</sup> *State v. Union*, 44 N. J. L. 599.

<sup>8</sup> *Farmers' Loan and Trust Co. v. R. R. Co.*, 24 Fed. Rep. 407.

<sup>9</sup> *Pelham v. Woolsey*, 16 Fed. Rep. 418.

<sup>10</sup> *Tuttle v. Strout*, 7 Minn. 465; 82 Am. Dec. 108.

<sup>11</sup> *State v. State Auditor*, 32 La. Ann. 89.

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But the following have been held invalid, viz.: An act entitled "An act for the protection of married women";<sup>1</sup> an act entitled "An act to establish evidence of title to real property, and to restore the records of the same, and to provide for the recording of deeds," which provides that any person claiming an estate or interest in real estate, where deeds have been lost or destroyed, may apply to the circuit court and have an adjudication of the title according to the evidence adduced by him, so far as it provides for proceedings which are to end in final judgment;<sup>2</sup> an act entitled "An act to incorporate the San Antonio and Mexican Gulf railroad," and which provides that certain towns may issue bonds to aid in the construction of the railroad;<sup>3</sup> an act entitled an act to "exempt"

<sup>1</sup> In *re* Burris Co., 66 Mo. 442; the court saying: "The title does not indicate in what that protection was to consist. By the title alone one would not know whether it was to protect married women in their rights of property, or in their persons, or in what manner the protection was to be afforded, — whether by conferring upon them the right of suffrage, or the right to control intemperate and improvident husbands, and providing means by which that object could be accomplished by them; but it does apprise one that it is a law for their protection, and any provision in the law not cognate to that general subject would be unconstitutional."

<sup>2</sup> In *re* Goode, 3 Mo. App. 226; the court saying: "The act before us violates this commandment in every aspect. Not only does it omit from the title the chief object to be effected by the body of the act: it also excludes from the body the purpose most conspicuously displayed in the title. The grossest frauds ever perpetrated in the legislation of the past were those wherein an enactment enforced a duty or a measure, of which no notice appeared in the title. Careless or unsuspecting citizens and legislators, finding nothing objectionable in the title, were too often indisposed to look any further. The most obnoxious laws

have thus gone undetected through all the forms of legislation, under an introductory disguise of innocence or apparent utility. Hence the practical wisdom of the constitutional provision above quoted. If any illustration of the wrongs it may prevent had been specially designed by the framer of the act under consideration, he could not have more happily succeeded. The citizen who should find nothing alarming in the establishment or perpetration of any possible evidence affecting his right of title might suddenly find the latter imperiled or destroyed by a process of very different import. If he happen not to have been served with personal notice, and to have neither seen nor heard of the newspaper publication 'to whom it may concern' for the space of two years, he may find his title divested by a 'conclusive' judgment under the fourth section, and yet never be able to comprehend how such final destruction could lurk in a mere proceeding to 'establish evidence.' For the reasons stated, we find the act unconstitutional and void, in so far as it provides for proceedings which, in every instance, are to culminate in a final judgment, no reference being made in the title to any such conclusion."

<sup>3</sup> *Giddings v. City of Antonio*, 47 Tex. 548; 26 Am. Rep. 321.

property from taxation as to a proviso imposing taxation;<sup>1</sup> a statute providing "a means for the collection of claims for cattle and other stock destroyed by railroad," whose body declares or creates an absolute liability which did not exist prior to its passage;<sup>2</sup> an act entitled an act "to prevent deception in the sale of dairy products, and to preserve the public health," which makes the manufacture of imitations of butter a crime;<sup>3</sup> an act entitled "An act to release the interest of the people . . . in certain real estate to A, B, and C, and for other purposes," one section of which purported to release the state's title to realty, and another section purported to release the state's title to personalty;<sup>4</sup> an act entitled "An act to require railroad companies to make cattle-guards, and to pay damages that individuals may sustain," which provides that where any railroad crosses any public highway the company shall construct crossings;<sup>5</sup> an act entitled "An act to prohibit the manufacture and sale of intoxicating liquors," which provides for the punishment of a person intoxicated;<sup>6</sup> an act entitled "An act to fix the license tax of stevedores," which provides for their examination as to their qualifications;<sup>7</sup> an act the title of which does not indicate that the act was to have a retrospective operation;<sup>8</sup> where the title of an act purports to be to regulate the sale of liquor, while the body of the act provides for prohibiting its sale;<sup>9</sup> an act which, when read by its title, declares that nothing is to be done except to repeal a certain act, while a section attempts affirmative legislation;<sup>10</sup> a statute relating to municipal as well as to state and county taxes, if only state and county taxation is referred to in its title.<sup>11</sup>

<sup>1</sup> *Sewickley v. Sholer*, 118 Pa. St. 165.

<sup>2</sup> *Savannah etc. R. R. Co. v. Geiger*, 21 Fla. 669.

<sup>3</sup> *Northwestern Mfg. Co. v. Wayne*, 58 Mich. 381; 55 Am. Rep. 693.

<sup>4</sup> *Johnston v. Spicer*, 107 N. Y. 185.

<sup>5</sup> *Missouri etc. R. R. Co. v. Long*, 27 Kan. 684.

<sup>6</sup> *State v. Barrett*, 27 Kan. 213.

<sup>7</sup> *State v. Palmes*, 23 Fla. 621.

<sup>8</sup> *Thomas v. Collins*, 58 Mich. 64.

<sup>9</sup> *Miller v. Jones*, 80 Ala. 89.

<sup>10</sup> *Stiefel v. Maryland Blind Institution*, 61 Md. 144.

<sup>11</sup> *Bugher v. Prescott*, 23 Fed. Rep. 20.

§ 3770. **Provisos.**—A proviso in a statute is to be strictly construed, and it takes no case out of the enacting clause which is not fairly within the terms of the proviso. Its office is either to except something from the enacting clause, to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extending to cases not intended to be included.<sup>1</sup>

§ 3771. **Other Provisions as to Form.**—Where the constitution provides that “no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act,” a statute which provides methods to carry out and more conveniently or adequately enforce a prior statute, without inserting the latter statute as a part of its provisions, is not forbidden.<sup>2</sup> Where the constitution declares that no bill “shall be so altered or amended on its passage through either house as to change its original purpose,” slight

<sup>1</sup> *Huddleston v. Francis*, 124 Ill. 195; *City of Chicago v. Phoenix Ins. Co.*, 126 Ill. 276; *Salling v. McKinney*, 1 Leigh, 42; 19 Am. Dec. 722.

<sup>2</sup> *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893; the court saying: “It might be better, perhaps, to have all laws relating to this subject incorporated in a single act; but I apprehend it is no objection to a law, under the constitution, that other laws on the same subject exist in other volumes of the statutes, or that the arrangement and location of such laws are faulty, or perhaps intricate and awkward, or involve labor and trouble to determine what in fact the law is. The object and intent of the constitutional provision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the legislature, and to require that all acts should contain within themselves such information as should

be necessary to enable it to act upon them intelligently and discreetly. It is obvious that it does not apply to an act purporting to amend existing laws, for in such a case no intelligent legislation could be had at all without a knowledge of the law intended to be amended. It must be presumed that the legislature is informed of the condition of a law which it is called upon to amend. It could never have been contemplated by the framers of the constitution that any legislator would remain ignorant of the provisions of a law which it was proposed to change, or would require the provisions of such a law to be transcribed into the proposed legislation to enable him to act upon it judiciously and intelligently. Such a construction would lead to innumerable repetitions of laws in the statute-books, and render them not only bulky and cumbersome, but confused and unintelligible almost beyond conception.”

changes will not be permitted to defeat the validity of the act as finally passed.<sup>1</sup> Therefore, where a bill, as originally introduced into and passed by one branch of the legislature, had for its object the prohibition of the sale of liquor in a certain county outside of a certain city, and in the other branch it was changed so as to extend the prohibition to numerous other localities, and in this form finally passed both houses, it was held not a violation of the constitutional provision.<sup>2</sup>

§ 3772. **Private Acts.**—Private acts are construed as private conveyances, not binding on strangers, but only upon parties and privies.<sup>3</sup> Where by a private act of the legislature the property of a person is directed to be sold or disposed of, and the money realized to be paid to certain creditors, it must be understood as saving the rights of third persons, and can only amount to a quitclaim of the right or interest of the state.<sup>4</sup> Recitals in private statutes are evidence between the applicant and the commonwealth, but not between the applicant and other individuals.<sup>5</sup> So facts stated in a private act are strong evidence against those who procured its passage.<sup>6</sup> A private act obtained by fraud may be set aside or relieved against in equity.<sup>7</sup> A statute forbidding the sale of liquors within two miles of a certain locality is not a private statute, but a public local statute.<sup>8</sup>

§ 3773. **Construction of Statutes.**—The intention of the legislatures should always be considered in giving construction to a statute,<sup>9</sup> if this can be ascertained with

<sup>1</sup> *Abernathy v. State*, 78 Ala. 411; *Stein v. Leeper*, 78 Ala. 517.

<sup>2</sup> *Hall v. Steele*, 82 Ala. 562.

<sup>3</sup> *Campbell's Case*, 2 Bland, 209; 20 Am. Dec. 360.

<sup>4</sup> *Jackson v. Catlin*, 2 Johns. 248; 3 Am. Dec. 416.

<sup>5</sup> *Elmondorff v. Carmichael*, 3 Litt. 472; 14 Am. Dec. 87.

<sup>6</sup> *May v. Frazee*, 4 Litt. 391; 14 Am. Dec. 159.

<sup>7</sup> *Campbell's Case*, 2 Bland, 209; 20 Am. Dec. 360.

<sup>8</sup> *State v. Chambers*, 93 N. C. 600.

<sup>9</sup> *Orndorff v. Turman*, 2 Leigh, 200; 21 Am. Dec. 608.

reasonable certainty; although such construction may seem contrary to the ordinary meaning of the letter of the statute.<sup>1</sup> And this intention may be collected from the cause or necessity of making the act, or from foreign circumstances.<sup>2</sup> The intention of the legislature, clearly expressed in a statute, should not be defeated by too rigid adherence to the letter of the statute, or by technical rules of construction. So any construction should be disregarded which leads to absurd consequences.<sup>3</sup> A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.<sup>4</sup> In construing statutes, courts, in order to ascertain the intention of the legislature, will judicially notice such contemporaneous history as led to and probably induced the passage of the laws.<sup>5</sup> But an express provision cannot be repealed or its construction controlled by the presumed or even well-known views of the members of the legislature.<sup>6</sup> Courts have no dispensing power

<sup>1</sup> *Staniels v. Raymond*, 4 Cush. 314; *Erwin v. Moore*, 15 Ga. 301; *Canal Co. v. R. R. Co.*, 4 Gill & J. 1; *Ingraham v. Speed*, 30 Miss. 410; *New Orleans etc. R. R. Co. v. Hemphill*, 35 Miss. 17; *Brown v. Wright*, 13 N. J. L. 240; *State v. R. R. Co.*, 2 Sneed, 88; *Ryegate v. Wardsboro*, 30 Vt. 746; *Jackson v. Collins*, 3 Cow. 89; *Riddick v. Governor*, 1 Mo. 147; *Beall v. Harwood*, 2 Har. & J. 167; 3 Am. Dec. 532; *Wilkinson v. Leland*, 2 Pet. 662; *People v. Utica Ins. Co.*, 15 Johns. 358; 8 Am. Dec. 243; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 64; *Kennedy v. Kennedy*, 2 Ala. 571; *Thompson v. State*, 20 Ala. 54; *Sprowl v. Lawrence*, 33 Ala. 674; *Ex parte Ellis*, 11 Cal. 222; *People v. Dana*, 22 Cal. 11; *State v. Poydras*, 9 La. Ann. 165; *Tonnele v. Hall*, 4 N. Y. 140; *Keith v. Quinney*, 1 Or. 364; *Allen v. Parish*, 3 Ohio, 198; *Simonds v. Powers*, 28 Vt. 354; *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475

<sup>2</sup> *Car Spring Co. v. R. R. Co.*, 11 Md. 81; 69 Am. Dec. 181.

<sup>3</sup> *Oakes v. Montgomery Bank*, 100 U. S. 237; *People v. Utica Ins. Co.*, 15 Johns. 353; 8 Am. Dec. 243; *Davis v. Minor*, 1 How. (Miss.) 183; 28 Am. Dec. 325; *Mayor of Baltimore v. Root*, 8 Md. 95; 63 Am. Dec. 692; *Sherman v. Buick*, 32 Cal. 241; 91 Am. Dec. 577; *Tynan v. Walker*, 35 Cal. 634; 95 Am. Dec. 152; *Pickering v. Day*, 3 Houst. 474; 95 Am. Dec. 291; *Stone v. Hill*, 72 Tex. 540; *Gore v. Brazier*, 3 Mass. 523; 3 Am. Dec. 182; *Pease v. Whitney*, 5 Mass. 380; *Stanwood v. Peirce*, 7 Mass. 458; *Gibson v. Jenney*, 15 Mass. 205; *Case of Kilby Bank*, 23 Pick. 93; *Opinion of the Justices*, 22 Pick. 571.

<sup>4</sup> *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819.

<sup>5</sup> *Conn. Mut. Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655.

<sup>6</sup> *Belleville etc. R. R. Co. v. Gregory*, 15 Ill. 20; 58 Am. Dec. 589.

over statutes; where they contain no exceptions, the courts can make none; if they are too rigid in their terms, the remedy is with the legislature.<sup>1</sup> Where the construction given to a statute has been acquiesced in for a long time, it will not be disturbed.<sup>2</sup> So the construction put upon it for a long time by the executive department charged with its execution is entitled to great weight.<sup>3</sup> Statutes *in pari materia*, or relating to the same subject-matter, are to be taken together as if they were one law.<sup>4</sup> So different sections of the same act must be construed together.<sup>5</sup> A statute is not to be isolated from the great body of law of which it forms a part, but is to be taken as forming part of one great system, and it is to be construed with reference to co-ordinate rules and statutes.<sup>6</sup> Effect must be given to every part of a statute, if it can be done without manifestly violating the intention of the legislature.<sup>7</sup> And every part of a statute must be viewed in connection with the whole, so as to make all the parts harmonize, if practicable.<sup>8</sup>

<sup>1</sup> *Box v. Stanford*, 13 Smedes & M. 93; 51 Am. Dec. 142.

<sup>2</sup> *Commonwealth v. Posey*, 4 Call, 109; 2 Am. Dec. 560; *Maher v. State*, 1 Port. 265; 26 Am. Dec. 379; *Bruce v. Schuyler*, 4 Gilm. 221; 46 Am. Dec. 447; *Chestnut v. Shayne*, 16 Ohio, 599; 47 Am. Dec. 387; *In re Warfield*, 22 Cal. 51; 83 Am. Dec. 49.

<sup>3</sup> *Westbrook v. Miller*, 56 Mich. 148; *United States v. Philbrick*, 120 U. S. 52; *United States v. Hill*, 120 U. S. 169.

<sup>4</sup> *Sedgwick on Construction of Statutes*, 210; *Montesquieu v. Heil*, 4 La. 51; 23 Am. Dec. 471; *State v. R. R. Co.*, 12 Gill & J. 399; 38 Am. Dec. 317; *Lorimer v. Lewis*, 1 Morris, 253; 39 Am. Dec. 461; *Dugan v. Gittings*, 3 Gill, 188; 43 Am. Dec. 306; *Scarborough v. Watkins*, 9 B. Mon. 540; 50 Am. Dec. 528; *Neill v. Keese*, 5 Tex. 23; 51 Am. Dec. 746; *Bishop v. Boyle*, 9 Ind. 169; 68 Am. Dec. 615; *Harrison v. State*, 22 Md. 468; 85 Am. Dec. 658; *The Harriet*, 1 Story, 251; *Scott v. Searles*, 1 Smedes & M. 590; *United States v. Collier*, 3 Blatchf. 325; *Bryan v. Den-*

*nia*, 4 Fla. 445; *Harrison v. Walker*, 1 Ga. 32; *Desban v. Pickett*, 16 La. Ann. 350; *Canal Co. v. R. R. Co.*, 4 Gill & J. 1; *Wakefield v. Phelps*, 37 N. H. 295; *Mitchell v. Duncan*, 7 Fla. 13; *State v. Garthwaite*, 23 N. J. L. 143; *Manuel v. Manuel*, 13 Ohio St. 458; *McLaughlin v. Hoover*, 1 Or. 31; *Bruce v. Schuyler*, 9 Ill. 221; 46 Am. Dec. 447; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Graham v. Gunn*, 87 Tenn. 458.

<sup>5</sup> *Stout v. Keyes*, 2 Doug. (Mich.) 184; 43 Am. Dec. 465; *Merrill v. Harris*, 26 N. H. 142; 57 Am. Dec. 359; *Burnham v. Hayes*, 3 Cal. 115; 58 Am. Dec. 389.

<sup>6</sup> *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48.

<sup>7</sup> *Montesquieu v. Heil*, 4 La. 51; 23 Am. Dec. 471; *Crawfordsville etc. Turnpike Co. v. Fletcher*, 104 Ind. 97; *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139.

<sup>8</sup> *Ogden v. Strong*, 2 Paine, 584; *Brooks v. Commissioners*, 31 Ala. 227; *Wilson v. Biscoe*, 11 Ark. 44; *Scott v. State*, 22 Ark. 369; *San Francisco v. Hazen*, 5 Cal. 169; *Gates v. Salmon*,

General words in a statute must receive a general construction.<sup>1</sup> But when general words follow specific words designating certain specified things, the general words are to be limited to cases of the same general nature as those which are specified.<sup>2</sup> Words are to be taken in their ordinary and popular signification,<sup>3</sup> and effect must be given to the words used by the legislature, if there is no uncertainty or ambiguity in their meaning.<sup>4</sup> Where a word is used having a definite meaning at common law, it will be restricted to that sense.<sup>5</sup> Words in a statute having two significations should be construed as generally understood in the community, except where it would contravene the manifest intention of the legislature.<sup>6</sup> When the legislature has used a term without defining it, which has a well-settled meaning in the common law, it must be supposed that they use it in the same sense.<sup>7</sup> Terms used in a statute ought to be understood according to their ancient acceptation, or according to the interpretation previously given them by usage or by judicial construction.<sup>8</sup> Where terms used in the common law are contained in a statute without an explanation of the sense in

35 Cal. 576; 95 Am. Dec. 139; Belleville R. R. Co. v. Gregory, 15 Ill. 20; 58 Am. Dec. 589; Green v. Check, 5 Ind. 105; Nichols v. Wells, Sneed, 301; Succession of Hebert, 5 La. Ann. 121; Canal Co. v. R. R. Co., 4 Gill & J. 1; Magruder v. Carroll, 4 Md. 335; Alexander v. Worthington, 5 Md. 471; Parkinson v. State, 14 Md. 184; 74 Am. Dec. 522; Holbrook v. Holbrook, 1 Pick. 248; Mendon v. Worcester, 10 Pick. 235; Commonwealth v. Cambridge, 20 Pick. 267; Attorney-General v. Bank of Michigan, Harr. (Mich.) 315; McKay v. Detroit etc. Co., 2 Mich. 138; Ellison v. R. R. Co., 36 Miss. 572.

<sup>1</sup> Jones v. Jones, 18 Mo. 308; 36 Am. Dec. 723.

<sup>2</sup> People v. Richards, 108 N. Y. 137; 2 Am. St. Rep. 373.

<sup>3</sup> State v. R. R. Co., 12 Gill & J. 399; 38 Am. Dec. 317; Cummings v. Coleman, 7 Rich. Eq. 509; 62 Am.

Dec. 402; Quigley v. Gorham, 5 Cal. 418; 63 Am. Dec. 139; Schrieffer v. Wood, 5 Blatchf. 215; Gross v. Fowler, 21 Cal. 392; Canal Co. v. Schroeder, 7 La. Ann. 615; Parkinson v. State, 14 Md. 184; 74 Am. Dec. 522; Green v. Weller, 32 Miss. 650.

<sup>4</sup> United States v. Warner, 4 McLean, 463; United States v. Ragsdale, 1 Hempst. 497; Bartlett v. Morris, 9 Port. 266; Farrell Foundry v. Dart, 26 Conn. 376; Pearce v. Atwood, 13 Mass. 324; Doane v. Phillips, 12 Pick. 223.

<sup>5</sup> Buckner v. Real Estate Bank, 5 Ark. 536; 41 Am. Dec. 105; Harris v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600.

<sup>6</sup> Favers v. Glass, 22 Ala. 621; 58 Am. Dec. 272.

<sup>7</sup> Hillhouse v. Chester, 3 Day, 166; 3 Am. Dec. 265.

<sup>8</sup> Butts v. Voorhees, 2 N. J. Eq. 13; 22 Am. Dec. 490.

v. Walker, 16 La. R. Co., 4 Phelps, 37; 7 Fla. 3 N. J. L. 3 Ohio St. 1 Or. 31; 21; 46 Am. ington Iron v. Gunn, 87

(Mich.) 184; Harris, 26; Burnham n. Dec. 389; 17 Ind. 356;

4 La. 51; 23 dsaville etc. 104 Ind. 97; 576; 95 Am.

Paine, 584; 31 Ala. 227; 44; Scott v. Francisco v. v. Salmon,



which they are employed, they should receive that construction which has been affixed to them by the common law.<sup>1</sup> In construing a statute, if the words are ambiguous, resort should be had to the probable consequences which would arise from the one or the other construction.<sup>2</sup> But considerations of policy in the construction of statutes are entitled to weight only in cases of doubtful interpretation, and where the intention of the legislature appears to be opposed to the literal import of the language of the act.<sup>3</sup> It is beyond the power of courts to supply by judicial construction what is palpably omitted in a statute.<sup>4</sup>

Penal statutes and statutes forfeiting vested rights are construed strictly,<sup>5</sup> and remedial statutes liberally.<sup>6</sup> Statutes involving penal consequences cannot be extended by construction so as to include acts not in terms forbidden merely because of their resemblance to the acts prohibited, or because they may be equally demoralizing and injurious.<sup>7</sup> Statutes in derogation of the common law are construed strictly.<sup>8</sup> And it will not be inferred that

<sup>1</sup> *Carpenter v. State*, 4 How. (Miss.) 163; 34 Am. Dec. 116.

<sup>2</sup> *Hoke v. Henderson*, 4 Dev. 1; 25 Am. Dec. 677; *Monaghan v. State*, 66 Miss. 513.

<sup>3</sup> *Coulter v. Robertson*, 24 Mo. 278; 57 Am. Dec. 168.

<sup>4</sup> *State v. Piazza*, 66 Miss. 426; *Monaghan v. State*, 66 Miss. 513.

<sup>5</sup> *Gates v. McDaniel*, 2 Stew. 211; 19 Am. Dec. 49; *People v. Perry*, 79 Cal. 105; *United States v. Starr*, 1 Hemp. 469; *United States v. Ramsay*, 1 Hemp. 481; *United States v. Beaty*, 1 Hemp. 487; *United States v. Ragsdale*, 1 Hemp. 497; *Lair v. Killmer*, 25 N. J. L. 522; *Andrews v. United States*, 2 Story, 202; *The Enterprise*, 1 Paine, 32; *Ferrett v. Atwill*, 1 Blackf. 151; *Rawson v. State*, 19 Conn. 292; *Steel v. State*, 26 Ind. 82; *Simms v. Bean*, 10 La. Ann. 346; *Hall v. State*, 20 Ohio, 7; *Horner v. State*, 1 Or. 267; *Remington v. State*, 1 Or. 281; *Warner v. Commonwealth*, 1 Pa. St. 154; 44 Am. Dec. 114; *State v. Solomons*, 3 Hill, 96; *Bettis v. Tay-*

*lor*, 8 Port. 564; *Andrews v. United States*, 2 Story, 202. Yet they are not to be construed so strictly as to defeat the obvious intention of the legislature: *Crosby v. Hawthorn*, 25 Ala. 221; *Doe v. Avaline*, 8 Ind. 6; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Commonwealth v. Loring*, 8 Pick. 370; *Reed v. Davis*, 8 Pick. 514; *Melody v. Reab*, 4 Mass. 471; *Broadwell v. Conger*, 2 N. J. L. 210; *Jones v. Estis*, 2 Johns. 379; *Crawford v. State*, Minor, 143; *United States v. Wiltberger*, 5 Wheat. 76; *Butler v. Ricker*, 6 Me. 268; *Daggett v. State*, 4 Conn. 61; 10 Am. Dec. 100; *Sprague v. Birdsall*, 2 Cow. 419.

<sup>6</sup> *White v. The Mary Ann*, 6 Cal. 462; 65 Am. Dec. 523; *Smith v. Wilcox*, 24 N. Y. 353; 82 Am. Dec. 302.

<sup>7</sup> *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23.

<sup>8</sup> *Melody v. Reab*, 4 Mass. 471; *Gibson v. Jenney*, 15 Mass. 205; *Commonwealth v. Knapp*, 9 Pick. 496; 20 Am. Dec. 491; *Wilbur v. Crane*, 13 Pick. 284; *Lock v. Miller*, 3 Stew. &

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the legislature intended to alter common-law principles further than is clearly expressed or the case absolutely requires.<sup>1</sup> A statute will not be construed to be retrospective, unless expressly so declared, or it is necessarily implied from the terms employed.<sup>2</sup> But a retrospective effect may be given to a statute where the plain meaning thereof so requires, and where no vested rights are thereby destroyed.<sup>3</sup> A statute will be construed, if possible, so as to sustain its constitutionality,<sup>4</sup> and so as not to suffer its intent to be defeated.<sup>5</sup> The existence of facts necessary to support a statute will be presumed until the contrary appears, where its validity depends upon their existence; thus where a statute would be valid if the consent of persons affected by its passage was previously obtained, that fact will be presumed, and conclusively so against a stranger.<sup>6</sup> When the meaning of the words is not clear, the statute should be given such construction

P. 13; *Dwelly v. Dwelly*, 46 Me. 377; *Burnside v. Whitney*, 21 N. Y. 148; *Sullivan v. La Crosse etc. Packet Co.*, 10 Minn. 386; *Smith v. Moffat*, 1 Barb. 65; *Young v. McKenzie*, 3 Ga. 31; *Schuyler Co. v. Mercer Co.*, 9 Ill. 20; *Millard v. R. R. Co.*, 9 How. Pr. 238; *Bailey v. Bryan*, 3 Jones, 357; 67 Am. Dec. 246; *Esterley's Appeal*, 54 Pa. St. 192.

<sup>1</sup> *Tinsman v. Belvidere R. R. Co.*, 26 N. J. L. 148; 69 Am. Dec. 565.

<sup>2</sup> *Bedford v. Shilling*, 4 Serg. & R. 401; 8 Am. Dec. 718; *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121; *Perkins v. Perkins*, 7 Conn. 558; 18 Am. Dec. 120; *Garrett v. Wiggins*, 2 Ill. 335; 30 Am. Dec. 653; *Oriental Bank v. Freeze*, 18 Me. 109; 36 Am. Dec. 701; *Oyon's Case*, 6 Rob. (La.) 504; 41 Am. Dec. 274; *Baughner v. Nelson*, 9 Gill, 299; 52 Am. Dec. 694; *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; *Warshung v. Hunt*, 47 N. J. L. 256; *McGehean v. Burke*, 37 La. Ann. 156; *State v. Emerick*, 87 Mo. 110; *Phillips v. New Buffalo*, 68 Mich. 217; *Torrey v. Corliss*, 33 Me. 333; *Whitman v. Hapgood*, 10 Mass. 437; *Somerset v. Dighton*, 12 Mass. 383;

*Medford v. Learned*, 16 Mass. 215; *Brown v. Wilcox*, 14 Smedes & M. 127; *State v. Auditor*, 41 Mo. 25; *Finney v. Ackerman*, 21 Wis. 268; *State v. Scudder*, 32 N. J. L. 203; *Taylor v. Mitchell*, 57 Pa. St. 209; *Dewart v. Purdy*, 29 Pa. St. 113; *Ex parte Graham*, 13 Rich. 277; *State v. Atwood*, 11 Wis. 422.

<sup>3</sup> *People v. Spicer*, 99 N. Y. 225.

<sup>4</sup> *Sutherland v. De Leon*, 1 Tex. 250; 46 Am. Dec. 100; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Preston v. Drew*, 33 Me. 558; 54 Am. Dec. 639; *Meyer v. Berlandi*, 39 Minn. 438; 12 Am. St. Rep. 663; *Boisdere v. Bank*, 9 La. 506; 29 Am. Dec. 453; *Santo v. State*, 2 Iowa, 165; 63 Am. Dec. 487. Where the language of a statute will bear two constructions, equally obvious, that which makes it constitutional is to be preferred to that which makes it unconstitutional: *Grenada County Supervisors v. Brogden*, 112 U. S. 261.

<sup>5</sup> *Reyburn v. Brackett*, 2 Kan. 227; 83 Am. Dec. 457; *McDougall v. State*, 109 N. Y. 73.

<sup>6</sup> *Wilmington et al., Petitioners*, 16 Pick. 87; 26 Am. Dec. 631.

as will not deprive the person interested in its construction of a substantial right,<sup>1</sup> or as will promote equity and justice,<sup>2</sup> and not work public mischief.<sup>3</sup> So a statute is not to be construed to protect fraud, where any other construction is possible.<sup>4</sup> A statute may be extended or restrained by an equitable construction, and a case out of the mischief intended to be remedied by a statute may be construed to be out of the purview though it be within the words of the statute.<sup>5</sup> The printer's punctuation of published statutes is an uncertain guide to their interpretation,<sup>6</sup> and may be disregarded. A comma may be transferred from after a word to before it, to effectuate the obvious intent.<sup>7</sup> A party has a right to the decision of the court as to the meaning of a statute applicable to his case, independently of a declaratory act passed while his suit was pending.<sup>8</sup>

**§ 3774. When Mandatory and when Permissive.**—A statute requiring a particular thing to be or not to be done, and leaving its exercise to the judgment and discretion of a designated agent, does not vest an arbitrary discretion in him; it only vests a lawful discretion, which must be exercised in a lawful manner, as he is amenable to the statute for abusing the discretion placed in him.<sup>9</sup> When power is given to do an act which concerns public interest, its exercise, when applied to a public officer or body, may be insisted upon as a duty, although the phraseology of the statute be permissive only; but when the power is lodged with persons exercising or to exercise legislative or judicial functions, and the subject-matter of

<sup>1</sup> *People v. Eichelroth*, 78 Cal. 141.

<sup>2</sup> *Lake Shore R. R. Co. v. R. R. Co.*, 116 Ind. 578.

<sup>3</sup> *People v. Lambier*, 5 Denio, 9; 47 Am. Dec. 273.

<sup>4</sup> *Rogers v. Brent*, 5 Gilm. 573; 50 Am. Dec. 422.

<sup>5</sup> *Blakeney v. Blakeney*, 6 Port. 109; 30 Am. Dec. 574.

<sup>6</sup> *State v. McNally*, 34 Me. 210; 56 Am. Dec. 650.

<sup>7</sup> *Albright v. Payne*, 43 Ohio St. 8; *Martin v. Gleason*, 139 Mass. 183.

<sup>8</sup> *Stephenson v. Doe*, 8 Blackf. 508; 46 Am. Dec. 490.

<sup>9</sup> *State v. Yost*, 97 N. C. 477; 2 Am. St. Rep. 305.

the statute and its phraseology concur in showing that the authority is essentially discretionary, no absolute duty is imposed.<sup>1</sup> A statute declaring a thing void is often to be construed as making it merely voidable at the instance of the party.<sup>2</sup>

**§ 3775. Statutes Adopted from Other States.**—When a statute has received a known and authoritative judicial construction in another state, and is substantially re-enacted, the legislature is presumed to adopt such construction.<sup>3</sup> And when the legislature re-enacts a law without change or amendment, it is deemed to adopt the construction placed upon it by the courts.<sup>4</sup> Where words in a statute have acquired, through judicial interpretation, a well-understood legislative meaning, they will, when found in a subsequent act, be presumed to be used in the same sense, unless a contrary intention appears from the act.<sup>5</sup> But the rule that where a statute has received a judicial construction in another state, that construction will be followed in the courts of a state which has copied it, is subject to the limitation that the decision of the former state cannot be presumed to be known to the legislature of the latter state antecedent to its official publication.<sup>6</sup> So where such construction is clearly erroneous, harsh, and oppressive, or where it is inconsistent with the spirit and policy of the laws of the state borrowing the statute, the courts of the latter may decline to follow it. The con-

<sup>1</sup> *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681.

<sup>2</sup> *Allen v. Huntington*, 2 Aiken, 249; 16 Am. Dec. 702.

<sup>3</sup> *Woolsey v. Cade*, 54 Ala. 378; 25 Am. Rep. 711; *Myrick v. Hasey*, 27 Me. 9; 46 Am. Dec. 583; *Ballance v. Rankin*, 12 Ill. 420; 54 Am. Dec. 412; *Rigg v. Wilton*, 13 Ill. 15; 54 Am. Dec. 419; *American Print Works v. Lawrence*, 23 N. J. L. 590; 57 Am. Dec. 420; *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; 8 Am. St. Rep. 643. And the same is true of a statute

adopted from England: *Doswell v. Buchanan's Ex'rs*, 3 Leigh, 365; 23 Am. Dec. 280; *Munson v. Hallowell*, 26 Tex. 475; 84 Am. Dec. 582; *Kirkpatrick v. Gibson*, 2 Brock. 388; *Pennock v. Dialogue*, 2 Pet. 1; *Kennedy v. Kennedy*, 2 Ala. 571; *Tyler v. Tyler*, 19 Ill. 151; *Adams v. Field*, 21 Vt. 256.

<sup>4</sup> *Indiana etc. R. R. Co. v. Guard*, 24 Ind. 222; 87 Am. Dec. 327.

<sup>5</sup> *The Abbotsford*, 98 U. S. 440.

<sup>6</sup> *Hunter v. Truckee Lodge*, 14 Nev. 25.

struction of a statute of a court of the state where it is enacted should be followed in the courts of other states.<sup>1</sup>

**§ 3776. Statutes Valid in Part and Void in Part.**—A statute may be valid in part and invalid in part.<sup>2</sup> An act may be in part beyond legislative authority, and without it for the residue; and if it is capable of being administered in the parts which are within the power of the legislature to enact, it will be so far valid.<sup>3</sup> That part of a statute is unconstitutional will not make the remainder void, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the act otherwise than as a whole. The valid and invalid provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the one may stand, though the other fall.<sup>4</sup>

<sup>1</sup> Case *v. Cushman*, 3 Watts & S. 544; 39 Am. Dec. 47.

<sup>2</sup> State *v. Clark*, 15 R. I. 383; Keokuk *v. Keokuk etc. Packet Co.*, 45 Iowa, 196; the court saying: "Statutes which are partly in conflict with the constitution will be held void no further than as to those parts which are unconstitutional; provisions which are within the limits of legislative authority will be enforced: *Santo v. State*, 2 Iowa, 167; 63 Am. Dec. 487; *Walters v. Steamboat Mollie Dozier*, 24 Iowa, 192; 95 Am. Dec. 722; *City of Des Moines v. Layman*, 21 Iowa, 153; *Childs v. Shower*, 18 Iowa, 261; *High School v. County of Clayton*, 9 Iowa, 175; *County of Louisa v. Davison*, 8 Iowa, 517; *Dist. Tp. of Dubuque v. Dubuque*, 7 Iowa, 262; *Duncan v. Sigler*, Morris, 39. City ordinances, like statutes, will be upheld to the extent of provisions authorizing the exercise of power clearly within the scope of the municipal authority, while other provisions, in excess of such authority, will be held void: *Dillon on Municipal Corporations*, sec. 354, and notes. But if

the parts of the statute or ordinance be necessarily connected and dependent, the whole must fall with the void part. The rule must be extended to the case of a statute or ordinance authorizing two or more acts, one of which is within and the other without legislative authority. The first act, when done under such statute or ordinance, will be valid, the second void."

<sup>3</sup> *Town of East Kingston v. Towle*, 48 N. H. 57; 97 Am. Dec. 575; *Bank of Hamilton v. Dudley*, 2 Pet. 526; *Duer v. Small*, 4 Blatchf. 263; *Mills v. Sargent*, 36 Cal. 379; *Nelson v. People*, 33 Ill. 390; *McCulloch v. State*, 11 Ind. 424; *Santo v. State*, 2 Iowa, 165; 63 Am. Dec. 487; *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381; *Matter of De Vaucene*, 31 How. Pr. 289; *State v. Copeland*, 3 R. I. 33; *State v. Snow*, 3 R. I. 62.

<sup>4</sup> *Com. v. Hitchings*, 5 Gray, 482; *State v. Clark*, 54 Mo. 17; 14 Am. Rep. 471; *Hagerstown v. Dechert*, 32 Md. 369; *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *People v. Hall*, 8 Col. 485.

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If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.<sup>1</sup> But if the intent of the act is to accomplish a single purpose only, and some provisions are void, the whole must fail, unless sufficient remains to effect the object without the invalid portion. If they are so mutually connected with and dependent on each other as conditions, considerations, or compensations as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions that are thus dependent, conditional, or connected must fall with them.<sup>2</sup> Where the main object of an act fails because of unconstitutionality, and all its provisions are connected as parts of a single scheme, the statute must be treated as wholly void.<sup>3</sup>

§ 3777. Remedies under Statutes.—When a statute has created a new right, and has also prescribed a remedy for the enjoyment of the right, he who claims the right must pursue the statute remedy.<sup>4</sup> So where a summary

<sup>1</sup> Board of Supervisors v. Stanley, 105 U. S. 305; Muldron v. Levi, 25 Neb. 457; People v. Perry, 79 Cal. 106; Berry v. R. R. Co., 41 Md. 446; 20 Am. Rep. 67; In re Groff, 21 Neb. 647; Mobile etc. R. R. Co. v. State, 29 Ala. 573; People v. Hill, 7 Cal. 97; Lathrop v. Mills, 19 Cal. 513; Robinson v. Bidwell, 22 Cal. 379; Campbell v. Union Bank, 7 Miss. 625; Exchange Bank v. Hinds, 3 Ohio St. 1; State v. Commissioners, 5 Ohio St. 497; Harris v. Niagara County Supervisors, 33 Hun, 279; Tripp v. Overocker, 7 Col. 72; Gunnison County Comm'rs v. Owen, 7 Col. 467; People v. Jobs, 7 Col. 475.

<sup>2</sup> State v. Commissioners, 5 Ohio, N. S., 497; State v. Dousman, 28 Wis. 541;

Campau v. Detroit, 14 Mich. 276; Willard v. People, 5 Ill. 461; Commonwealth v. Potts, 79 Pa. St. 164; Baker v. Braman, 6 Hill, 47; 40 Am. Dec. 387; Meyer v. Berlandi, 39 Minn. 438; 12 Am. St. Rep. 663; State v. Deal, 24 Fla. 293; 12 Am. St. Rep. 204; O'Brien v. Kreuz, 36 Minn. 136; Burkholz v. State, 16 Lea, 71; State v. Pugh, 43 Ohio St. 98.

<sup>3</sup> Jones v. Jones, 104 N. Y. 234.

<sup>4</sup> Russell v. Turnpike Co., 13 Bush, 307; Lang v. Scott, 1 Blackf. 405; 12 Am. Dec. 257; App v. Dreisbach, 2 Rawle, 287; 21 Am. Dec. 447; Wetmore v. Tracy, 14 Wend. 250; 28 Am. Dec. 525; Basett v. Carleton, 32 Me. 553; 54 Am. Dec. 605; People v. Craycroft, 2 Cal. 243; 56 Am. Dec. 331;

remedy is given by statute, those who wish to avail themselves of it must be confined strictly to its provisions, and can take nothing by intendment.<sup>1</sup> Where a statute, to attain a particular object, prescribes the mode of proceeding to enforce it, that mode must be pursued; if no mode is prescribed, that of the forum must be resorted to to supply the deficiency; but in such case, if the statute cannot be enforced under the form of proceeding in the court applied to, it has no jurisdiction; and if there is no court which can supply the deficiency, the statute is a nullity.<sup>2</sup> If full redress has been provided by statute, equity is ousted of its jurisdiction in such cases as partitions, the establishment of lost papers, the foreclosure of mortgages, the settlement of accounts, etc., notwithstanding the English rule adopted here giving equity exclusive or concurrent jurisdiction of such cases.<sup>3</sup> Where a statute gives penal damages to a party injured in a case where he had before a remedy at common law, if he claim such damages, he must do so by a reference to the statute.<sup>4</sup> On the other hand, where there is a pre-existing right, and a statute gives a new remedy, or inflicts a new penalty, they are cumulative.<sup>5</sup> But this rule does not apply to acts done by express authority of the statute for a public purpose.<sup>6</sup> A party injured is confined to his remedy

*Andover Co. v. Gould*, 6 Mass. 40; 4 Am. Dec. 80; *Franklin Glass Co. v. White*, 14 Mass. 286; *Sturgeon v. State*, 1 Blackf. 39; *Journey v. State*, 1 Mo. 428; *Riddick v. Governor*, 1 Mo. 147; *State v. Cole*, 2 McCord, 117; *Bank v. Darden*, 18 Ga. 318; *Laverty v. Chamberlain*, 7 Blackf. 556; *Ham v. The Hamburg*, 2 Iowa, 460; *Manning v. Merritt*, 1 Clarke, 98.

<sup>1</sup> *Logwood v. Huntsville*, Minor, 23; *Childress v. McGehee*, Minor, 131; *Crawford v. State*, Minor, 143; *Yancy v. Hankins*, Minor, 171; *Hale v. Burton*, Dud. (Ga.) 105.

<sup>2</sup> *Hughes's Case*, 1 Bland. 46.

<sup>3</sup> *Osborn v. Ordinary of Harris*

*County*, 17 Ga. 123; 63 Am. Dec. 230.

<sup>4</sup> *Palmer v. York Bank*, 18 Me. 166; 36 Am. Dec. 710.

<sup>5</sup> *Lang v. Scott*, 1 Blackf. 405; 12 Am. Dec. 257; *Crittenden v. Wilson*, 5 Cow. 165; 15 Am. Dec. 462; *Calking v. Baldwin*, 4 Wend. 66; 15 Am. Dec. 168; *Turnpike Co. v. ...* 15 Wend. 268; *Methodist Church v. Remington*, 1 Watts, 218; 3 Am. Dec. 61; *Dygert v. Schenck*, 25 Wend. 445; 35 Am. Dec. 575; *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59; *People v. Craycroft*, 2 Cal. 243; 56 Am. Dec. 331.

<sup>6</sup> *Calking v. Baldwin*, 4 Wend. 667; 21 Am. Dec. 168.

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under a statute only in cases clearly within the provisions of the statute; for any other case, his remedy remains as at common law.<sup>1</sup> A change in the common law is not presumed from the enactment of a statute upon the same subject, unless the statute is explicit and clear in that direction.<sup>2</sup> A statute giving a new remedy does not alter the nature of the wrong complained of; if a tort before such statute was enacted, it remains a tort afterwards.<sup>3</sup>

§ 3778. **Amending or Repealing Statutes.** — All statutes are in legal contemplation perpetual, unless limited by their terms, which means simply that they are of force until duly repealed or amended.<sup>4</sup> A statute, when amended by a subsequent statute, is as though the amendment took the place of the original statute.<sup>5</sup> Where it is sought to amend a statute which has been repealed by implication, the fact that parts of the statute are copied into the amendment does not re-enact them.<sup>6</sup> Where an amendatory act first declares what the amendments shall be, and then makes a mistake in reciting the law as it will read when amended, such mistake will not vitiate the act.<sup>7</sup> In some states a bill introduced into the legislature cannot be so amended as to change its original purpose.<sup>8</sup> The constitutions of several states<sup>9</sup> provide that "no law shall be revised, altered, or amended by reference to its title only; but the act revised, and the section or sections of the act altered or amended, shall be re-enacted and published at length." Under this provision it is held that an act to authorize proceedings under another act, which simply refers for its rule of action to a third, the provisions of the latter being left unchanged for

<sup>1</sup> *Troy v. R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177.

<sup>2</sup> *People v. Palmer*, 109 N. Y. 110; 4 Am. St. Rep. 423.

<sup>3</sup> *Wilson v. Myers*, 4 Hawks, 73; 15 Am. Dec. 510.

<sup>4</sup> *Wellington et al., Petitioners*, 16 Pick. 87; 26 Am. Dec. 632.

<sup>5</sup> *Kamerick v. Castleman*, 21 Mo. App. 587.

<sup>6</sup> *Stingle v. Nevel*, 9 Or. 62.

<sup>7</sup> *Custin v. Viroqua*, 67 Wis. 314.

<sup>8</sup> *Creation of New Counties*, 9 Col. 624.

<sup>9</sup> Missouri, Michigan, Illinois, Arkansas, Kansas, and Tennessee, among others.



their original purposes, but modified by the act in question for its own purposes, is void.<sup>1</sup> An amendatory statute is not broader than its title, where the title gives notice to whomsoever reads that legislation is impending which, by amending the act referred to in the title of the amending act, may touch upon the subject-matter of any of the provisions of the act amended.<sup>2</sup> The clause of the constitution which forbids the amendment of a statute by a mere reference to its title is prohibitory, while the clause which requires that the section as amended shall be published and set forth at full length is mandatory.<sup>3</sup> A constitutional provision that "all acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended," does not apply to acts which, by their positive provisions, operate a repeal of previous acts by necessary implication.<sup>4</sup> No act or part of an act repealed is, by the statutes of most of the states, deemed to be revived by the repeal of the repealing act, unless so expressed.<sup>5</sup> Re-enacting into a code the general provisions of prior laws does not repeal the exceptions to which these general provisions were subject.<sup>6</sup> A recital in a statute that a former statute was repealed or superseded by subsequent acts is not conclusive as to such repeal or supersedure. Whether a statute was so repealed is a judicial, not a legislative, question.<sup>7</sup> A statute cannot be repealed by mere disuser.<sup>8</sup> Thus a statute im-

<sup>1</sup> *Mok v. Detroit Ass'n*, 30 Mich. 511.

<sup>2</sup> *People v. Whitlock*, 92 N. Y. 191.

<sup>3</sup> *Bush v. City of Indianapolis*, 120 Ind. 476.

<sup>4</sup> *State v. Gaines*, 4 Lea, 306; *Home Ins. Co. v. Taxing Dist.*, 4 Lea, 644; *Cooley on Constitutional Law*, 152; citing *Spencer v. State*, 5 Ind. 41; *Branham v. Lange*, 16 Ind. 497; *People v. Mahaney*, 13 Mich. 481; *Lehman v. McBride*, 15 Ohio, N. S., 593.

<sup>5</sup> *Stimson's American Statute Law*, sec. 1043; *Butler v. Russell*, 3 Cliff.

251. The general rule, independent of any statutory change in it, is, that the repeal of a repealing statute *ipso facto* revives the original statute: *Sedgwick on Construction of Statutes*, 2d ed., Pomeroy's notes, p. 108, note a, and p. 116; 1 Bla. Com., Sharswood's ed., p. 90, note 35; 1 Kent's Com., 7th ed., p. 516.

<sup>6</sup> *Miller v. Mercier*, 3 Mart., N. S., 236; 15 Am. Dec. 156.

<sup>7</sup> *United States v. Claffin*, 97 U. S. 546.

<sup>8</sup> *Pearson v. International Distillery*, 72 Iowa, 348.

posing a penalty on the sale of fireworks without special license was held not repealed by statutes imposing taxes for revenue purposes on the manufacturers and venders of fireworks.<sup>1</sup> A local and special statute which adopts, by reference, provisions relating to procedure from an existing general law is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted.<sup>2</sup> A statute cannot be modified or superseded by one of earlier date, or perhaps by one of the same date which precedes it in the authorized publication of the laws.<sup>3</sup> That one act is published a day later than another does not imply a repeal, if both acts, construed together, can stand.<sup>4</sup> Where a repealing statute contains a special saving clause, the general saving clause of the general statutes has no application.<sup>5</sup> A saving clause respecting persons out of the state contained in a statute in relation to wills is not repealed by an act repealing a similar saving clause contained in an act respecting limitations of actions.<sup>6</sup> In an unconstitutional statute a clause attempting to repeal a former statute, or all conflicting statutes, is inoperative.<sup>7</sup> An unconstitutional amendment cannot by mere implication repeal the original act.<sup>8</sup>

**§ 3779. Inconsistent and Repugnant Statutes.**—The repeal of statutes by implication is not favored by the courts.<sup>9</sup> Therefore a former statute will not be held to be

<sup>1</sup> *Homer v. Commonwealth*, 106 Pa. St. 221; 51 Am. Rep. 521.

<sup>2</sup> *Schwenke v. R. R. Co.*, 7 Col. 512.

<sup>3</sup> *Thomas v. Collins*, 58 Mich. 64.

<sup>4</sup> *In re Hall*, 38 Kan. 670.

<sup>5</sup> *State v. Showers*, 34 Kan. 269.

<sup>6</sup> *Schultz v. Schultz*, 10 Gratt. 358; 60 Am. Dec. 335.

<sup>7</sup> *State v. Hallock*, 14 Nev. 202; 33 Am. Rep. 559; *State v. Barnes*, 22 Fla. 8.

<sup>8</sup> *Ex parte Davis*, 21 Fed. Rep. 396.

<sup>9</sup> *People v. Quigg*, 59 N. Y. 85, 88; *People v. Palmer*, 52 N. Y. 82; *Hogan*

*v. Guigon*, 29 Gratt. 709; *State v. Severance*, 55 Mo. 378; *W. W. Co. v. Burkhart*, 41 Ind. 364; *McCool v. Smith*, 1 Black, 459; *Naylor v. Field*, 29 N. J. L. 287; *State v. Berry*, 12 Iowa, 58; *United States v. Twenty-five Cases of Cloth*, Crabbe, 356; *People v. R. R. Co.*, 28 Cal. 254; *Blain v. Bailey*, 25 Ind. 165; *Conner v. Southern etc. Co.*, 37 Ga. 397; *People v. Burr*, 44 Ill. 198; *McDonough v. Campbell*, 42 Ill. 490; *Hume v. Gossett*, 43 Ill. 297; *Lichtenstein v. State*, 5 Ind. 162; *Cassey v. Harned*, 5 Iowa, 1;

repealed by a later one, except by express words or strong and necessary implication, or unless there is an irreconcilable repugnance between them.<sup>1</sup> And they will be construed, if possible, so as both may stand.<sup>2</sup> But it is a well-settled rule of construction that when two statutes are irreconcilably repugnant, the prior must yield to the subsequent.<sup>3</sup> So where the two statutes are plainly inconsistent, and cannot be reconciled by any judicial construction, the later act must be presumed to have been intended to take the place of and repeal the earlier one, so far as they are inconsistent.<sup>4</sup> The common law is

*Loker v. Brookline*, 13 Pick. 343; *Haynes v. Jenks*, 2 Pick. 172; *Buckingham v. Steubenville*, 10 Ohio St. 25; *Hockaday v. Wilson*, 1 Head, 113; *Furman v. Nichols*, 3 Cold. 432; *Snell v. Bridgewater etc. Co.*, 24 Pick. 296; *Goddard v. Boston*, 20 Pick. 407; *Bowen v. Lease*, 5 Hill, 221; *Wyman v. Campbell*, 6 Port. 219; 31 Am. Dec. 677.

<sup>1</sup> *Wilson v. Spencer*, 1 Rand. 76; 10 Am. Dec. 491; *Saul v. His Creditors*, 5 Martin, N. S., 569; 16 Am. Dec. 212; *McCartee v. Orphan Asylum*, 9 Cow. 437; 18 Am. Dec. 516; *People v. Guild*, 4 Denio, 522; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210; *Warder v. Arell*, 2 Wash. (Va.) 282; 1 Am. Dec. 488; *Wyman v. Campbell*, 6 Port. 219; 31 Am. Dec. 677; *Neill v. Kease*, 5 Tex. 23; 51 Am. Dec. 746; *Western Sav. Soc. v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730; *Ament v. Humphrey*, 3 G. Greene, 255; *Attorney-General v. Brown*, 1 Wis. 513; *Bruce v. Schuyler*, 9 Ill. 221; 46 Am. Dec. 447; *Brown v. Miller*, 4 J. J. Marsh. 474; *Planters' Bank v. State*, 14 Miss. 628; *White v. Johnson*, 23 Miss. 68; *State v. Macon County*, 41 Mo. 453; *Williams v. Potter*, 2 Barb. 316; *Street v. Commonwealth*, 6 Watts & S. 209; *Shinn v. Commonwealth*, 3 Grant. Cas. 205; *McLaughlin v. Hoover*, 1 Or. 31; *Nixon v. Piffet*, 16 La. Ann. 379; *De Pauw v. New Albany*, 22 Ind. 204; *Mullen v. People*, 31 Ill. 444; *Elliott v. Lochname*, 1 Kan. 126.

<sup>2</sup> *Fowler v. Perkins*, 77 Ill. 271; *Iverson v. State*, 52 Ala. 170.

<sup>3</sup> *Sedgwick on Construction of Statutes*, 2d ed., 104; *Ex parte Trapnall*, 6 Ark. 9; 4<sup>th</sup> Am. Dec. 676; *Rawls v. Kennedy*, 2<sup>nd</sup> Ala. 240; 58 Am. Dec. 289; *Davis v. State*, 7 Md. 151; 61 Am. Dec. 331; *Edgar v. Greer*, 8 Iowa, 394; 74 Am. Dec. 316; *Brangan v. Dulaney*, 8 Col. 408; *State v. Miskimons*, 2 Ind. 440; *Moore v. Moss*, 14 Ill. 106; *Ham v. State*, 7 Blackf. 314; *Casey v. Harned*, 5 Iowa, 1; *State v. Smith*, 7 Iowa, 244.

<sup>4</sup> *Perrine v. Rice*, 80 Cal. 266; *United States v. Irwin*, 5 McLean, 178; *Morlot v. Lawrence*, 1 Blatchf. 608; *Johnson v. Byrd*, 1 Hemp. 434; *Kinney v. Mallory*, 3 Ala. 626; *Bowen v. Lease*, 5 Hill, 221; *George v. Skeates*, 19 Ala. 738; *McQuilkin v. Doe*, 8 Blackf. 581; *Board of Commissioners v. Potts*, 10 Ind. 286; *Johnston's Estate*, 33 Pa. St. 511; *Adams v. Ashby*, 2 Bibb, 96; *Moore v. Vance*, 1 Ohio, 10; *West v. Pine*, 4 Wash. C. C. 691; *Morrison v. Barksdale*, Harp. 101. But see *State v. Taylor*, 2 McCord, 483. "A subsequent statute which is clearly repugnant to a prior one necessarily repeals the former, although it does not do so in terms; and even if the subsequent statute be not repugnant in all its provisions to a prior one, yet if the latter statute was clearly intended to prescribe the only rule which should govern the case provided for, it repeals the original act: *Sedgwick on Statutory and Constitutional Law*, 124; *Rochester v. Barnes*, 26 Barb. 657, and cases cited. A subsequent statute making a different provision on

repealed by implication when the whole subject is revised by a statute apparently intended to prescribe the only rules applicable thereto.<sup>1</sup> But if the latter part of a statute is repugnant to a former part, the latter part shall stand, and shall work a repeal of the former to the extent of that repugnancy.<sup>2</sup> A second act will operate as a repeal of a former act only to the extent of repugnancy between them, and not merely because it may repeat some provisions of the first act and omit others, or add new provisions, unless it plainly appears that it was intended as a substitute for the first act. When an act expresses a repeal of former acts only so far as they are inconsistent with its provisions, such provision expresses and limits the extent of the repeal.<sup>3</sup> A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, will operate to repeal the former statute, although no express words to that effect are used.<sup>4</sup> Where a statute covers the entire subject-matter of a prior one, and embraces new and different provisions plainly indicating that it was intended as a substitute therefor, it may operate as a repeal thereof

the same subject is not to be construed as an explanatory act, but an implied repeal of the former: *Dash v. Van Kleeck*, 7 Johns. 477; 5 Am. Dec. 291; *Columbian Mfg. Co. v. Vanderpool*, 4 Cow. 556. Inconsistent provisions incompatible with each other are thus repealed, leaving the former law in full force and effect in all other respects: *Livingston v. Harris*, 11 Wend. 329; *Harrington v. Trustees of Rochester*, 10 Wend. 547; *Excelsior Pet. Co. v. Embury*, 67 Barb. 264.

<sup>1</sup> *State v. Wilson*, 43 N. H. 415; 82 Am. Dec. 163. The repeal of a statute does not operate as a revival of the common law: *State v. Slaughter*, 70 Mo. 484.

<sup>2</sup> *Sedgwick on Statutory and Constitutional Law*, 107; *Comm'rs v. Carp River Iron Co.*, 54 Mich. 168.

<sup>3</sup> *Bank of British N. A. v. Cahn*, 79 Cal. 463.

<sup>4</sup> *Bartlett v. King*, 12 Mass. 530; 7

Am. Dec. 99; *Goodenow v. Buttrick*, 7 Mass. 140; *Ashley, Appellant*, 4 Pick. 21, 23; *Commonwealth v. Cooley*, 10 Pick. 39; *Pulaski County v. Downer*, 10 Ark. 588; *State v. Conkling*, 19 Cal. 501; *Illinois etc. Canal v. Chicago*, 14 Ill. 334; *Wakefield v. Phelps*, 37 N. H. 295; *Farr v. Brackett*, 30 Vt. 344; *Giddings v. Cox*, 31 Vt. 607; *Bracken v. Smith*, 39 N. J. Eq. 169; *State v. Rogers*, 10 Nev. 319; *Norris v. Crocker*, 13 How. 429; *United States v. Tynen*, 11 Wall. 95; *United States v. Barr*, 4 Saw. 256; *Dowdell v. State*, 58 Ind. 333; *Hayes v. State*, 55 Ind. 99; *Longlois v. Longlois*, 48 Ind. 60; *Keese v. Denver*, 10 Col. 112. A repealing act re-enacted the provisions of the old statute in its very language in all respects, except in reducing the imprisonment. Held, that it would be considered simply as a continuation of the old statute: *State v. Wish*, 15 Neb. 448.

without any express declaration to that effect.<sup>1</sup> And though a subsequent statute be not repugnant in its provisions to a former one, yet if it was clearly intended to prescribe the only rules which should govern, it repeals the prior statute.<sup>2</sup> Statutes prohibiting the same offenses and injuries as former acts, but imposing different penalties or giving different remedies, repeal so far such former acts.<sup>3</sup> A general statute does not, as a general rule, repeal a local enactment by mere implication.<sup>4</sup>

**§ 3780. Effect of Amendment or Repeal of Statute. —**

If a right of action not existing at common law is given by statute, and the statute is repealed without any saving of pending actions, the repeal takes away the right of action in such pending causes, and the jurisdiction of the court to go on to judgment is ousted. The legislature has the power to take away by statute a right given by statute, unless rights have become vested under the law before its repeal.<sup>5</sup> The effect of the repeal of a statute "to obliterate the statute repealed as completely from the records of Parliament as if it had never passed, and it must be considered as a law that never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law."<sup>6</sup> Pending judicial proceedings based upon a statute cannot proceed after its repeal.<sup>7</sup> This rule holds true until the proceedings have reached a final judgment in the court of last resort, for this court, when it comes to pronounce its decision, conforms it to the law then existing, and may

<sup>1</sup> *State v. Studdt*, 31 Kan. 245.

<sup>2</sup> *Rogers v. Watrous*, 8 Tex. 62; 58 Am. Dec. 100.

<sup>3</sup> *Fraser v. Alexander*, 75 Cal. 147.

<sup>4</sup> *Evans v. Phillipi*, 117 Pa. St. 226; 2 Am. St. Rep. 655.

<sup>5</sup> *Board of Commissioners v. Ruckman*, 57 Ind. 96; *North Canal Street Road*, 10 Watts, 331; 36 Am. Dec. 185.

<sup>6</sup> *Ex parte McCardle*, 7 Wall. 514;

*Key v. Goodwin*, 4 Moore & P. 341;

*Thorne v. San Francisco*, 4 Cal. 165;

*Van Inwagen v. Chicago*, 61 Ill. 31;

*Musgrove v. R. R. Co.*, 50 Miss. 677;

*Town of Belvidere v. R. R. Co.*, 34 N. J. L. 193.

<sup>7</sup> *Gilliland v. Schnyler*, 9 Kan. 569;

*Wade v. St. Mary's School*, 43 Md. 178; *McMinn v. Bliss*, 31 Cal. 122;

*State v. Daly*, 29 Conn. 272.

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therefore reverse a judgment which was correct when pronounced in the subordinate tribunal whence the appeal was taken, if it appears that, pending the appeal, a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal.<sup>1</sup> The unconditional repeal of a penal statute abrogates all rights which may have arisen under it.<sup>2</sup> The repeal of a statute conferring jurisdiction takes away all right to proceed under the repealed statute, even in suits pending at the time of the repeal, unless they are saved by a clause in the repealing statute.<sup>3</sup> A statute repealing all divorce laws of the state ousts the court of jurisdiction in an action for divorce pending at the passage of the statute.<sup>4</sup> The repeal of a statute giving a lien to laborers pending the action destroys the right of action where there is no saving clause in the repealing statute; and this notwithstanding that an attachment had been levied by virtue of the prior statute.<sup>5</sup> The repeal of a statute under which a penalty is assessed remits the penalty so that it cannot afterwards be collected.<sup>6</sup> The repeal of the local-option law pending an appeal from a conviction under it avoids the conviction.<sup>7</sup> But vested rights are not destroyed by a repeal of the law under which they were acquired.<sup>8</sup> Rights

<sup>1</sup> *Hartung v. People*, 22 N. Y. 95; *Hubbard v. State*, 2 Tex. App. 506; *Montgomery v. State*, 2 Tex. App. 618; *Sheppard v. State*, 1 Tex. App. 522; *Atwell v. Grant*, 11 Md. 104; *Mayor of Annapolis v. Maryland*, 30 Md. 112.

<sup>2</sup> *Gregory v. German Bank of Denver*, 3 Col. 332; 25 Am. Rep. 760.

<sup>3</sup> *Smith v. Arapahoe District Court*, 4 Col. 235. After the supreme court had remanded a case a statute changed the law. Held, that the relief sought could not be had in that case; that plaintiff must sue *de novo*: *Connecticut and Passumpsic Rivers R. R. Co. v. St. Johnsbury*, 59 Vt. 320.

<sup>4</sup> *Grant v. Grant*, 12 S. C. 29; 32 Am. Rep. 506.

<sup>5</sup> *Bangor v. Goding*, 35 Me. 73; 56 Am. Dec. 688.

<sup>6</sup> *Snell v. Campbell*, 24 Fed. Rep. 880.

<sup>7</sup> *Fitze v. State*, 13 Tex. App. 372; *Pinckard v. State*, 13 Tex. App. 373; *Wells v. State*, 24 Tex. App. 230.

<sup>8</sup> *Dixon v. Dixon*, 4 La. 188; 23 Am. Dec. 478; *Bowen v. Striker*, 100 Ind. 45; *Davis v. Minor*, 2 Miss. 183; 28 Am. Dec. 325; *Rice v. R. R. Co.*, 1 Black, 358; *Mitchell v. Dozgett*, 1 Fla. 356; *James v. Dubois*, 16 N. J. L. 285; *Ex parte Graham*, 13 Rich. 277; *Den v. Robinson*, 5 N. J. L. 689; *Naught v. O'Neal*, 1 Ill. App. 29; *McMeichen v. Mayor etc.*, 2 Har. & J. 41; *Taylor v. Rushing*, 2 Stew. 160. During the existence of a statute making it unlawful for a railroad company to charge for the carriage of freight higher rates than those prescribed in the act, plaintiff was compelled by defendant to pay

which have become perfect under a statute may be enforced, notwithstanding its subsequent appeal.<sup>1</sup> The mere repeal of a statute or ordinance, after issuance of a license thereunder, and before the expiration of such license, does not, in general, affect the license.<sup>2</sup> By the statutes of most of the states, the repeal of a statute does not affect acts and proceedings previously had, or offenses done, or penalties incurred, or rights accrued prior to the repeal.<sup>3</sup> The repeal of a statute making an act illegal does not thereby render the act valid.<sup>4</sup>

§ 3781. **Revival of Statutes.**—The repeal of a repealing statute revives the original statute,<sup>5</sup> and so does the expiration of the repealing statute by its own limitation.<sup>6</sup> Provisions in an act are repealed on the re-enactment of the act in all its particulars, with the exception that the provision is omitted.<sup>7</sup> The repeal of a statute amending a former statute by making the same to read as set forth at length in the latter act does not work a revival of the first act, but both fall together.<sup>8</sup> Where a statute is repealed and re-enacted, with some changes at the same time, both statutes may be considered together in giving a construction to the latter, but the act repealed has no force, except so far as it is continued in force by saving clauses and exceptions.<sup>9</sup>

higher rates, and paid them under protest. Held, that the subsequent repeal of the statute would not prevent his recovering damages for the unlawful act: *Graham v. R. R. Co.*, 53 Wis. 473.

<sup>1</sup> *Sinking Fund Com. v. North. Bank*, 1 Met. (Ky.) 174; *Rice v. R. R. Co.*, 1 Black, 358; *Ex parte Graham*, 13 Rich. 277; *Streubel v. Milwaukee*, 13 Wis. 67; *Creighton v. Pragg*, 21 Cal. 115.

<sup>2</sup> *Davis v. State*, 2 Tex. App. 425.

<sup>3</sup> *Stimson's American Statute Law*, sec. 1042.

<sup>4</sup> *Roby v. West*, 4 N. H. 285; 17 Am. Dec. 423.

<sup>5</sup> *Collins v. Smith*, 6 Whart. 294; 36 Am. Dec. 229; *Janes v. Buzzard*, 1 Hemp. 250; *Harrison v. Walker*, 1 Ga. 32; *Doe v. Naylor*, 2 Blackf. 32; *Witkowski v. Witkowski*, 16 La. Ann.

232; *Tallamon v. Cardenas*, 14 La. Ann. 509; *Hastings v. Aiken*, 1 Gray, 163; *Commonwealth v. Churchill*, 2 Met. 118; *Commonwealth v. Mott*, 21 Pick. 492; *Directors of the Poor v. R. R. Co.*, 7 Watts & S. 236; *Janes v. Dubois*, 16 N. J. L. 285. *Contra*, *Milne v. Huber*, 3 McLean, 212; *Commercial Bank v. Chambers*, 16 Miss. 9; *Sullivan v. People*, 15 Ill. 233; *Smith v. Hoyt*, 14 Wis. 252; *Nazro v. Merchants' etc. Co.*, 14 Wis. 295.

<sup>6</sup> *Collins v. Smith*, 6 Whart. 294; 36 Am. Dec. 229.

<sup>7</sup> *Camley v. Stanfield*, 10 Tex. 546; 60 Am. Dec. 219.

<sup>8</sup> *People v. Supervisors*, 67 N. Y. 103; 23 Am. Rep. 94.

<sup>9</sup> *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559.

§ 3782. **Pleading Statutes.**—The provisions of public statute under which a party rests his right to recover need not be pleaded, unless the statute gives a cumulative remedy, in which event the pleader should show which remedy he intends to assert.<sup>1</sup> A declaration on a penal statute may be framed in the words of the statute.<sup>2</sup> It should allege that the facts charged are against the form of the statute upon which the action is based.<sup>3</sup> While the complaint will be strictly construed, it need not necessarily follow the language of the statute, if equivalent language is used.<sup>4</sup> In pleading an ordinance, it need not be set out in full, nor need the steps preliminary to its passage be detailed.<sup>5</sup> The allegation of precise time is not essential in general in actions on penal statutes. Proving the act to have been done on any day after the day first alleged, and before the commencement of the action, is sufficient.<sup>6</sup> Where, in *assumpsit* to recover back money illegally exacted, defendant sets up a statute legalizing certain collections, but it does not appear from the answer, or otherwise, that the money sued for falls within the statute, a defense is not shown.<sup>7</sup> Where, by an obvious clerical error, the wrong section of the statute is referred to in a complaint to recover a penalty for an encroachment on a highway, the complaint will be deemed sufficient.<sup>8</sup> Where, in pleading, it is necessary to set forth a statute of another state, it need not be set forth *in hæc verba*, if its substance sufficiently gives notice of the particular statute relied on.<sup>9</sup> A remedial or curative statute may shift the burden of proof, but this does not relieve the plaintiff from alleging in his petition so much as is necessary to show a right in him.<sup>10</sup>

<sup>1</sup> Chicago etc. R. R. Co. v. Dillon, 123 Ill. 570; 5 Am. St. Rep. 559.

<sup>2</sup> Gebhart v. Adams, 23 Ill. 397; 76 Am. Dec. 702.

<sup>3</sup> Palmer v. York Bank, 18 Me. 166; 36 Am. Dec. 710.

<sup>4</sup> Western Union Telegraph Co. v. Walker, 102 Ind. 599.

<sup>5</sup> Eyerman v. Payne, 28 Mo. App. 72.

<sup>6</sup> Gebhart v. Adams, 23 Ill. 397; 76 Am. Dec. 702.

<sup>7</sup> Liverpool etc. S. S. Co. v. Emigration Comm'rs, 113 U. S. 33.

<sup>8</sup> State v. Schwin, 65 Wis. 207.

<sup>9</sup> Louisville etc. R. R. Co. v. Shires, 108 Ill. 617.

<sup>10</sup> Maguiar v. Henry, 84 Ky. 1; 4 Am. St. Rep. 182.

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## PART III. — JUDICIAL POWER.

## CHAPTER CXCI.

## JUDICIAL POWER.

- § 3783. Legislative interference with judicial power.
- § 3784. Judicial interference with legislative or executive power.
- § 3785. Jurisdiction of federal courts.
- § 3786. Conflict between state and federal decisions.
- § 3787. Suits against states.
- § 3788. Due process of law.
- § 3789. Trial by jury.
- § 3790. Waiver of.
- § 3791. In what cases right to trial by jury exists.
- § 3792. In what cases jury trial not of right.
- § 3793. What statutes do and do not interfere with such right.
- § 3794. Imprisonment for debt.
- § 3795. Judgments of sister states.

**§ 3783. Legislative Interference with Judicial Power.**

—By the constitution of most of the states the powers of the government are distributed among three departments, —the legislative, executive, and judicial; and no person or persons belonging to one shall exercise any of the powers properly belonging to either of the others.<sup>1</sup> The legislature cannot authorize part of the judges who constitute a court to make an appointment which the constitution

<sup>1</sup> *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *Lane v. Dorman*, 3 Scam. 238; 36 Am. Dec. 543; *Parsons v. Water Co.*, 5 Cal. 43; 63 Am. Dec. 76; *Guy v. Hermance*, 5 Cal. 73; 63 Am. Dec. 85. Where the constitution in many instances devolves functions of one department upon another, it follows that the entire practical separation between the departments was not designed by the bill of rights, but that it was intended to ingraft this principle on the state system only so far as comported with free government as an

inhibition upon the exercise of one department of powers conferred on any other by the constitution: *Mayor etc. of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572. Only the judicial department of the state is clothed with power to investigate antagonistic claims of contending parties, and consequently an order of the executive correcting a grant after the rights of third parties have intervened is inoperative and void: *Sykes v. McRory*, 10 Ga. 465; 54 Am. Dec. 402.

provides shall be made by the court.<sup>1</sup> A law declaring the forfeiture of the salary of a judge for a failure to perform his duties is unconstitutional, as being an indirect attempt by the legislature to assume a control over the salaries of the judges.<sup>2</sup> So a statute is unconstitutional requiring judges of the supreme court to prepare *syllabi* of their decisions.<sup>3</sup> So is a statute requiring the supreme court to give the reasons for its decisions in writing.<sup>4</sup> The legislature cannot confer judicial power upon any person or tribunal, for all judicial power comes from the constitution, and is by it vested in courts and judges.<sup>5</sup> Any statutory change which transfers the power which belongs to a judge, to a jury, or to any other person or body, is unconstitutional.<sup>6</sup> Under this provision the legislature has no authority to pass a law in which it exercises judicial powers by determining the rights of parties.<sup>7</sup> So it is not in the power of the legislature to direct what shall be the decision of the supreme court in a particular case, or where the judges are equally divided;<sup>8</sup> nor to give the clerk of a court power to fix the amount of bail;<sup>9</sup> nor to give the master commissioners authority to grant writs of *habeas corpus*.<sup>10</sup> The legislature cannot deprive the supreme court of its revisory jurisdiction over all the other state tribunals.<sup>11</sup> It cannot impair the appellate or origi-

<sup>1</sup> Warner v. People, 2 Denio, 272; 43 Am. Dec. 740.

<sup>2</sup> Ex parte Tully, 4 Ark. 220; 38 Am. Dec. 33.

<sup>3</sup> Ex parte Griffiths, 118 Ind. 83; 10 Am. St. Rep. 107.

<sup>4</sup> Vaughn v. Harp, 49 Ark. 160; Houston v. Williams, 13 Cal. 24; 73 Am. Dec. 565.

<sup>5</sup> State v. Noble, 118 Ind. 350; 10 Am. St. Rep. 143. In Indiana it is held that a statute providing for the appointment of commissioners of the supreme court to assist that court in the performance of its duties, to hold office for the term of four years, and until their successors are elected and qualified, and to perform such work as the supreme court shall assign or

appoint, but in no event to be binding or conclusive upon the supreme court, is unconstitutional: State v. Noble, 118 Ind. 350; 10 Am. St. Rep. 143. But the contrary has been recently held in California: People v. Hayne, 83 Cal. 111.

<sup>6</sup> Brown v. Buck, 75 Mich. 274; 13 Am. St. Rep. 438.

<sup>7</sup> State v. Tappan, 29 Wis. 664; 9 Am. Rep. 622; Ervine's Appeal, 16 Pa. St. 256; 55 Am. Dec. 499.

<sup>8</sup> Perkins v. Scales, 4 Cent. L. J. 451; Baggs's Appeal, 43 Pa. St. 512; 82 Am. Dec. 583.

<sup>9</sup> Gregory v. State, 94 Ind. 384; 48 Am. Rep. 162.

<sup>10</sup> Shoultz v. McPheeters, 79 Ind. 373.

<sup>11</sup> Brown v. Buck, 75 Mich. 274; 13 Am. St. Rep. 438.

nal power of the supreme court given by the constitution; but it may regulate the mode in which appeals may be taken.<sup>1</sup> It has the power to reasonably regulate, but not to abolish, either directly or indirectly, the use of the writ of *certiorari*.<sup>2</sup> The legislature, in undertaking to regulate the rules of pleading, does not usurp judicial functions.<sup>3</sup> And it has power to regulate continuances and new trials.<sup>4</sup> But cannot prescribe a form of process at variance with that prescribed by the state constitution.<sup>5</sup> Where the constitution has conferred upon a court general jurisdiction in law and equity, the legislature is powerless to abridge or limit such jurisdiction, either with or without the consent of that court.<sup>6</sup>

A legislature cannot declare what the law is or has been, but only what it shall be.<sup>7</sup> An act is unconstitutional, as an assumption of judicial power, if it professes to decide between adverse claims of right, or if it declare that an existing right of property shall cease.<sup>8</sup> The legislature has no power by a special act directed to a certain case pending in the courts to direct or change the decision of that case;<sup>9</sup> nor to authorize the court of appeals to

<sup>1</sup> *Haight v. Gay*, 8 Cal. 297; 68 Am. Dec. 323; *In re Court of Appeals*, 9 Cal. 623; *Deck v. Gehrke*, 6 Cal. 666; *Dodd v. Lyon*, 49 N. J. L. 229. And see *Heath v. Circuit Judge*, 37 Mich. 372; *Hutkoff v. Demorest*, 103 N. Y. 377.

<sup>2</sup> *Green v. Jersey City*, 42 N. J. L. 118.

<sup>3</sup> *Whiting v. Townsend*, 57 Cal. 515.

<sup>4</sup> *Lillard v. State*, 17 Tex. App. 114.

<sup>5</sup> *Manville v. Battle Mountain Smelting Co.*, 17 Fed. Rep. 126.

<sup>6</sup> *De Hart v. Hatch*, 3 Hun. 375.

<sup>7</sup> *Ogden v. Blackledge*, 2 Cranch, 272.

<sup>8</sup> *Hoke v. Henderson*, 4 Dev. 1; 25 Am. Dec. 677.

<sup>9</sup> *Columbus R. R. Co. v. Comm'rs*, 65 Ind. 427; the court saying: "The legislature, in the passage of the statute above cited, invaded and exercised the functions of the judicial department of our state government, and for this reason the act must be held un-

constitutional and void. The general assembly made a special finding in and by the preamble to the act of matters of fact, and upon such finding adjudged and declared that the acts of the appellee were thereby legalized. It was not within the power of the general assembly to thus legalize the illegal and void proceedings of the commissioners of Grant County. The record shows that on the twenty-ninth day of November, 1876, the court below overruled the appellee's demurrer to the complaint. After the passage of the curative statute, the court sustained the demurrer. Here was the 'arbitrary will of the legislature,' controlling the action of the court before which the suit was pending. It was not within the power of the legislature, by a special act directed to a particular case then pending before the courts, to change the decision of that case."

reopen and rehear certain enumerated cases which had been previously decided by the court, and upon hearing thereof, to pass such judgments, orders, and decrees in the said cases as right and justice might require;<sup>1</sup> nor to grant a new trial;<sup>2</sup> nor to grant the right to appeal after the expiration of the time prescribed by law;<sup>3</sup> nor to legalize any judicial act that is void for want of jurisdiction,<sup>4</sup> or any proceeding what has been adjudged invalid by a decree of the highest court of the state;<sup>5</sup> nor to validate appeal bonds executed by attorneys without authority;<sup>6</sup> nor to pass a law expository of a former statute;<sup>7</sup> nor to pass an act obliging the courts to construe and apply a previous law in reference to past transactions, according to the legislative judgment;<sup>8</sup> nor an act authorizing the opening of an existing judgment;<sup>9</sup> nor an act validating a sale declared by the court to be invalid;<sup>10</sup> nor an act directing a certain deposition to be read in the trial of a cause then pending;<sup>11</sup> nor a special act authorizing guardians to sell lands of infant wards to pay debts of the latter's ancestor;<sup>12</sup> nor to prescribe a

<sup>1</sup> *Dorsey v. Dorsey*, 37 Md. 64; 11 Am. Rep. 528.

<sup>2</sup> *Merrill v. Sherburne*, 1 N. H. 199; 8 Am. Dec. 52; *De Chastellux v. Fairchild*, 15 Pa. St. 18; 53 Am. Dec. 570.

<sup>3</sup> *Staniford v. Barry*, 1 Aiken, 315; 15 Am. Dec. 691.

<sup>4</sup> *Maxwell v. Goetschius*, 40 N. J. L. 383; 29 Am. Rep. 242; *Pryor v. Downey*, 50 Cal. 388; 19 Am. Rep. 636.

<sup>5</sup> *Denny v. Mattoon*, 2 Allen, 361; 79 Am. Dec. 784.

<sup>6</sup> *Andrews v. Beane*, 15 R. I. 451.

<sup>7</sup> *Haley v. Philadelphia*, 68 Pa. St. 45; 8 Am. Rep. 153. In this case the supreme court of Pennsylvania had decided that, under the laws as to the opening of roads in Philadelphia, interest was to be allowed on an award from the date of the assessment. By an act of 1867, the legislature provided that the award should be enforced "in the same manner as provided by law in

the opening of roads in the city of Philadelphia." By an act of 1869, the legislature declared that the true intent and meaning of the act of 1867 were "that no interest shall be allowed on damages for ground taken, up to the time of their payment, on the issue of any warrant for their payment by the city of Philadelphia." In a case arising under the act of 1867, the court held that the act of 1869, an expository act, was destitute of force, because it was an act of judicial power.

<sup>8</sup> *Lincoln Building Association v. Graham*, 7 Neb. 173.

<sup>9</sup> *Ratliff v. Anderson*, 31 Gratt. 105; 31 Am. Rep. 716.

<sup>10</sup> *Menges v. Dentler*, 33 Pa. St. 495; 75 Am. Dec. 616.

<sup>11</sup> *Dupy v. Wickwire*, 1 D. Chip. 237; 6 Am. Dec. 729.

<sup>12</sup> *Jones v. Perry*, 10 Yerg. 59; 30 Am. Dec. 430. But see *Stewart v. Griffith*, 33 Mo. 13; 82 Am. Dec. 148.

rule of conclusive evidence.<sup>1</sup> Neither the legislature nor the executive branches can constitutionally assign to the judiciary any duties but such as are properly judicial, and to be performed in a judicial manner.<sup>2</sup> The legislature cannot impose on the courts such administrative duties as the appointment of surveyors to examine premises for the purpose of enabling the court to relevy a void drain tax.<sup>3</sup> So a statute is invalid directing the justices of a state court to appoint supervisors of election;<sup>4</sup> or a statute which provides that the salaries of the official reporters shall be fixed by the court;<sup>5</sup> or a statute which requires the supreme court to approve rules and forms of proceedings under the school laws;<sup>6</sup> or a statute which provides that one incompetent to testify may be required to testify by the court;<sup>7</sup> or a statute giving the courts power to supersede, revoke, or annul a municipal ordinance.<sup>8</sup>

ILLUSTRATIONS.—A statute authorized actions in which the judge was interested or prejudiced to be tried, by consent of the parties, before a counselor of the court. *Held*, unconstitutional: *Van Slyke v. Ins. Co.*, 39 Wis. 390; 20 Am. Rep. 50. A statute directed the assessor and county clerk, in making out the land-books for the year 1881, to disregard all changes made by the county court in the value of any tract of land made after July, 1876. *Held*, unconstitutional, as being judicial legislation: *Ex parte Low*, 24 W. Va. 620. A statute provided that the supreme court, in cases brought *in forma pauperis*, shall hear evidence upon the question of poverty, etc. *Held*, an

<sup>1</sup> Little Rock and Fort Scott R. R. Co. v. Payne, 33 Ark. 816; 34 Am. Rep. 55. While a legislature may not, by the mere machinery of rules of evidence, override and set at naught the restrictions of the constitution, or arbitrarily make conclusive evidence of a fact, anything which in the nature of things has no connection with that fact, nor reasonably tends to prove it, yet it may make that which, according to the ordinary rules of human experience, reasonably tends to prove a fact conclusive evidence of it: *State v. Woodward*, 2 Cent. L. J. 818.

<sup>2</sup> Hayburn's Case, 2 Dallas, 409; *United States v. Ferreria*, 13 How. 40; *In re Supervisors of Election*, 114 Mass. 247; 19 Am. Rep. 341; *Reply of the Judges*, 33 Conn. 586.

<sup>3</sup> *Houseman v. Montgomery*, 58 Mich. 364.

<sup>4</sup> *Case of Supervisors of Election*, 114 Mass. 247; 19 Am. Rep. 341.

<sup>5</sup> *Smith v. Strother*, 68 Cal. 194.

<sup>6</sup> *In re School Law Manual*, 63 N. H. 574.

<sup>7</sup> *Tillman v. Cocke*, 9 Baxt. 429.

<sup>8</sup> *Shephard v. Wheeling*, 30 W. Va. 479.

unconstitutional attempt to confer original jurisdiction on that court: *State v. Gannaway*, 16 Lea, 124. By the constitution of Kansas, the jurisdiction of the supreme court was restricted to certain original proceedings, and "such appellate jurisdiction as may be provided by law." The legislature conferred upon the supreme court the power to hear appeals from a board of county clerks in the appraisal of the property of railroads for purpose of taxation. *Held*, that the valuation of property for purposes of taxation is not such a "judicial power" as can be conferred upon the supreme court in the form of appellate jurisdiction: *Auditor of State v. R. R. Co.*, 6 Kan. 500; 7 Am. Rep. 575.

§ 3784. **Judicial Interference with Legislative or Executive Power.**—Where by the constitution the legislative, judicial, and executive departments are made distinct and independent, neither is responsible to the other for the performance of its duties, and neither can enforce such performance by the other. The courts have no right or authority to determine questions belonging properly to the legislative or executive department of the government.<sup>1</sup> The judiciary will not interfere with either of the other co-ordinate departments of the government in the legitimate exercise of their jurisdiction and powers, except to enforce mere ministerial acts required by law to be performed by some officer thereof, and not then, if the law leaves it discretionary with the officer or department.<sup>2</sup> Courts have no jurisdiction to issue a *mandamus* to compel a governor to perform an act required of him by law.<sup>3</sup>

<sup>1</sup> *Luther v. Borden*, 7 How. 1; *Georgia v. Stanton*, 6 Wall, 50; *People v. Pacheco*, 27 Cal. 175; *Kennett v. Chambers*, 14 How. 38; *Fall v. Sutter*, 21 Cal. 237; *State v. Gleason*, 12 Fla. 190; *United States v. Holliday*, 3 Wall. 407. When the performance of an act is by statute imposed upon the governor, it is imposed upon him, not as a private person, but in his official capacity: *Rice v. Austin*, 19 Minn. 103; 18 Am. Rep. 330.

<sup>2</sup> *Ex parte Echols*, 39 Ala. 698; 88 Am. Dec. 749. The clerk of a court, although a constitutional officer, is subject to orders of the court in regard

to the control of its records: *Houston v. Williams*, 13 Cal. 24; 73 Am. Dec. 565.

<sup>3</sup> *State v. Warmoth*, 22 La. Ann. 1; 2 Am. Rep. 712; *Mauran v. Smith*, 8 R. I. 192; 5 Am. Rep. 564, and note; *State v. Warmoth*, 24 La. Ann. 351; 13 Am. Rep. 126; *People v. Governor*, 29 Mich. 320; 18 Am. Rep. 89; *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *In re Dennett*, 32 Me. 508; 54 Am. Dec. 603; *Miles v. Bradford*, 22 Md. 170; 85 Am. Dec. 643. But see, *contra*, *Harpenden v. Haight*, 39 Cal. 189; 2 Am. Rep. 432. In several cases the power

So the courts cannot compel the governor to call a session of the legislature.<sup>1</sup> Where the governor has power to remove an officer for neglect of duty, he is the sole judge whether the duty has been neglected.<sup>2</sup> The courts may acquire jurisdiction of the governor by his consent, in

to issue the writ has been sustained: *Marbury v. Madison*, 1 Cranch, 137; *Tennessee etc. R. R. Co. v. Moore*, 36 Ala. 380; *Middleton v. Low*, 30 Cal. 596; *Harpending v. Haight*, 39 Cal. 189; 2 Am. Rep. 432. In a note to *Hawkins v. Governor*, 1 Ark. 570, in 33 Am. Dec. 360-368, it is said: "A number of able opinions have been rendered sustaining this view of this question. A court having jurisdiction to issue writs of *mandamus* may compel the governor to canvass a vote authorizing a change in the seat of government when the act submitting the question to a vote of the qualified electors required the governor to make such canvass, and the governor had refused and neglected so to do: *Chumero v. Potts*, 2 Mont. 242. *Mandamus* may be issued against the governor to compel him to draw a warrant on the treasury in favor of a state officer, it being shown that the officer is entitled to the amount claimed, and that the law requires such warrants to be signed by the governor: *Catten v. Ellis*, 7 Jones, 545. A writ of *mandamus* will lie to compel the governor to issue a proclamation setting forth that a company organized as a branch of the state bank was authorized to commence and carry on the business of banking, under a statute requiring him to make such proclamation when it is made to appear that the conditions imposed by the statute have been complied with: *State v. Chase*, 5 Ohio St. 528. So, also, he may be required to issue a commission to an officer upon the production by the latter of a certificate of election: *State v. Moffit*, 5 Ohio, 362. In *Magruder v. Swan*, 25 Md. 212, after a full review of the authorities touching this subject, it was held that the governor, like all other officers in the discharge of mere ministerial duties, is subject to the writ of *mandamus*, and to deny the writ to a suitor in such a case would be to acknowledge an authority higher than the law.

And this case was afterwards approved and followed in *Groome v. Gwinn*, 43 Md. 572. The same rule is declared in *Chamberlain v. Sibley*, 4 Minn. 312, in which case it is said, in effect, that when some official act not necessarily pertaining to the office of governor, and which might as well be performed by one officer as another, is directed by law to be done, then any person who clearly shows himself entitled to its performance, and has no other adequate remedy, may have a writ of *mandamus* against the officer, even though the law may have designated the chief executive of the state as a convenient officer to perform the duty. There is no tenable ground for distinguishing the governor from any other officer who may be designated to perform a mere ministerial act, otherwise a party might be entirely without a remedy. But the court, after announcing this general doctrine, proceeded to draw a distinction between a duty imposed by the constitution, and one imposed by a statute, and, proceeding upon the theory that the former were official duties, properly pertaining to the governor by virtue of his office, the writ was refused for want of jurisdiction. The foregoing comprise all the cases we have been able to discover in which the authority of the judiciary to issue the writ has been sustained. In Georgia, Illinois, Louisiana, Maine, Maryland, Michigan, Missouri, New Jersey, Rhode Island, Tennessee, and Texas, it is held that *mandamus* cannot be issued against the governor. The opinions upon which the decisions denying the power to issue the writ are based are replete with exhaustive logic drawn from the necessity of maintaining the independence of the separate branches of government entire."

<sup>1</sup> *Whiteman v. R. R. Co.*, 2 Harr. (Del.) 514; 33 Am. Dec. 411.

<sup>2</sup> *State v. Doherty*, 25 La. Ann. 119; 13 Am. Rep. 131.

which case the court will determine all questions submitted to it, and its adjudication will be binding.<sup>1</sup> The courts cannot interfere with the action of the legislature in including certain territory in a city on the ground that the territory will not be benefited. This is a political question for the legislature.<sup>2</sup>

§ 3785. **Jurisdiction of Federal Courts.**—The judicial power of the United States extends to all cases, in law and equity, arising under the constitution, the laws of the United States, and the treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.<sup>3</sup> It must always appear by the record that a case in the federal court is within its jurisdiction; the presumption is against it until it is shown.<sup>4</sup> Any state law which attempts to provide for the enforcement of a maritime claim or contract by any but a common-law remedy infringes upon the exclusive jurisdiction of the federal courts, and is void.<sup>5</sup> But in so far as the state laws create liens and provide remedies for claims not maritime, over which the courts of admiralty have no jurisdiction, they are valid and operative.<sup>6</sup> The national constitution does not vest the exclusive original jurisdiction "of all cases of admiralty and

<sup>1</sup> *People v. Bissell*, 19 Ill. 229; 68 Am. Dec. 591.

<sup>2</sup> *People v. Riverside*, 70 Cal. 461.

<sup>3</sup> Const., art. 3, sec. 2.

<sup>4</sup> *Robertson v. Cease*, 97 U. S. 646; *Godfrey v. Teiry*, 97 U. S. 171; *Jackson v. Ashton*, 8 Pet. 148; *Bailey v. Dozier*, 6 How. 23.

<sup>5</sup> *Brookman v. Hammill*, 43 N. Y. 554; 3 Am. Rep. 731.

<sup>6</sup> *Brookman v. Hammill*, 43 N. Y. 554; 3 Am. Rep. 731; *Sheppard v. Steele*, 43 N. Y. 52; 3 Am. Rep. 660; *Foster v. The Busteed*, 100 Mass. 409; 1 Am. Rep. 125.



maritime jurisdiction" in the United States courts, and where, prior to the adopting of the constitution, there was a concurrent remedy at law, the remedy at law yet exists.<sup>1</sup>

**§ 3786. Conflict between State and Federal Decisions.**— Upon questions of the construction, operation, or force of any provision of the state constitution or laws, or of the validity of any state enactment, or any power, right, privilege, or exemption claimed under state authority, or of the force or application of the local common law or usages, the decisions of the state courts will furnish the rule of decision for the federal courts;<sup>2</sup> and if the judgments of the state court of last resort are found to be in conflict, the federal courts will follow the last settled adjudications.<sup>3</sup> But this rule does not apply when the state decision involves a question of national authority, or any right, title, privilege, or exemption derived from or claimed under the constitution or any law or treaty of the United States.<sup>4</sup> Nor is it applied to questions not dependent upon local statutes or usages; such as the construction, operation, and negotiability of bills of exchange and other commercial contracts, contracts of insurance and bailment, and questions of injury dependent on principles which are of general recognition.<sup>5</sup> Such decisions of the state courts not based upon local legislative enactments are not "laws" within the meaning of the federal statute which provides that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where

<sup>1</sup> *State v. Judge Watts*, 7 La. 440; 26 Am. Dec. 507.

<sup>2</sup> *Shelby v. Guy*, 11 Wheat. 361; *Elmwood v. Marcy*, 92 U. S. 289.

<sup>3</sup> *Green v. Neal's Lessee*, 6 Pet. 291; *Suydam v. Williamson*, 24 How. 427. See *ante*, § 3786.

<sup>4</sup> *State Bank v. Knoop*, 16 How. 369; *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

<sup>5</sup> *Chicago v. Robbins*, 2 Black, 418; *Boyce v. Tabb*, 18 Wall. 546; *Venice v. Murdock*, 92 U. S. 494.

they apply."<sup>1</sup> In *Burgess v. Seligman*,<sup>2</sup> the supreme court lay down the law as follows: The federal courts have an independent jurisdiction in the administration of state laws co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them

<sup>1</sup> *Swift v. Tyson*, 16 Pet. 1; *Brooklyn Bank v. Republic Bank*, 102 U. S. 14.

<sup>2</sup> 107 U. S. 20.

balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions.<sup>1</sup>

<sup>1</sup> These decisions are: *McKeen v. Delancy's Lessee*, 5 Cranch, 33; *Polk's Lessee v. Wendell*, 9 Cranch, 98; *Thatcher v. Powell*, 6 Wheat. 127; *Preston's Heirs v. Bowmar*, 6 Wheat. 581; *Daly v. James*, 8 Wheat. 535; *Elmendorf v. Taylor*, 10 Wheat. 159-165; *Shelby v. Guy*, 11 Wheat. 367; *Jackson v. Chew*, 12 Wheat. 167, 168; *Fullerton v. Bank of United States*, 1 Pet. 614; *Gardner v. Collins*, 2 Pet. 85; *United States v. Morrison*, 4 Pet. 136; *Green v. Neal's Lessee*, 6 Pet. 295-300; *Groves v. Slaughter*, 15 Pet. 497; *Swift v. Tyson*, 16 Pet. 18-20; *Carpenter v. Washington Ins. Co.*, 16 Pet. 517; *Carroll v. Safford*, 3 How. 460; *Lane v. Vick*, 3 How. 476; *Rowan v. Rannels*, 5 How. 139; *Smith v. Kernochen*, 7 How. 219; *Nesmith v. Sheldon*, 7 How. 818; *Williamson v. Berry*, 8 How. 558, 559; *Van Rensselaer v. Kearney*, 11 How. 318; *Webster v. Cooper*, 14 How. 504; *Ohio Life and Trust Co. v. Debolt*, 16 How. 431, 432; *Beauregard v. New Orleans*, 18 How. 500-503; *Watson v. Tarpley*, 18 How. 519; *Pease v. Peck*, 18 How. 598, 599; *Morgan v. Curtenius*, 20 How. 1;

*League v. Egery*, 24 How. 266; *Snydam v. Williamson*, 24 How. 433; 6 Wall. 736; *Leffingwell v. Warren*, 2 Black. 603; *Mercer Co. v. Hackett*, 1 Wall. 95, 96; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Seibert v. Pittsburgh*, 1 Wall. 273, 274; *Havermeyer v. Iowa City*, 3 Wall. 294, 303; *Thompson v. Lee Co.*, 3 Wall. 330; *Christy v. Pridgeon*, 4 Wall. 203; *Mitchell v. Burlington*, 4 Wall. 274, 275; *Lee Co. v. Rogers*, 7 Wall. 183-187; *Butz v. Muscatine*, 8 Wall. 583; *City v. Lamson*, 9 Wall. 485; *Olcott v. Supervisors of Fond du Lac*, 16 Wall. 678; *Supervisors v. United States*, 18 Wall. 81, 82; *Boyce v. Tabb*, 18 Wall. 543; *Township of Pine Grove v. Talcott*, 19 Wall. 677; *Elmwood v. Marcy*, 92 U. S. 294; *State Railroad Tax Cases*, 92 U. S. 617; *Ober v. Gallagher*, 93 U. S. 207; *Ottawa v. Perkins*, 94 U. S. 260, 267, 268; *Davie v. Briggs*, 97 U. S. 637, 638; *Fairfield v. Gallatin Co.*, 100 U. S. 47, 55; *Oates v. Bank of Montgomery*, 100 U. S. 245; *Douglass v. Pike Co.*, 101 U. S. 686, 687; *Barrett v. Holmes*, 102 U. S. 655; *Town of Thompson v. Perrine*, 103 U. S. 816; 106 U. S. 589.

§ 3787. **Suits against States.**—In the absence of a statute authorizing it, a state cannot be sued in her own courts. And this cannot be done indirectly by ignoring the state, and proceeding directly against the public officer having the custody of the moneys sought to be reached.<sup>1</sup> Creditors of a state have nothing to rely upon except her good faith, and she has equally the power to postpone the time of payment or to refuse to pay at all.<sup>2</sup> But it is held that the rule that the United States cannot be sued without its consent does not apply to officers and agents of the United States who, while holding property for public uses, are sued by persons claiming title thereto, and that in such suit the title of the United States can be adjudicated.<sup>3</sup> One state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the constitution, by assuming the prosecution of debts owing by the other state to its citizens.<sup>4</sup> The immunity from suit belonging to a state is a personal privilege which it may waive at pleasure, so that in a suit otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court would be a voluntary submission to its jurisdiction.<sup>5</sup> When a party avails himself of the state's consent, he must pursue the remedy which the law has provided.<sup>6</sup> When the state breaks its contract, duly made by its authorized agents, for the construction of a public work, it is liable.<sup>7</sup> Equity will grant an injunction, although the state is directly interested in having the act done, upon a case showing entire want of authority on the part of the officer about to do the act, and where the injured party would be left remediless.<sup>8</sup> But a

<sup>1</sup> Tate v. Salmon, 79 Ky. 540.

<sup>2</sup> Hunsaker v. Borden, 5 Cal. 288; 63 Am. Dec. 130.

<sup>3</sup> United States v. Lee, 106 U. S. 196.

<sup>4</sup> New Hampshire v. Louisiana, 108 U. S. 76.

<sup>5</sup> Clark v. Barnard, 108 U. S. 436;

Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225; 41 Am. Dec. 549.

<sup>6</sup> Cornwall v. Commonwealth, 82 Va. 644; 3 Am. St. Rep. 121.

<sup>7</sup> Danolds v. State, 89 N. Y. 36; 42 Am. Rep. 277.

<sup>8</sup> Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225; 41 Am. Dec. 549.

state may sue in the courts of any other state.<sup>1</sup> A suit the subject of which is local must be commenced by the state in the county of its locality, unless a special statute authorizes it to be commenced elsewhere.<sup>2</sup> While a state is not ordinarily bound by a statute, unless expressly named therein, or included by necessary implication, yet it is not exempted from the operation of general rules of law or the fair interpretation of language in statutes.<sup>4</sup>

ILLUSTRATIONS.—The constitution of Alabama provided that "suits may be brought against the state in such courts as may be by law provided." The legislature made provision accordingly by a statute which was afterwards repealed. *Held*, that the repeal was constitutional, and abated pending suits: *Ex parte Alabama*, 52 Ala. 231; 23 Am. Rep. 567.

§ 3788. **Due Process of Law.**—By the constitution, no state shall deprive any person of life, liberty, or property without "due process of law." Explaining the meaning of this phrase, Judge Story says: "Different principles are applicable in different cases, and require different forms and proceedings; in some they must be judicial; in others the government may interfere directly and *ex parte*; but due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."<sup>4</sup> The terms "law of the land" and "due process of law," as constitu-

<sup>1</sup> *State v. Woram*, 6 Hill, 33; 40 Am. Dec. 378; *Michigan Bank v. Hastings*, 1 Doug. (Mich.) 225; 41 Am. Dec. 549.

<sup>2</sup> *People v. City of St. Louis*, 5 Gill, 351; 48 Am. Dec. 339.

<sup>3</sup> *State v. Piazza*, 66 Miss. 427.

<sup>4</sup> Story on Constitution, sec. 1947; *Ex parte Ah Fook*, 49 Cal. 403; *Taylor v. Porter*, 4 Hill, 140; 40 Am. Dec. 274; *Donovan v. Mayor*, 29 Miss.

247; 64 Am. Dec. 143; *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529; *Ames v. Port Huron etc. Co.*, 11 Mich. 139; 83 Am. Dec. 731; *Rison v. Farr*, 24 Ark. 161; 87 Am. Dec. 52; *Bagley v. Castle*, 42 Ark. 77; *Savannah etc. R. Co. v. Geiger*, 21 Fla. 669; 58 Am. Rep. 697. A corporation is entitled to this privilege like an individual: *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Rep. 72.

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tional terms, are of equivalent import.<sup>1</sup> The constitu-  
tional provision requiring "due process of law," as ap-  
plied to judicial proceedings, was intended to secure to  
citizens the right to a trial and judgment according to  
the forms of law, by an impartial tribunal, of the ques-  
tions of his liability and responsibility before his person  
or his property shall be condemned, which includes regu-  
lar allegations, opportunity to answer, and trial accord-  
ing to some settled course of judicial proceeding.<sup>2</sup> The  
"law of the land" means a general public law binding  
upon every member of the community under similar cir-  
cumstances, and every partial or private law which di-  
rectly proposes to destroy or affect individual rights, or  
does the same thing by affording remedies leading to  
similar consequences, is not "law of the land."<sup>3</sup> These  
terms do not mean the general body of the law, common  
and statute, as it was at the time the constitution took  
effect; for that would deny the right of the legislature  
to amend or repeal the law. They refer to certain fun-  
damental rights which that system of jurisprudence of  
which ours is a derivative has always recognized.<sup>4</sup> Some  
subjects are cognizable in one court, and others in an-  
other. What would be due process of law in one proceed-  
ing might not be in another. The nature of the suit, and  
how the judgment will operate, and upon what, must be  
looked at in determining whether the proceeding has been

<sup>1</sup> *State v. Staten*, 6 Cold. 234,  
244; *Green v. Briggs*, 1 Curt. 113;  
*Ervine's Appeal*, 16 Pa. St. 256; 55  
Am. Dec. 499; *Banning v. Taylor*, 16  
Pa. St. 292; *Murray's Lessee v. H. L.*  
*I. Co.*, 18 How. 276; *Davidson v. New*  
*Orleans*, 95 U. S. 97; 17 Alb. L. J.  
233. In *Green v. Briggs*, 1 Curt.  
325, the court said: "The exposition  
of these words, 'the law of the land,'  
as they stand in Magna Charta, as  
well as in the American constitutions,  
has been that they require 'due pro-  
cess of law,' and this is necessarily  
implied and included in the right to

answer to and contest the charge, and  
the consequent right to be discharged  
from it, unless it is proved. Lord  
Coke, giving the interpretation of  
these words in Magna Charta (2 Inst.  
50, 51), says they mean due process of  
law, in which is included presentment  
or indictment, and being brought in  
to answer thereto."

<sup>2</sup> *Parsons v. Russell*, 11 Mich. 113;  
83 Am. Dec. 729.

<sup>3</sup> *Wally's Heirs v. Kennedy*, 2 Yerg.  
554; 24 Am. Dec. 511.

<sup>4</sup> *Brown v. Levee Commissioners*, 50  
Miss. 468.

conducted according to due process of law. In our system there have existed remedies which affect the person, — suits *inter partes*, — remedies which are of a mixed nature, touching both a person and a “thing,” and remedies which are purely and simply *in rem*, which affect, or may affect, the subject-matter or thing only.<sup>1</sup> Due process is not necessarily judicial process. Administrative process, which has been regarded as necessary in government, and sanctioned by long usage, is as much due process of law as any other. Summary process to enforce the payment, by a collector and his sureties, of the taxes not returned by him, having been in use by express legislation both before and ever since the adoption of the constitution, must be considered permitted by that instrument, and be regarded as due process.<sup>2</sup> So the constitutional provision is not violated by a law authorizing property to be summarily seized and sold for non-payment of taxes, if a remedy, such as an injunction suit, is afforded by law, by which the owner may have his liability to the tax judicially ascertained, even though in bringing such injunction suit he is required to give security.<sup>3</sup> And a statute authorizing executions on judgments against towns to be issued against and levied upon the goods and chattels of the inhabitants is constitutional.<sup>4</sup> Due process of law does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings.<sup>5</sup> Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state.<sup>6</sup> A statute providing that suits may be brought in the name of the state, on the written direction of the

<sup>1</sup> *Brown v. Levee Commissioners*, 50 Miss. 468.

<sup>2</sup> *Weimer v. Bunbury*, 30 Mich. 201.

<sup>3</sup> *McMillen v. Anderson*, 95 U. S. 37.

<sup>4</sup> *Eames v. Savage*, 77 Me. 212; 52 Am. Rep. 751.

<sup>5</sup> *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. 280.

<sup>6</sup> *Walker v. Sauvinet*, 92 U. S. 90.

governor, "without giving bond or security, or causing affidavit to be made, though the same may be required in actions between private citizens," is not a dispensing with "due process of law."<sup>1</sup> A statute which, under the pretext of preserving the public morals, provides for the seizure of private property, without providing a mode of judicial proceedings for determining whether it is the kind of property, and was used or held for the purposes condemned by it, is unconstitutional.<sup>2</sup> Thus a statute authorizing the seizure and destruction of gambling-tables and devices,<sup>3</sup> or of implements used in illegal fishing, without a judicial hearing and judgment, is void.<sup>4</sup> The right to "due process" inhibits the legislature from dispensing with personal service where it is practicable, and has been usual under the general law.<sup>5</sup> A legislature may pass laws, but it cannot pass judgments or decrees.<sup>6</sup>

**§ 3789. Trial by Jury.**—The United States constitution provides that in all suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and the constitution of all the states preserves the right of trial by jury in the state courts.<sup>7</sup> By the common law "is meant what the

<sup>1</sup> *Ex parte Macdonald*, 76 Ala. 603.

<sup>2</sup> *Lowry v. Rainwater*, 70 Mo. 152; 35 Am. Rep. 420.

<sup>3</sup> *Lowry v. Rainwater*, 70 Mo. 152; 35 Am. Rep. 420.

<sup>4</sup> *Jeck v. Anderson*, 57 Cal. 251; 40 Am. Rep. 115.

<sup>5</sup> *Brown v. Levee Commissioners*, 50 Miss. 468.

<sup>6</sup> *Cooley on Constitutional Law*, sec. 319; *Tyson v. School Directors*, 51 Pa. St. 9; *Gaines v. Buford*, 1 Dana, 481.

<sup>7</sup> *Flint River Stbt. Co. v. Roberts*, 2 Fla. 102; 48 Am. Dec. 178, and see note 185-194. But "though the right of trial by jury is preserved by the constitution of the United States, the states may, nevertheless, if they choose, provide for the trial of all offenses against the states,

as well as the trial of civil cases in the state courts, without the intervention of a jury": *Cooley on Constitutional Limitations*, 19, note; *Barron v. Baltimore*, 7 Pet. 250; *State v. Keyes*, 8 Vt. 57; 30 Am. Dec. 450; *Livingston v. Mayor*, 8 Wend. 85; 22 Am. Dec. 622; *Lee v. Tillotson*, 24 Wend. 337; 35 Am. Dec. 624; *Edwards v. Elliott*, 21 Wall. 557; *Kane v. Commonwealth*, 89 Pa. St. 522; 33 Am. Rep. 787; *Twitchell v. Commonwealth*, 7 Pet. 247; *Livingston v. Moore*, 7 Pet. 551; *Fox v. Ohio*, 5 How. 434; *Smith v. Maryland*, 18 How. 76; *Foster v. Jackson*, 57 Ga. 206; *Joseph v. Bidwell*, 28 La. Ann. 383; 26 Am. Rep. 102; *Sauvinet v. Walker*, 27 La. Ann. 14; 92 U. S. 92; the court saying, after stating that the seventh amendment relates only to trials in the courts of



constitution denominated in the third article 'law'; not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit."<sup>1</sup> It is immaterial, therefore, what changes may be made in the forms of action or pleadings, since the nature of the controversy and the right in dispute must determine the privilege, and not the form of remedy provided.<sup>2</sup> But as the constitution only preserves the right, and does not extend it, the privilege is demandable of right only in those cases in which the law gave it before.<sup>3</sup>

§ 3790. **Waiver of.**—A party may waive his right to a jury trial in all civil cases, and if he does waive it, he cannot afterwards claim it as a right.<sup>4</sup> But he can waive his right only in the mode specified by the statute.<sup>5</sup> A statute that trial by jury shall be considered waived if not demanded is valid.<sup>6</sup> The clause in a constitution declaring that "a jury trial may be waived . . . in the manner to be prescribed by law," does not preclude the

the United States: "A trial by jury in suits at common law pending in the state courts is not therefore a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge."

<sup>1</sup> *Parsons v. Bedford*, 3 Pet. 433, 447.

<sup>2</sup> *Backus v. Lebanon*, 11 N. H. 19; 35 Am. Dec. 466; *Tabor v. Cook*, 15 Mich. 322.

<sup>3</sup> *Rhines v. Clark*, 51 Pa. St. 96. "The provisions of the constitution that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' refers to the right as it existed at the time of the adoption of the constitutional provision": *State v. McClear*, 11 Nev. 39; *State v. Raymond*, 1 Nev. 98; *People v. Lane*, 6

*Abb. Pr.*, N. S., 105; *Whitehurst v. Coleen*, 53 Ill. 247; *Byers v. Commonwealth*, 42 Pa. St. 89; *Stillwell v. Kellogg*, 14 Wis. 461; *Howe v. Plainfield*, 37 N. J. L. 145; *Comm'r's v. Seabrook*, 2 Strob. 560.

<sup>4</sup> *Marsh v. Brown*, 57 N. H. 173.

<sup>5</sup> *Shaw v. Kent*, 11 Ind. 80.

<sup>6</sup> *Cooley on Constitutional Law*, 279; *Commonwealth v. Whitney*, 108 Mass. 5; the court saying: "It has been the uniform practice of the legislature since the adoption of the constitution to pass laws regulating the mode in which the rights secured to the subject by the bill of rights and constitution shall be enjoyed. And if the subject neglects to comply with these regulations, he thereby waives his constitutional privileges."

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court from holding that parties have waived their right to such a trial by their conduct or silence, although the case has not been provided for by any statute.<sup>1</sup>

**§ 3791. In What Cases Right to Trial by Jury Exists.**

—It has been held that the right to trial by jury exists in the probate courts<sup>2</sup> in contests of wills;<sup>3</sup> where an issue in *quo warranto* is sent down to the circuit court to be tried;<sup>4</sup> in contests for office;<sup>5</sup> in prosecutions to enforce a seizure under acts of Congress;<sup>6</sup> on questions of fraud;<sup>7</sup> in an action to recover damages for a tortious conversion of property;<sup>8</sup> in an action to abate a nuisance, and recover the damages occasioned thereby, although the complaint is in form as for equitable relief, and the prayer for damages may be regarded as incidental thereto;<sup>9</sup> in an action on a note for foreclosure of a mortgage securing it, and determination of the priority of liens;<sup>10</sup> and in a suit on a guardian's bond.<sup>11</sup>

**§ 3792. In What Cases Jury Trial not of Right.** — But the constitutional right is confined to actions at law, and a jury trial cannot be demanded as of right in equity cases;<sup>12</sup> nor in proceedings to enforce liens on ves-

<sup>1</sup> Baird v. Mayor, 74 N. Y. 382.

<sup>2</sup> Clem v. Durham, 14 Ind. 263.

<sup>3</sup> Tingley v. Cowgill, 48 Mo. 291.

<sup>4</sup> People v. Doesburg, 16 Mich. 133.

<sup>5</sup> State v. Head, 22 La. Ann. 54.

<sup>6</sup> United States v. Armory, 2 Abb. 129.

<sup>7</sup> Bank of Louisiana v. Delery, 2 La. Ann. 648; Freeman v. Atlantic Mut. Ins. Co., 13 Abb. Pr. 124; Levy v. Brooklyn Fire Ins. Co., 25 Wend. 687.

<sup>8</sup> Lewis v. Varnum, 12 Abb. Pr. 305.

<sup>9</sup> Hudson v. Caryl, 44 N. Y. 553.

<sup>10</sup> Clemenson v. Chandler, 4 Kan. 558.

<sup>11</sup> Galway v. State, 93 Ind. 161.

<sup>12</sup> McCarthy v. Edwards, 24 How. Pr. 236; Rathbun v. Rathbun, 3 How. Pr. 141; Weil v. Kune, 49 Mo. 158; Stilwell v. Kellogg, 14 Wis. 461; Lake v. Tolles, 8 Nev. 785; Kimball v. Connor, 3 Kan. 414; Plimpton v. Somer-

set, 33 Vt. 283; Wynkoop v. Cooch, 89 Pa. St. 450; Convan v. Sellev, 28 Mo. 320; Lucken v. Wickham, 5 S. C. 411; Flaherty v. McCormick, 113 Ill. 538; Bellows v. Bellows, 58 N. H. 60; Helm v. Huntington, 91 Ind. 44. In equity cases "an issue to try a matter of fact will be ordered or not, according to the sound judicial discretion of the court"; Ward v. Hill, 4 Gray, 595; Colman v. Dixon, 50 N. Y. 572; Lake v. Tolles, 8 Nev. 285; Hatch v. Peugnet, 64 Barb. 189; Weil v. Kune, 49 Mo. 158; Palmer v. Lawrence, 5 N. Y. 389; Cahoon v. Levy, 5 Cal. 294; Parsons v. Bradford, 3 Pet. 433; Ellis v. Kreutzinger, 31 Mo. 432; Bray v. Thatcher, 28 Mo. 132; Gray v. Hornbeck, 31 Mo. 400; Hunter v. Whitehead, 42 Mo. 524; Koppikus v. Commissioners, 16 Cal. 248; Heyneman v. Blake, 19 Cal. 579; Smith v. Moberly,

sels;<sup>1</sup> nor in an action to foreclose a mechanic's or laborer's lien;<sup>2</sup> nor in a suit brought to foreclose a mortgage;<sup>3</sup> nor on bills to quiet title and to remove clouds from the title to real estate;<sup>4</sup> nor in a proceeding, under the Iowa statute, to establish a lost corner;<sup>5</sup> nor in a proceeding to review a sewer assessment;<sup>6</sup> nor in inferior courts, where the amount involved is small;<sup>7</sup> nor in proceedings in contempt;<sup>8</sup> nor in references in cases of long account;<sup>9</sup> nor on a petition for damages against a corporation in the hands of a receiver;<sup>10</sup> nor in proceedings by commissioners

14 B. Mon. 70. "It is not indispensable, as a matter of law, in any case that any question in an equity suit in a federal court should be sent to a state court." *Goodyear v. Providence Rubber Co.*, 2 Cliff. 351.

<sup>1</sup> *Sheppard v. Steele*, 43 N. Y. 52; 3 Am. Rep. 460; *Flint River Stbt. Co. v. Foster*, 3 Ga. 199; 48 Am. Dec. 248.

<sup>2</sup> *Curnow v. Happy Valley Blue Gravel etc. Co.*, 68 Cal. 202.

<sup>3</sup> *Carmichael v. Adams*, 91 Ind. 526.

<sup>4</sup> *Gage v. Ewing*, 107 Ill. 11.

<sup>5</sup> *Caldwell v. Nash*, 68 Iowa, 658.

<sup>6</sup> *Bishop v. Tripp*, 15 R. I. 466.

<sup>7</sup> *Proffatt on Jury Trial*, sec. 49.

<sup>8</sup> *Clark v. People*, 1 Ill. 340; 12 Am. Dec. 177; *Eickenberry v. Edwards*, 67 Iowa, 619; 56 Am. Rep. 360; *Garrigus v. State*, 93 Ind. 239. As upon proceedings supplementary to execution: *Kennesaw Mills Co. v. Walker*, 19 S. C. 104. A party under arrest in a civil action, moving to vacate the order upon affidavits submitted to the court, is not entitled to a trial by jury upon the questions of fact raised: *Wingo v. Watson*, 98 N. C. 482.

<sup>9</sup> *Lee v. Tillotson*, 24 Wend. 337; 35 Am. Dec. 624; *Sands v. Tillinghast*, 24 How. Pr. 437; *Mead v. Walker*, 17 Wis. 189; *Supervisors v. Dunning*, 20 Wis. 210; *Burt v. Harrah*, 65 Iowa, 643.

<sup>10</sup> *Kennedy v. R. R. Co.*, 11 Cent. L. J. 88; the court saying: "The original cause in which he intervenes is of equitable cognizance, and could not have been maintained in a court of law. It is then a chancery cause pending in and to be determined by a chancery court. The constitutional

guaranty securing trial by jury does not in terms extend to chancery courts. It has not been so understood or interpreted. On the contrary, courts of chancery are, and always have been, invested with the prerogative of deciding the facts as well as the law of cases pending before them. Their right, generally, to do this, has not been denied by the counsel in this case. But it is said, *arguendo*, that this case is an exception to the general rule, because the wrong complained of is a tort, for which, apart from the other considerations to be hereafter adverted to, an action at law is the only remedy; and if the case was prosecuted in a law court the right to trial by jury would exist. Certainly an action at law could have been maintained for the alleged wrong if there was any one capable of being sued. But the receiver is not personally liable, and this court cannot be sued without its consent, and this consent it declines to give. There is, therefore, no one suable at law, and there is, consequently, no such suit. The petitioner is compelled to seek redress here or forego all relief. And coming here he will be required to pursue his remedy according to the practice prevailing in this court. Under this practice, as herein previously stated, the court may decide the facts as well as the law, and the right to do this extends to all questions coming legitimately before it. This right is not confined to questions arising upon the original pleading nor to questions of equitable cognizance. When the jurisdiction has once attached, the court will grant

to condemn land, nor in eminent domain cases generally;<sup>1</sup> nor in motions and the like;<sup>2</sup> nor on distress warrants issued by the solicitor of the treasury;<sup>3</sup> nor in suits against the government;<sup>4</sup> nor in divorces;<sup>5</sup> nor in suit issues of *nul tiel record*;<sup>6</sup> nor in proceedings to close the business of a corporation on the ground of insolvency;<sup>7</sup> nor in proceedings taken by corporations for the removal of a member for offenses against the corporation;<sup>8</sup> nor in actions brought under a statute to determine the title to land of which the plaintiff has possession;<sup>9</sup> nor in suits for partition;<sup>10</sup> nor in proceedings under a public drainage act;<sup>11</sup> nor in cases of *quo warranto*,<sup>12</sup> or *mandamus*;<sup>13</sup> nor in proceedings to appoint a guardian;<sup>14</sup> nor on an inquest of lunacy by a board of commissioners;<sup>15</sup> nor in trials by courts-martial;<sup>16</sup> nor in admiralty cases;<sup>17</sup> nor in cases of contested elections;<sup>18</sup> nor in proceedings for settlement of

full relief, although the questions presented are not ordinarily within the scope of chancery jurisdiction: Bishop's Principles of Equity, 565. And where chancery once entertains a suit upon grounds legitimately cognizable in that court, it will proceed to adjudicate other matters, of which it has only incidental cognizance, in order to avoid a multiplicity of suits: *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 464; *Haggin v. Peck*, 10 B. Mon. 210."

<sup>1</sup> *Louisiana and Frankfort Plank Road Co. v. Pickett*, 25 Mo. 535; *Livingston v. Mayor*, 8 Wend. 85; 22 Am. Dec. 622; *Beekman v. R. R. Co.*, 3 Paige, 45; 22 Am. Dec. 679; *Penn. R. R. Co. v. German Church*, 53 Pa. St. 445; *Kendall v. Post*, 8 Or. 141; *Des Moines v. Lyman*, 21 Iowa, 153; *Dronberger v. Reed*, 11 Ind. 420; *Backus v. Lebanon*, 11 N. H. 19; 35 Am. Dec. 466; *Buffalo etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Cairo etc. R. R. Co. v. Trout*, 32 Ark. 17. *Aliter* in California, by a constitutional provision.

<sup>2</sup> *Hart v. Robinett*, 5 Mo. 11; *Hensley v. Baker*, 10 Mo. 157.

<sup>3</sup> *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 276.

<sup>4</sup> *McElrath v. United States*, 12 Ct. of Cl. 312; *Felham v. State*, 30 Tex. 472.

<sup>5</sup> *Mead v. Mead*, 1 Mo. App. 247; *Coffin v. Coffin*, 55 Me. 361; *Anonymous*, 5 How. Pr. 306.

<sup>6</sup> *Hooker v. State*, 7 Blackf. 272; *Thompson v. Williams*, 15 Miss. 270; *Cassidy v. Sullivan*, 64 Cal. 266.

<sup>7</sup> *Case of Mechanics' Fire Ins. Co.*, 5 Abb. Pr. 444.

<sup>8</sup> *People v. N. Y. Com. Ass'n*, 18 Abb. Pr. 271.

<sup>9</sup> *Ellithorpe v. Buck*, 17 Ohio St. 72.

<sup>10</sup> *Allen v. Anderson*, 57 Ind. 388.

<sup>11</sup> *Anderson v. Caldwell*, 91 Ind. 451; 46 Am. Rep. 613; *Lipes v. Hand*, 104 Ind. 503.

<sup>12</sup> *State v. Lupton*, 64 Mo. 415; 27 Am. Rep. 253; *State v. Vail*, 53 Mo. 97; *State v. Johnson*, 26 Ark. 281.

*Contra*, *People v. Doesburg*, 16 Mich. 133; *People v. R. R. Co.*, 57 N. Y. 161; *State v. Bennett*, 2 Ala. 140.

<sup>13</sup> *Atherton v. Sherwood*, 15 Minn. 221.

<sup>14</sup> *Shroyer v. Richmond*, 16 Ohio St. 455; *Hagany v. Cohnen*, 29 Ohio St. 82.

<sup>15</sup> *Black Hawk County v. Springer*, 58 Iowa, 417.

<sup>16</sup> *Rawson v. Brown*, 18 Me. 216.

<sup>17</sup> *United States v. Steamer The Queen*, 4 Ben. 237.

<sup>18</sup> *Ewing v. Filley*, 43 Pa. St. 384; *Whallon v. Bancroft*, 4 Minn. 109.

paupers;<sup>1</sup> nor on the commitment of infants in certain cases to houses of refuge, or to industrial schools;<sup>2</sup> nor in proceedings taken by corporations for the removal of a member for offenses against the corporation.<sup>3</sup>

**§ 3793. What Statutes do and do not Interfere with Such Right.**—A law “which provides that upon the trial by jury of a cause which has been referred under the act, ‘the report of the referee shall be evidence of all the facts stated therein subject to be impeached,’ is unconstitutional and void.”<sup>4</sup> So is a statute authorizing the court to render judgment without a jury, but upon the affidavit of the plaintiff alone and without notice to the defendant;<sup>5</sup> so is a statute which makes an appraisement conclusive on railroad companies as to the value of cattle killed;<sup>6</sup> so is a statute providing that, upon the affirmance of a judgment in the court of appeals, judgment shall be given by that court against a surety on a *supersedeas* bond;<sup>7</sup> so is a statute which prohibits those not tax-payers from serving on juries;<sup>8</sup> so is a statute which takes away the right to have a jury of the vicinage;<sup>9</sup> so is a statute authorizing the court upon petition “on due proof” that a ground-rent has been extinguished to make such decree;<sup>10</sup> so any law requiring conditions for the purpose of preventing a trial by jury is at war with the spirit of the constitution, and so far as it deprives one of this means of protection it is void.<sup>11</sup>

<sup>1</sup> *Shirley v. Lunenburg*, 11 Mass. 379.

<sup>2</sup> *Ex parte Crouse*, 4 Whart. 9; *Ex parte Ah Peen*, 51 Cal. 230.

<sup>3</sup> *People v. New York Com. Ass'n*, 18 Abb. Pr. 271.

<sup>4</sup> *King v. Hopkins*, 57 N. H. 334; *Plimpton v. Somerset*, 33 Vt. 283; *Francis v. Baker*, 11 R. I. 103; 23 Am. Rep. 424. See *Copp v. Henniker*, 55 N. H. 179; 20 Am. Rep. 194. *Contra*, *Holmes v. Hunt*, 122 Mass. 505; 23 Am. Rep. 381.

<sup>5</sup> *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102; 43 Am. Dec. 178.

<sup>6</sup> *Graves v. R. R. Co.*, 5 Mont. 556; 51 Am. Rep. 81.

<sup>7</sup> *Gullion v. Bowlware*, Sneed, 76; 2 Am. Dec. 708.

<sup>8</sup> *Reece v. Knott*, 3 Utah, 451.

<sup>9</sup> *Swart v. Kimball*, 43 Mich. 443.

<sup>10</sup> *Haines's Appeal*, 73 Pa. St. 169.

<sup>11</sup> *Inhabitants of Saco v. Wentworth*, 37 Me. 165; 58 Am. Dec. 786. After the evidence was in, on a trial before a jury, the court ordered a verdict for plaintiff, subject to the opinion of the court whether, on the evidence, defendant was liable, and then rendered judgment for defendant. Held, that plaintiff was unlawfully deprived of his right to a trial by jury: *Baylis v. Traveler's Ins. Co.*, 113 U. S. 316.

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But a statute increasing the amount required to entitle a defeated party, in an action before a justice, to appeal and obtain a jury trial, is not unconstitutional;<sup>1</sup> nor is a law providing that the party demanding a jury shall pay the jury fees, etc.;<sup>2</sup> nor is a statute providing for sending certain cases, requiring an examination of vouchers or an investigation of accounts, to an auditor, and making the auditor's report evidence to the jury;<sup>3</sup> nor is a statute providing that in civil actions no party shall be entitled to a trial by jury, unless he files within a prescribed time a notice that he desires such trial;<sup>4</sup> nor is a statute increasing the jurisdiction of justices of the peace as to amount;<sup>5</sup> nor an affidavit of defense law;<sup>6</sup> nor a statute providing that after a hearing in equity the supreme court may confirm an assessment made by an insurance company;<sup>7</sup> nor a statute giving special juries to either party on motion, by paying the costs of the same;<sup>8</sup> nor a statute regulating the practice in chancery cases referred to masters or auditors;<sup>9</sup> nor a statute which enables the court to make the record conform to what was tried before the jury and found by the verdict;<sup>10</sup> nor a statute giving power to the court to assess the value of the property and damages in replevin when plaintiff discontinues.<sup>11</sup>

§ 3794. **Imprisonment for Debt.**—In many of the states the constitution provides that there shall be no imprisonment for debt.<sup>12</sup> It is generally held that this pro-

<sup>1</sup> Guile v. Brown, 38 Conn. 237.

<sup>2</sup> Randall v. Kehlror, 60 Me. 37; 11 Am. Rep. 169; Adams v. Corrison, 7 Minn. 456; People v. Hoffman, 3 Mich. 243. But see *contra*, Hine v. Sweeney, 3 G. Greene, 511.

<sup>3</sup> Perkins v. Scott, 57 N. H. 55; Doyle v. Doyle, 56 N. H. 567. *Contra*, St. Paul etc. R. R. Co. v. Gardner, 19 Minn. 132; 18 Am. Rep. 334.

<sup>4</sup> Foster v. Morse, 132 Mass. 354; 42 Am. Rep. 438; Garrison v. Hollins, 2 Lea, 654.

<sup>5</sup> Head v. Hughes, 1 A. K. Marsh.

372; 10 Am. Dec. 742; Beers v. Beers, 4 Conn. 535; 10 Am. Dec. 186.

<sup>6</sup> Lawrance v. Boon, 86 Pa. St. 225; Datre v. Lockwood, 61 Ga. 293.

<sup>7</sup> Hamilton Ins. Co. v. Parker, 11 Allen, 574.

<sup>8</sup> Vierling v. Stifel Brewing Co., 15 Mo. App. 125.

<sup>9</sup> Mahan v. Cavender, 77 Ga. 118.

<sup>10</sup> Parks v. Boynton, 98 Pa. St. 370.

<sup>11</sup> Lamy v. Remuson, 2 New Mex. 245.

<sup>12</sup> Stimson's American Statute Law, 80. A clause that "no person shall be

vision is confined to causes of action arising *ex contractu*,<sup>1</sup> and does not prohibit imprisonment for liabilities arising in tort or *ex delicto*,<sup>2</sup> as under bail process in an action of trover,<sup>3</sup> or in an action for libel;<sup>4</sup> nor does it prohibit the punishing of a contempt in refusing to obey the lawful orders or decrees of a court,<sup>5</sup> as on a refusal to pay over money,<sup>6</sup> or to pay alimony ordered by a decree.<sup>7</sup> But a

imprisoned for debt, except in cases of fraud," does not mean debts fraudulently contracted only, but includes cases where the debtor attempts fraudulently to defeat the creditor's recovery of ordinary debt by the usual process of law: *Ex parte Clark*, 20 N. J. L. 648; 45 Am. Dec. 394.

<sup>1</sup> *Long v. McLean*, 88 N. C. 3.

<sup>2</sup> *Ex parte Hardy*, 68 Ala. 303; the court saying: "It has been, as we think, properly decided that similar provisions in the several state constitutions against imprisonment for debt apply only to actions based on contracts, express or implied, and they do not extend to actions originating in torts: *People v. Cotton*, 14 Ill. 414; *Cotton v. Sharpstein*, 14 Wis. 226. Hence it has been held that a statute allowing an arrest in a civil action for libel does not violate a section in the constitution of North Carolina which provides that 'there shall be no imprisonment for debt, except in cases of fraud': *Moore v. Green*, 73 N. C. 394; 21 Am. Rep. 470. And again, in like manner, that the constitution of the state of Georgia, which simply prohibited 'imprisonment for debt,' was not violated by imprisonment under bail process in an action of trover: *Harris v. Bridges*, 57 Ga. 407; 24 Am. Rep. 495. It is not to be supposed that the framers of the constitution intended to prohibit the legislature from authorizing the remedy of incarceration as a means to coerce the payment of damages originating *ex delicto*, but only of debts originating *ex contractu*. Where the property of another than the debtor has been taken by fraud or violence, or is withheld so as to tortiously deprive the true owner of his rights, the act is *quasi* criminal, and the prohibition as to imprisonment has no application."

<sup>3</sup> *Harris v. Bridges*, 57 Ga. 407; 24 Am. Rep. 495.

<sup>4</sup> *Moore v. Green*, 73 N. C. 394; 21 Am. Rep. 470.

<sup>5</sup> *Ex parte Hardy*, 68 Ala. 303; the court saying: "The ordinary power of courts to punish contempts as a means of enforcing obedience to their lawful orders and decrees is in no wise challenged or denied, but is fully recognized in argument by the petitioners' counsel as being imperatively necessary to the administration of justice. No doubt can be entertained of their authority to enforce such decrees by process of attachment, without which they would be bereft of all possible power to maintain the majesty of the law as against refractory litigants, and even impotent to preserve their own existence: *Ex parte Walker*, 25 Ala. 108; *Gates v. McDaniel*, 3 Port. 358; *Randall v. Pryor*, 4 Ohio, 424. It is often said that contempts of court are in the nature of a 'special criminal offense,' and the proceedings for their punishment are in the nature of a criminal procedure: *In re Williamson*, 26 Pa. St. 9; 67 Am. Dec. 374. However this may be, punishments for contempt have a double aspect: 1. To vindicate the dignity of the court from disrespect exhibited to it or its orders; 2. To compel the performance of some order or decree of the court which it is in the power of the party to perform, and which he, without sufficient excuse, refuses to obey: *In re Chiles*, 22 Wall. 158."

<sup>6</sup> *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529; *Lewis v. Lewis*, 80 Ga. 706; 12 Am. St. Rep. 281.

<sup>7</sup> *In Wightman v. Wightman*, 45 Ill. 167, a divided court sustained the legality of the proceeding, but placed it upon the ground that alimony thus decreed to be paid was not a debt. The court say: "The amount found

statute is unconstitutional which confers a new and extensive jurisdiction upon courts of chancery not before possessed, its manifest purpose being to coerce the payment of an ordinary judgment debt by imprisonment in the county jail under the guise of making a refusal to pay a contempt of court.<sup>1</sup>

§ 3795. **Judgments of Sister States.**—The constitution of the United States provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that Congress may by judicial law prescribe the manner in which such acts, records, and proceedings shall be proven, and the effect thereof."<sup>2</sup> The full faith and credit to which the public acts, records, and proceedings are entitled in other

by the decree was not originally founded on a contract, and it was such debts only from which the debtor could claim exemption from imprisonment."

<sup>1</sup> *Ex parte Hardy*, 68 Ala. 303; the court saying: "The power in question was never exercised by chancery courts, except in those cases where a trust in the property or fund arose between the parties litigant, or some specific interest in it was claimed, or the chattel had such peculiar value and importance as that a recovery of damages at law for its detention or conversion was inadequate. Such interference was in the nature of a bill *quia timet*, and was asserted only on a proper showing that the fund or property was in danger of loss or destruction. No jurisdiction to compel the payment of an ordinary money demand, unconnected with such peculiar equities, ever existed in chancery courts, nor had they the power to compel such payment by punishing the refusal to pay under the guise of a contempt. The act authorizing it is a clear and sweeping innovation upon established equity jurisdiction. . . . Its clear design was to provide a machinery for compelling the payment of an ordinary debt by the defendant, when he fraudulently withholds property, money, or effects, which are not exempted from execution at law. The

purpose of the law is to force the payment of the debt which is the basis of the suit. The defendant is attached and imprisoned because he does not deliver the money or property in order to pay the debt." And see *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529.

<sup>2</sup> In pursuance of this authority, Congress, by act of May 26, 1790, enacted that the "records and proceedings of the courts of any state shall be proved or admitted in any court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form. And judicial proceedings authenticated as aforesaid shall have such faith and credit within the United States as they have by law or usage in the courts of the states whence the records are or shall be taken": 1 Stats. at Large, 122. By section 2 of the act of March 27, 1804 (2 Stats. at Large, 299), the provisions of the said act were extended to the respective territories of the United States and countries subject to its jurisdiction. The substance of these acts is incorporated in the United States Revised Statutes, section 905.



court rendering the judgment, but by reason of its jurisdiction is the same faith and credit to which they are entitled in the state whose acts, records, and judicial proceedings they are.<sup>1</sup> When suit is brought in one state upon a judgment rendered by a court of another state, and it appears that by the law of the last-mentioned state it is conclusive upon the defendant, it must be held equally conclusive in the court in which suit upon it is brought.

Whatever pleas would be good to it in the state where it was pronounced, and none others, might be pleaded to it in any other court within the United States.<sup>2</sup> But the judgment can have no greater or other force abroad than at home, and therefore it is always competent to show that it is invalid for want of jurisdiction in the court rendering it.<sup>3</sup> So anything that goes in release or discharge of the judgment may be shown;<sup>4</sup> and the statute of limitations of the state where suit is brought will be available if the case comes within it.<sup>5</sup> Where the court rendering the judgment had no jurisdiction over the person or the subject-matter, the judgment is void, as where no personal service of process was had, and the defendant made no appearance, or where service was had out of the jurisdiction.<sup>7</sup> It is held in Connecticut that where a judgment was obtained through fraud in another state, and the parties are within its jurisdiction, it has power to correct such fraud, the court maintaining its jurisdiction, not by reason of having any control of the records of the

<sup>1</sup> *Armstrong v. Carson*, 2 Dall. 302; *Mills v. Durye*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; *Field v. Gibbs*, Pet. C. C. 155; *Bryant v. Hunters*, 3 Wash. C. C. 48; *Nations v. Johnson*, 24 How. 195, 203.

<sup>2</sup> *Mills v. Durye*, 7 Cranch, 481.

<sup>3</sup> *Hampton v. McConnell*, 3 Wheat. 234; *Green v. Van Buskirk*, 7 Wall. 139.

<sup>4</sup> *Harris v. Hardeman*, 14 How. 334; *Cheever v. Wilson*, 9 Wall. 108; *Galpin v. Page*, 18 Wall. 350; *Thompson v. Whitman*, 18 Wall. 457; *Arnott v.*

*Webb*, 1 Dill. 362; *Wharton's Conflict of Laws*, secs. 811, 819.

<sup>5</sup> *Jacquette v. Hugunon*, 2 McLean, 129.

<sup>6</sup> *Id.*

<sup>7</sup> *Mayhew v. Thatcher*, 6 Wheat. 129; *Bates v. Delavan*, 5 Paige, 299; 1 *Phillips on Evidence*, note 639; *Phelps v. Holker*, 1 Dall. 261; *Kilbura v. Woodworth*, 5 Johns. 41; 4 Am. Dec. 321; *Robinson v. Ward*, 8 Johns. 90; 5 Am. Dec. 327; *Tenton v. Garlick*, 8 Johns. 197; *Fawling v. Bird*, 13 Johns. 192.

diction over the parties to the judgment.<sup>1</sup> But the contrary has been held in other states.<sup>2</sup>

<sup>1</sup> *Pearce v. Olney*, 20 Conn. 544.

<sup>2</sup> *McRae v. Mattoon*, 13 Pick. 53; *Bicknell v. Field*, 8 Paige, 440; the court saying: I am satisfied this court has no jurisdiction over the parties to a judgment in a sister state to restrain their proceedings in the court of that state. If the judgment was fraudulently entered, the proper remedy of the complainant appears to be

to apply to that court to set aside the judgment. The constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. That provision of the constitution is as binding upon this court as upon the supreme court.

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## PART IV.—PUBLIC OFFICES AND OFFICERS.

### CHAPTER CXCI.

#### CREATION OF OFFICES.

§ 3796. What is a public office.

§ 3797. Power of legislature to create, abolish, or change.

§ 3798. Power of legislature to prescribe mode of election.

§ 3799. Who are public officers.

§ 3800. Officers de facto.

§ 3796. **What is a Public Office.**—In contemplation of law a public office is “an employment on behalf of government in any station or public trust not merely transient, occasional, or incidental.”<sup>1</sup> The phrase would seem to embrace the ideas of tenure, duration, fees or emoluments, rights and powers, as well as of duty.<sup>2</sup> In this country no public office is properly termed a hereditament, and the holder has no property or vested interest in his office further than what may be prescribed by the constitution or statute creating it.<sup>3</sup> A public office is nothing more than a part of the machinery adopted by the law for the purpose of procuring the performance of public duties.<sup>4</sup> A person desirous of obtaining an office has no right to purchase it, nor can a holder sell or encumber his office. The right to the compensation attached to the office depends only on the performance of the services required, and has no connection with any supposed contract between the appointing or electing power and the officer.

<sup>1</sup> In the Matter of the Oath to be Taken by Attorneys etc., 20 Johns. 493; *People v. Nichols*, 52 N. Y. 478; 11 Am. Rep. 734; *State v. Wilson*, 29 Ohio St. 347.

<sup>2</sup> 2 Burrill's Law Dict. 766; *Ex parte Gist*, 26 Ala. 159.

<sup>3</sup> 3 Kent's Com. 454; *United States v. Addison*, 6 Wall. 291; *State v. Davis*, 44 Mo. 129.

<sup>4</sup> *State v. Stanley*, 66 N. C. 59; 8 Am. Rep. 488.

In case of an assignment of all his property by an officeholder, his office is not deemed to be included therein. He has no right to insist that his office shall continue for any definite time, or that he shall receive any specific compensation so long as he holds the office, as the power which created the office may abolish it without reference to its terms or tenure at the time it was conferred upon the incumbent. Unless prevented by the terms of the constitution, the legislature may vary or abolish the compensation, as and when it may deem proper;<sup>1</sup> nor is the officer under any obligation to continue to render the services for any specified term.<sup>2</sup> A public office has also been defined to be "a right to exercise a public function or employment, and to take the fees and emoluments belonging to it."<sup>3</sup> A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer.<sup>4</sup> The terms "office" and "public trust," as used in a state constitution, have relation only to those persons and duties that are of a public nature.<sup>5</sup>

ILLUSTRATIONS.—The constitution prohibited judges from holding any other "office or public trust." G., a judge, was appointed by the legislature one of a committee to pass upon the genuineness of certain relics, about to be purchased by the state. *Held*, that the appointment was not in violation of the constitution, the position not being an "office": *People v. Nichols*, 52 N. Y. 478; 11 Am. Rep. 734. The legislature of Ohio authorized the judges of the superior court to appoint trustees of a contemplated railroad. *Held*, that the act was not in violation of the state constitution, in not fixing the term of office and compensation of the trustees, such trustees not being "officers" in the sense of the constitution: *Walker v. City of Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24.

§ 3797. Power of Legislature to Create, Abolish, or Change.—All public offices in the United States are

<sup>1</sup> *State v. Davis*, 44 Mo. 129; *Hyde v. State*, 52 Miss. 665; *Conner v. Mayor*, 5 N. Y. 285; *Benford v. Gibson*, 15 Ala. 521.

<sup>2</sup> *Swann v. Buck*, 40 Miss. 268.

<sup>3</sup> 2 *Bouvier's Law Dict.* 255; *Com. v. Sutherland*, 3 Serg. & R. 149.

<sup>4</sup> *State v. Stanley*, 66 N. C. 59; 8 Am. Rep. 488.

<sup>5</sup> *Ex parte Yale*, 24 Cal. 241; 85 Am. Dec. 62; *In the Matter of Oaths to be Taken by Attorneys etc.*, 20 Johns. 492; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169, and note.

created under the provisions of the federal or state constitutions or by legislative enactment; and with regard to offices created by the constitution, all the duties connected therewith not protected by that instrument may be established, altered, and abolished at the will of the legislature, without regard to the pleasure or interests of the incumbent.<sup>1</sup> The holder of the office can only invoke the protection of the constitution as to those things expressly contained or necessarily implied in it. As to all others, he is completely at the mercy of the legislative will.<sup>2</sup> The legislature possesses the power to alter or abridge an office of purely legislative creation.<sup>3</sup> And when the legislature has, in the exercise of its constitutional discretion, vested certain duties to be paid for by fees in a certain officer, *ex officio*, who has been elected by the people, and duly given bonds, it is competent for it to take those fees and duties from him during his term of office and to give them to another.<sup>4</sup> But if the constitution provides for the duration of an office, the legislature has no power, even for the purpose of changing the beginning of the term, to alter the duration.<sup>5</sup> Where the constitution has created an office and fixed its term, and has also declared the grounds and mode for removal of an incumbent before the expiration of his term, the legislature has no power to remove or suspend the officer for any other reason or in any other mode.<sup>6</sup> One who holds an existing office under a fixed tenure cannot be removed, nor can his regular term of service be abridged, by an ordinary act of legislation, other than an act abolishing the office.<sup>7</sup> If the constitu-

<sup>1</sup> Hyde v. State, 52 Miss. 674; Bryan v. Cattell, 15 Iowa, 538.

<sup>2</sup> State v. Smeeds, 26 Miss. 47; Board of Comm'rs v. Blake, 21 Ind. 34; People v. Devlin, 33 N. Y. 269; 88 Am. Dec. 377; Benford v. Gibson, 15 Ala. 521.

<sup>3</sup> People v. Haskell, 5 Cal. 357; People v. Barnard, 27 Cal. 470; People v. Auditor, 2 Ill. 537; Territory v. Pyle, 1 Or. 149; Taft v. Adams, 3 Gray, 126;

State v. Douglass, 26 Wis. 428; 7 Am. Rep. 87; Davis v. State, 7 Md. 151; 61 Am. Dec. 331.

<sup>4</sup> Attorney-General v. Squires, 14 Cal. 12.

<sup>5</sup> Howard v. State, 50 Ind. 99; State v. Brewster, 44 Ohio St. 589.

<sup>6</sup> Lowe v. Commonwealth, 3 Met. (Ky.) 237.

<sup>7</sup> State v. Wiltz, 11 La. Ann. 439; Cotten v. Ellis, 7 Jones, 545.

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tion defines the qualifications of an officer, the legislature cannot change or superadd to them, unless the power so to do be expressly or by necessary implication conferred.<sup>1</sup> Where the constitution provides for the appointment of an officer in a particular manner, the legislature has no power to create a new office for the performance of the same, or the principal part of the same duties, and to direct the appointment to be made in another manner.<sup>2</sup> An office created by law may be repealed by law without regard to the term or future salary of the officer intrusted with its exercise.<sup>3</sup> The provision of a constitution directing that the different counties shall be laid off in districts of convenient size, and providing for the election of justices of the peace and constables for the different districts, is mandatory, and not restrictive, and is to be construed that there shall be at least as many officers as the constitution directs, but does not limit the power of the legislature to increase the number.<sup>4</sup> Congress by "discontinuing" an office abolishes it.<sup>5</sup> Where the constitution provides for the office of sheriff, but does not define the powers and duties pertaining to the office, the legislature has no power to take from the office a part of the duties and functions usually appertaining to the office and to transfer them to another office.<sup>6</sup>

**ILLUSTRATIONS.**—The constitution fixed the term of judicial offices. The legislature passed an act establishing a new judicial district, and a judge was appointed. *Held*, that a subsequent act repealing the former act, and abolishing the district before the expiration of the term, was unconstitutional: *Commonwealth v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422. A clause in a state constitution provided that the election and appointment of all officers and the filling of all vacancies not otherwise

<sup>1</sup> *Thomas v. Owens*, 4 Md. 189.

<sup>2</sup> *Warner v. People*, 2 Denio, 272; 43 Am. Dec. 740.

<sup>3</sup> *Conner v. City of New York*, 2 Sand. 355; 5 N. Y. 285.

<sup>4</sup> *Britton v. Moody*, 2 Cold. 15; *People v. Draper*, 15 N. Y. 532.

<sup>5</sup> *Beaman v. United States*, 19 Ct. of Cl. 5.

<sup>6</sup> *King v. Hunter*, 65 N. C. 603; 6 Am. Rep. 754; *State v. Brunst*, 26 Wis. 412; 7 Am. Rep. 84.

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provided for by that constitution or the constitution of the United States should be made in such manner as might be directed by law, but that no appointing power should be exercised by the general assembly except as prescribed in that constitution and in the election of United States senators. *Held*, that, in cases not provided for by the constitution, the general assembly might direct how offices should be filled by appointment: *State v. Kennon*, 7 Ohio St. 546. A statute provided that the terms of certain named officers should commence at a certain time, unless otherwise specially provided. The constitution fixed the commencement of the term of one of the officers named. *Held*, that the statute did not apply to him, and was therefore constitutional: *State v. Hastings*, 10 Wis. 525.

**§ 3798. Power of Legislature to Prescribe Mode of Election.**—The mode of filling vacancies in an office, where the term of office is made to correspond with the general elections by the people, and the constitution makes no provision for filling vacancies that may occur during the term, is within the control of the legislature.<sup>1</sup> The legislature has the power to change the mode of appointment to any office of legislative creation.<sup>2</sup> But it cannot establish arbitrary exclusions from office, or any general regulations requiring qualifications which the constitution has not required; but it can inflict disqualification to hold office as a punishment for crime.<sup>3</sup> Where the office is created by law after the adoption of the constitution, it is competent for the legislature to declare the manner of the appointment of the officer.<sup>4</sup> The act of a legislature vesting the appointment of a public officer in the governor, with the advice and consent of the senate, is unconstitutional, when the same functions were performed by similar officers at the time of the adoption of the constitution, which prescribed the mode in which such officers should be elected.<sup>5</sup> A legislature has no

<sup>1</sup> *State v. Crow*, 20 Ark. 209.

<sup>2</sup> *Davis v. State*, 7 Md. 151; 61 Am. Dec. 331.

<sup>3</sup> *Barker v. People*, 3 Cow. 686; 15 Am. Dec. 322.

<sup>4</sup> *Brown v. Woodruff*, 32 N. Y. 355;

*People v. Pinckney*, 32 N. Y. 377.

<sup>5</sup> *People v. Raymond*, 37 N. Y.

<sup>1</sup> Dev.  
35 Barb.  
<sup>2</sup> Peo.  
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power to confer the appointment of local officers, whose offices existed prior to the adoption of the constitution, upon any other body than the people, or the county, city, or town authorities, as provided by the constitution.<sup>1</sup> An act of the legislature incorporating a village, and naming certain persons to act as trustees, temporarily, until the annual meeting of the voters thereof, is in violation of the provisions of the state constitution that all village officers shall be elected by the electors of such village.<sup>2</sup> Where power is conferred upon public officers by legislative enactment, such power can be executed by them only in the way directed by the law, and unless the law granting the power is strictly complied with, the acts of the officers are void.<sup>3</sup> When a statute which creates an office fixes the time when the first election shall be held, and merely provides that the person elected at such election shall hold his office for two years, and until his successor is elected and qualified, without making any other provision as to the term of office, it will be presumed that the legislature intended that the term of office should be two years, and that the elections should be biennial.<sup>4</sup> Statutes regulating the mere mode of conducting elections are directory, and any departure from the prescribed mode will not vitiate an election if the irregularity does not deprive any legal voter of his vote, or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of the party seeking to derive a benefit from it.<sup>5</sup> A statute providing for the election of officers is not in conflict with the provision of a state constitution that "all officers whose offices may hereafter be created by law shall be elected by the people or appointed, as the legislature may direct."

<sup>1</sup> *Devoy v. Mayor etc. of New York*, 32 N. Y. 355; 35 Barb. 264.

<sup>2</sup> *People v. Blake*, 49 Barb. 9.

<sup>3</sup> *Mayor etc. of Baltimore v. Porter*, 18 Md. 284; 79 Am. Dec. 686.

<sup>4</sup> *State v. Percy*, 44 Mo. 159.

<sup>5</sup> *Gass v. State*, 34 Ind. 425; *Bailey v. Fisher*, 38 Iowa, 229.

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Although the word "elected" is used in the statute, the mode prescribed for selecting the officers is in legal effect an appointment, and comes within the meaning of that word as used in the constitution.<sup>1</sup>

§ 3799. **Who are Public Officers.**—Where an individual has acted notoriously as a public officer, it is *prima facie* evidence of the official character he assumes.<sup>2</sup> Where it appears that the claimant of the office of sheriff was acting as such, that circumstance, together with the certificate of election, will raise the presumption that he had executed his bond, and taken the oath of office.<sup>3</sup> If an officer be eligible, and has taken the oath of office, he will be deemed an officer *de jure* as well as *de facto*, until the office is declared vacant by competent authority.<sup>4</sup> An officer who derives his official character from the general law and the election of the people of a particular district is a public officer.<sup>5</sup> A public officer is one who has some duty to perform concerning the public; and he is not the less a public officer when his duty is confined to narrow limits, because it is the duty and the nature of that duty which makes him a public officer, and not the extent of his authority.<sup>6</sup> And where an individual has been appointed or elected, in manner prescribed by law, has a general designation or title given him by law, and exercises functions concerning the public assigned to him by law, he is a public officer.<sup>7</sup> Every office is considered public the duties of which concern the public. Commissioners to lay out a road are public officers,<sup>8</sup> and so is a representative in a state legislature.<sup>9</sup>

<sup>1</sup> Sturgis v. Spofford, 45 N. Y. 446.

<sup>2</sup> Bryan v. Walton, 14 Ga. 185; Wayne County v. Benoit, 20 Mich. 176; 4 Am. Rep. 382.

<sup>3</sup> People v. Clingan, 5 Cal. 389.

<sup>4</sup> People v. Clute, 50 N. Y. 451; 10 Am. Rep. 508; Morgan v. Vance, 4 Bush, 323.

<sup>5</sup> Ogden v. Raymond, 22 Conn. 379; 58 Am. Dec. 429.

<sup>6</sup> 7 Bac. Abr. 280; Shelby v. Alcorn, 36 Miss. 273; 72 Am. Dec. 169, and note.

<sup>7</sup> Bradford v. Justices, 33 Ga. 332.

<sup>8</sup> People v. Hayes, 7 How. Pr. 248; Wood's Case, 2 Cow. 29; People v. Bedell, 2 Hill, 196; People v. Nostrand, 46 N. Y. 381.

<sup>9</sup> Morrill v. Haynes, 2 N. H. 246.

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But there cannot be an officer *de facto* and one *de jure* in possession of the same office at the same time.<sup>1</sup> Authority to appoint another to office constitutes the appointee a public officer, although he be not required to take an oath and is not allowed a salary.<sup>2</sup> In the case of a public officer, it is sufficient to prove by reputation that he acts as a public officer, without producing his appointment,<sup>3</sup> and the formal requisites for validity of official acts are presumed when such acts are shown to have been done in a manner substantially regular.<sup>4</sup> An officer *de facto* is one who discharges the duties of an office under color of title; but one who, having been elected to an office, assumes to exercise its duties without having qualified, or attempted to qualify, is not an officer *de facto*.<sup>5</sup> But an officer *de jure*, who has been wrongfully removed from office, cannot recover his salary which has been paid to his successor until after an adjudication establishing his right.<sup>6</sup> Attorneys at law are not public officers. They are officers of the court, but not of the government.<sup>7</sup> Attendants upon New York courts whose duties are such as the preservation of order and the care of juries are public officers;<sup>8</sup> so is a clerk in the office of the secretary of state;<sup>9</sup> so is a clerk of the assistant treasurer of the United States appointed under a statute;<sup>10</sup> so are deputy postmasters who have been sworn as required by law.<sup>11</sup> Marshals and deputy marshals are public officers;<sup>12</sup> so are sheriffs and deputy sheriffs;<sup>13</sup> and state printers,<sup>14</sup> and

<sup>1</sup> Boardman v. Halliday, 10 Paige, 223.

<sup>2</sup> State v. Stanley, 66 N. C. 59; 8 Am. Rep. 438.

<sup>3</sup> Potter v. Luther, 3 Johns. 431; Cotton v. Beardsley, 38 Barb. 29; Tomlinson v. Darnall, 2 Head, 538.

<sup>4</sup> Adams v. Cowles, 95 Mo. 501; 6 Am. St. Rep. 74.

<sup>5</sup> Creighton v. Commonwealth, 83 Ky. 142; 4 Am. St. Rep. 143; Hamlin v. Kassafer, 15 Or. 456; 3 Am. St. Rep. 176.

<sup>6</sup> Selby v. City of Portland, 14 Or.

243; 58 Am. Rep. 307; Stuhr v. Curran, 44 N. J. L. 181; 43 Am. Rep. 353.

<sup>7</sup> Matter of Dorsey, 7 Port. 293.

<sup>8</sup> Rowland v. Mayor, 83 N. Y. 376.

<sup>9</sup> Vaughn v. English, 8 Cal. 39.

<sup>10</sup> United States v. Hartwell, 6 Wall. 385.

<sup>11</sup> Schroyer v. Lynch, 8 Watts, 453.

<sup>12</sup> United States v. Strobach, 4 Woods, 592; United States v. Tinklepaugh, 3 Blatchf. 430.

<sup>13</sup> Dayton v. Lynes, 30 Conn. 351; White v. State, 44 Ala. 409.

<sup>14</sup> Ellis v. State, 4 Ind. 1.

school directors and trustees,<sup>1</sup> and a notary public,<sup>2</sup> and trustees of state libraries,<sup>3</sup> and an agent of fortifications,<sup>4</sup> and county commissioners.<sup>5</sup>

§ 3800. **Officers de Facto.**—An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised,—

1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be;
2. Under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like;
3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public;
4. Under color of an election or appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.<sup>6</sup> Where the court has jurisdiction of the offense and of the person, and the warrant is regular, a conviction is lawful, although the justice holding the court was only an officer *de facto*.<sup>7</sup> A *de facto* officer cannot maintain an action against the municipality for the salary or compensation attached to the office.<sup>8</sup> The

<sup>1</sup> McCoy v. Curtice, 9 Wend. 17; 24 Am. Dec. 113.

<sup>2</sup> Kirksey v. Bates, 7 Port. 529; 31 Am. Dec. 722.

<sup>3</sup> People v. Sanderson, 30 Cal. 160.

<sup>4</sup> United States v. Maurice, 2 Brock. 96.

<sup>5</sup> Hummell's Case, 9 Watts, 416.

<sup>6</sup> State v. Carroll, 38 Conn. 449; 9 Am. Rep. 409; Petersilea v. Stone, 119 Mass. 465; 20 Am. Rep. 335; People v. Staton, 73 N. C. 546; 21 Am. Rep. 479.

<sup>7</sup> Sheehan's Case, 122 Mass. 445; 24 Am. Rep. 274.

<sup>8</sup> Matthews v. Supervisors, 53 Miss. 715; 24 Am. Rep. 715.

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acts of officers *de facto* as to public and interested third persons are held valid to prevent a failure of justice, and are, as to such persons, of equal validity as if they had been done by officers *de jure*.<sup>1</sup> Officers are officers *de facto*, and their acts as to third persons are valid, where, although their appointment by the selectmen of a county was without authority, they were commissioned by the governor of the territory, who was authorized to issue commissions to such officers, and they discharged the duties of their offices, and were generally recognized as legally constituted officers.<sup>2</sup> But acts of officers *de facto*, when declared void by a constitution or statute, cannot be held valid upon any assumed principle of public expediency.<sup>3</sup> And the acts of an officer *de facto* are invalid, unless he is exercising the functions of a *de jure* or *de facto* office.<sup>4</sup> Persons who, having been elected to office, have failed to qualify, or to assume in any way the functions of the office, are in no sense either officers *de jure* or *de facto*, and cannot be compelled to do any act pertaining to said office.<sup>5</sup> Where the term of office of county treasurer is limited by statute to two years, "and until his successor is elected and qualified," in the event of the re-election of such treasurer, and his failure to give a new bond, the office becomes vacant, and he holds office as treasurer *de facto* only.<sup>6</sup>

ILLUSTRATIONS.—T. was elected clerk of the county court of Fayette County in 1862. He took the oath to support the constitution of the state of Tennessee and the confederate states, and the oath of office, and discharged all the duties pertaining to the office until October, 1865. *Held*, that he was an officer *de facto*: *Ward v. State*, 2 Cold. 605; 91 Am. Dec. 270. An unconstitutional statute attempted to create a board of county

<sup>1</sup> *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Hawver v. Seldenridge*, 2 W. Va. 274; 94 Am. Dec. 532; *Farmers' etc. Bank v. Chester*, 6 Humph. 458; 44 Am. Dec. 318; *Burke v. Elliott*, 4 Ired. 355; 42 Am. Dec. 142. <sup>2</sup> *Mallett v. Uncle Sam etc. Co.*, 1 Nev. 188; 90 Am. Dec. 484.

<sup>3</sup> *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169.

<sup>4</sup> *Hawver v. Seldenridge*, 2 W. Va. 274; 94 Am. Dec. 532.

<sup>5</sup> *State v. Beloit*, 21 Wis. 280; 91 Am. Dec. 474.

<sup>6</sup> *Wapello County v. Bigham*, 10 Iowa, 39; 74 Am. Dec. 370.

supervisors. *Held*, that the acts of these officers were valid as the acts of officers *de facto*: *Leach v. People*, 122 Ill. 420. Defendant, on his trial for murder, sought to justify on the ground that he was a deputy constable. He had not taken the oath of office necessary to make him an officer *de jure*, nor had his appointment been filed with the county clerk as the statute required. *Held*, that as an officer *de facto*, his defense was available: *State v. Dierberger*, 90 Mo. 369. One whose right to preside at the annual meeting of a board of chosen freeholders had terminated by the abolition of his office of director, nevertheless assumed the chair. *Held*, that an election then had for county collector was valid, the presiding officer being such *de facto*: *State v. Farrier*, 47 N. J. L. 383. A statute providing for the organization of a town directed an election on a certain day. The statute should have been, but was not, published before that day. The election, however, was held. *Held*, that town officers then elected were officers *de facto*, and their acts binding: *Yorty v. Paine*, 62 Wis. 154. A notary public continued to exercise the duties of his office after the expiration of his commission, with public acquiescence, so long as to afford a reasonable presumption of reappointment. *Held*, to constitute him an officer *de facto*: *Cary v. State*, 76 Ala. 78.

## CHAPTER CXCI.

## QUALIFICATIONS OF OFFICERS.

- § 3801. Citizenship.
- § 3802. Residence.
- § 3803. Other qualifications.
- § 3804. Disqualifications of officers.
- § 3805. Official bonds.

§ 3801. **Citizenship.**—No person is eligible to hold any public office in the United States unless he is a citizen, either natural-born or naturalized, or has declared his intention to become a citizen of the country. A candidate for the office of President must be a natural-born citizen. As a general rule, all public officers must possess the qualifications required of an elector, which include that of citizenship. The constitution of the United States, and those of most of the states of the Union, prescribe this qualification as an indispensable preliminary to the holding of a public office.<sup>1</sup> But where there is no such constitutional or statutory requirement, it is held not to be essential.<sup>2</sup> An alien who has not declared his intention to become a citizen of the United States may be elected to a public office, and may hold the same in case his disability be removed before the term of office begins.<sup>3</sup> A constitutional provision that "no person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector" does not, by implication, forbid the legislature from requiring other reasonable qualifications for office.<sup>4</sup> Where a "voter" of a county is, without statutory definition, declared to be eligible to an office, he need not be a citizen of the United States if he

<sup>1</sup> See the federal and state constitutions; *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489.

<sup>2</sup> *Barker v. People*, 3 Cow. 686, 703; 15 Am. Dec. 322.

<sup>3</sup> *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489.

<sup>4</sup> *State v. Covington*, 29 Ohio St. 102; *Darrow v. People*, 8 Col. 417; *People v. Goddard*, 8 Col. 432.

be a voter under the state constitution.<sup>1</sup> The terms "inhabitant" and "citizen" are not synonymous, so that one eligible, under a statute, to an office, because an inhabitant of a certain county, need not necessarily be a citizen thereof.<sup>2</sup>

§ 3802. **Residence.**—Under the constitutions and laws of most of the states, a candidate for public office is required to have been a resident of the state for a certain prescribed period before his election. The period varies for the different offices and in the various states.<sup>3</sup> The period of residence required must be complete at the date of election, and it is not sufficient that the candidate elect should have completed the term of residence at the commencement of the term of office or before qualification.<sup>4</sup> The residence of a consul in a foreign country, on account of his official duties as such, does not change his domicile so as to disqualify him from holding office on his return.<sup>5</sup>

**ILLUSTRATIONS.**—The constitution of Louisiana provides that in case of "absence from the state" of the governor, the power and duties of his office shall devolve upon the lieutenant-governor. *Held*, not to refer to a mere temporary absence, and the fact that the governor was at a place out of the state, but within a few hours' ride of the capital, for a period of twenty-one days, did not authorize the lieutenant-governor to exercise the functions of governor: *State v. Graham*, 26 La. Ann. 568; 21 Am. Rep. 551.

§ 3803. **Other Qualifications.**—A statute prescribing qualifications to an officer is directory, and the appointment of one not possessing the requisite qualifications is not absolutely void, unless it is so expressly enacted.<sup>6</sup> The election of a person who is not a freeholder to an office which the statute requires to be filled by a freeholder is simply void.<sup>7</sup>

<sup>1</sup> *McCarthy v. Froelke*, 63 Ind. 507. *Parker v. Smith*, 3 Minn. 240; 14 Am. Dec. 749.

<sup>2</sup> *State v. Kilroy*, 86 Ind. 118.

<sup>3</sup> See the several state constitutions.

<sup>4</sup> *State v. McMillen*, 23 Neb. 385;

<sup>5</sup> *Wheat v. Smith*, 50 Ark. 266.

<sup>6</sup> *St. Louis Co. Court v. Sparks*, 10 Mo. 117; 45 Am. Dec. 355.

<sup>7</sup> *Spear v. Robinson*, 29 Me. 531.

§ 3804. **Disqualifications of Officers.** — All persons not possessing the required constitutional or statutory qualifications are, of course, disqualified from holding office, and, in addition to such disqualifications, there are a number of express ones, of which the following are some of the principal. A person may not hold incompatible offices; if he accepts an office incompatible with one he already holds, the latter is *ipso facto* vacated;<sup>1</sup> and if his election to both is simultaneous, by accepting one he rejects the other.<sup>2</sup> Incompatibility arises where the functions of the two offices are inconsistent with their being exercised by the same person; such as being judge and clerk of the same court; the officer who presents his account for audit and the officer who passes upon it; judge and deputy sheriff;<sup>3</sup> governor of a state and member of its legislature; justice of the peace and judge of the appellate court;<sup>4</sup> sheriff and justice of the peace.<sup>5</sup> It is also usually provided that no person shall hold offices in two departments of the same government at the same time, or two lucrative offices,<sup>6</sup> or both a federal and a state office;<sup>7</sup> or be qualified for re-election for a definite period, after holding office;<sup>8</sup> or be eligible while a public defaulter;<sup>9</sup> or after having used money corruptly to procure election;<sup>10</sup> or after being concerned in a duel.<sup>11</sup>

<sup>1</sup> *People v. Hanifan*, 96 Ill. 420; *Stubbs v. Lee*, 64 Me. 195; 18 Am. Rep. 251; *People v. Nostrand*, 46 N. Y. 375; *State v. Goff*, 15 R. I. 505; 2 Am. St. Rep. 921.

<sup>2</sup> *Cotton v. Phillips*, 56 N. H. 220.

<sup>3</sup> *People v. Green*, 58 N. Y. 495; *State v. Goff*, 15 R. I. 505; 2 Am. St. Rep. 921.

<sup>4</sup> *Barnum v. Gilpin*, 27 Minn. 466; 38 Am. Rep. 304; *Mohan v. Jackson*, 52 Ind. 599; *Commonwealth v. Binns*, 17 Serg. & R. 221; *State v. Feibleman*, 28 Ark. 424.

<sup>5</sup> *Stubbs v. Lee*, 64 Me. 195; 18 Am. Rep. 251; *Wilson v. King*, 3 Litt. 457; 14 Am. Dec. 84; *State Bank v. Curran*, 10 Ark. 142.

<sup>6</sup> *Crawford v. Dunbar*, 52 Cal. 36; *Howard v. Shoemaker*, 35 Ind. 115; *State v. Kirk*, 44 Ind. 401; 15 Am. Rep. 239; *Dailey v. State*, 8 Blackf. 329; *Smith v. Moore*, 90 Ind. 294.

<sup>7</sup> *People v. Brooklyn Common Council*, 77 N. Y. 503; 33 Am. Rep. 659; *State v. De Gross*, 53 Tex. 387; *State v. Clark*, 3 Nev. 566.

<sup>8</sup> *Horton v. Watson*, 23 Kan. 229; *Gorrell v. Bier*, 15 W. Va. 311.

<sup>9</sup> *Cawley v. People*, 95 Ill. 249; *Hoskins v. Brantley*, 57 Miss. 814.

<sup>10</sup> *Commonwealth v. Walter*, 86 Pa. St. 15.

<sup>11</sup> *Cochran v. Jones*, 14 Am. Law Reg. 222.



Where the statute imposes certain duties to be performed by an officer after the expiration of his term, their performance does not constitute a place or office of trust or profit, so as to disqualify him from holding another office at the same time.<sup>1</sup> Where county commissioners in good faith refuse to induct into office one duly elected on the ground that he is disqualified, and in a suit to try the title to the office it is decided that he was qualified, he cannot recover from them as damages the profits of the office of which he was deprived.<sup>2</sup> A public offer to the electors by a candidate for public office to perform the duties of the office for less than the legal salary or fees invalidates his election.<sup>3</sup> One who was disqualified under the constitution to "hold office" at the time of his election is eligible if the disability was removed before the issuing of the certificate and taking possession of the office.<sup>4</sup> Public officers are not permitted to be interested in contracts pertaining to their office, and a public officer, as a school director or trustee, will not be allowed while so acting to take a contract relating to the matters of his office.<sup>5</sup> A judge is disqualified from sitting in a case in the result of which he is interested as advocate or counsel, or where any relationship or affinity exists between him and either party.<sup>6</sup>

ILLUSTRATIONS.—The California constitution, article 4, section 20, provides that "no person holding a lucrative office under the United States . . . shall be eligible to any civil office of profit under the state." *Held*, that one who accepts a federal office loses his right to the state office then held by him: *People v. Leonard*, 73 Cal. 230. Under the Indiana constitution, a judicial officer is ineligible to a political office the term of which begins before the expiration of the judicial term. The term of a justice of the peace expired at midnight of the

<sup>1</sup> *McNeill v. Somers*, 96 N. C. 467.

<sup>2</sup> *Hannon v. Grizzard*, 96 N. C. 293.

<sup>3</sup> *State v. Collier*, 72 Mo. 13; 37 Am. Rep. 417; *Carrothers v. Russell*, 53 Iowa, 346; 36 Am. Rep. 222.

<sup>4</sup> *Privett v. Bickford*, 26 Kan. 52; 40 Am. Rep. 301.

<sup>5</sup> *Pickett v. School District*, 25 Wis. 551; 3 Am. Rep. 105.

<sup>6</sup> *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114.

<sup>1</sup> *Jack*  
C. 255.  
<sup>2</sup> *Peop*

16th. *Held*, that he was ineligible to the office of township trustee voted for on the 5th, the statute requiring the certificate of election to issue the day following, and the term of office to begin at the expiration of ten days from the day of election: *Vogel v. State*, 107 Ind. 374. The Indiana constitution declares that no person shall hold more than one lucrative office at the same time. *Held*, that a postmaster cannot be a township trustee: *Foltz v. Kerlin*, 105 Ind. 221; 55 Am. Rep. 197. The constitution of Virginia, article 7, section 6, provides that "sheriffs shall hold no other office." *Held*, that the acceptance by a sheriff of the office of a sampler of tobacco of itself vacated the sheriff's office, and that no proceedings were necessary to declare the office vacant: *Shell v. Cousins*, 77 Va. 328.

§ 3805. **Official Bonds.**—Nearly, if not all, the holders of public ministerial offices in the United States are required to furnish bonds for the faithful performance of their duties. Such bonds are required by statutes, which usually prescribe their condition, penalties, and the number and qualifications of the sureties necessary for their acceptance. An officer must give the required bond before he can enter on the performance of his duties.<sup>1</sup> And where an officer is elected for a new term, he should give a new bond, and his sureties are discharged on a bond given for one term after his election for a new term.<sup>2</sup> Where the statute provides that before one can act in a certain office he shall give a bond, approved, etc., before he can claim so to act, he must show that his bond was approved before he entered on the office.<sup>3</sup> Where a bond is delivered to third persons, who deliver it to the obligee, and such bond is not deposited as an escrow, it cannot be avoided by the sureties upon the ground that they signed the bond upon the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, and that the ownership of more property should be qualified to, which was not done, when it appears that the obligee had no notice of such conditions,

<sup>1</sup> *Jackson v. Simonton*, 4 Cranch C. 255.

<sup>2</sup> *Rounds v. Mansfield*, 38 Me. 586; *Rounds v. Bangor*, 46 Me. 541; 74 Am. Dec. 469.

<sup>3</sup> *People v. Aikenhead*, 5 Cal. 106.

and there is nothing in the bond or the manner of its execution to put him on inquiry, and also that he has been induced upon the faith of such bond to act to his own prejudice.<sup>1</sup> If a person give bond for the faithful discharge of the duties of an office, it is an admission of his appointment to that office, so far as to make him liable for official misconduct or neglect of duty.<sup>2</sup> In a bond with sureties given by an officer to the government, it is sufficient to make the bond valid as a common-law obligation that it is voluntarily given, and that the office and the duties assigned to the officer, and covered by the bond, are duly authorized by law.<sup>3</sup> If there is a substantial conformity in the bond to the terms of the statute, and no obligation, which is not imposed by the statute, be added, the bond is good as a statutory bond, and the summary remedies afforded by the statute should be allowed to enforce it.<sup>4</sup> Frequently, the bond is signed by some of the sureties conditionally on the names of others being obtained to it, and those signing seek to evade responsibility on the ground that such other signatures have not been obtained. Such a defense, however, is not maintainable, unless it is shown that the obligee had actual or constructive notice of the condition.<sup>5</sup> As to the time when the liability on the bond commences, it is held that such liability dates from the time of the delivery, and not from the time of acceptance.<sup>6</sup> It is essential that official bonds should be duly delivered and accepted. The acceptance generally consists of the approval by some person or body upon whom the duty devolves by law, and the sureties cannot set up as a defense to an action upon their bond that its approval by the proper officer

<sup>1</sup> Taylor Co. v. King, 73 Iowa, 153; Am. Dec. 566; Goodrum v. Carroll, 2 5 Am. St. Rep. 666. Humph. 490; 37 Am. Dec. 564;

<sup>2</sup> Barada v. Caundele, 8 Mo. 644.

<sup>3</sup> United States v. Rogers, 28 Fed. Rep. 607.

<sup>4</sup> Bouring v. Williams, 17 Ala. 510; Polk v. Plummer, 2 Humph. 500; 37

199; Boykin v. State, 50 Miss. 375.

<sup>5</sup> State v. Peck, 53 Me. 284.

<sup>6</sup> Broome v. United States, 15 How. 143.

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was defective.<sup>1</sup> In Michigan the duty of deciding upon the sufficiency of official bonds, and of accepting or rejecting them, is held to be judicial, while in Arkansas it is classed among ministerial functions.<sup>2</sup> Where a power of attorney authorizing the execution of an official bond, signed by a number of persons, but with the names of several persons who had signed it erased, was presented to a judge, it was his duty to investigate the matters of the erasures, and not having done so, the approval of the bond was improper, and the bond itself void.<sup>3</sup> Where a statutory bond contains conditions in excess of those specified in the statute, it is valid so far as it imposes obligations so authorized, but the stipulations which are in excess of the statutory requirements may be rejected as surplusage.<sup>4</sup> Where the principal has failed to sign the bond, but it has been executed by the sureties and delivered in accordance with the statute, and there is nothing to show that it was so delivered upon any condition that the principal should also sign it, the sureties are liable.<sup>5</sup>

ILLUSTRATIONS.—A county collector, owing two thousand seven hundred dollars of taxes not paid over, concealed about four thousand five hundred dollars on his person, and set out on horseback, unarmed, from his residence to go to the county seat to pay it over. On the way, he was attacked by a highway robber, and some three thousand three hundred dollars was taken from him. *Held*, that he was negligent in carrying more than the amount required, and that it was for the jury to say whether he was not negligent in going unarmed, and that, being negligent, his sureties would be liable: *State v. Houston*, 78 Ala. 576; 56 Am. Rep. 59. An officer, holding for a definite term, and until the appointment of his successor, gave a bond for good behavior during his term. *Held*, that the bond did not extend until the actual appointment of his successor, but

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States, 15 How.

<sup>1</sup> *People v. Edwards*, 9 Cal. 286; *Blatchf.* 1; *State v. Findlay*, 10 Ohio, 51; *Treasurer v. Bates*, 2 Bail. 362.

<sup>2</sup> *Bay County v. Brock*, 44 Mich. 45; <sup>3</sup> *Trustees v. Scheik*, 10 Ill. App. 51; *Smith v. Supervisors*, 59 Ill. 414;

<sup>4</sup> *Bracken County v. Daum*, 80 Ky. 388; *Wildcat Branch v. Ball*, 45 Ind. 213; *Nash v. Fugate*, 32 Gratt. 595; 34

<sup>5</sup> *United States v. Mynderse*, 1 Am. Rep. 780.

only for a reasonable time for such appointment: *Mayor etc. of Rahway v. Crowell*, 40 N. J. L. 207; 29 Am. Rep. 224. A school district treasurer deposited school money in a bank, to his own individual credit, directing the bank to pay out of it certain school district bonds about maturing, payable at that bank. The bank failed, and the money was lost. *Held*, that the treasurer was liable for it in an action on his bond: *Ward v. School District*, 10 Neb. 293; 35 Am. Rep. 477. Section 164 of the Alabama code provides that the bonds of certain public officers "shall be invalid and insufficient in law," unless the sureties respectively reside in the county wherein the duties of the officer are to be performed. *Held*, that a bond is not void because of the non-residence of one or more of the sureties: *State v. Flinn*, 77 Ala. 100. Where the statutory condition of a bond was "for the two years ensuing the first day of February," and the condition of the bond as executed was "for the two years ensuing the 1st of January," *held*, that the variance was immaterial: *Wimpey v. Evans*, 84 Mo. 144.

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## CHAPTER CXCV.

## TERM AND TENURE OF OFFICE.

- § 3806. In general.
- § 3807. When the term commences.
- § 3808. When the term ends.
- § 3809. Vacancies.
- § 3810. Holding over.
- § 3811. Neglect to qualify — After election.
- § 3812. Resignation.
- § 3813. Forfeiture.

§ 3806. **In General.** — A "term" uniformly designates a "fixed and definite period of time." Officers removable at the pleasure of another officer, or who must be removed on the occurrence of an uncertain event, do not hold office for a term so as to bring them under the provisions of a constitution authorizing their election "for such terms" as are prescribed by law.<sup>1</sup> The tenure of an office which is held by executive appointment, and having no term for its duration fixed, can be filled at the executive pleasure, is not enlarged by a constitution which provides that "the duration of all offices not fixed by this constitution shall never exceed four years." Such a provision is a restriction upon the legislature, and applies to offices held during good behavior, or for a longer term than four years.<sup>2</sup> Where the duration of the appointment of special commissioner is not limited by law, but is left to the discretion of the court, according to the exigencies of the various cases that may arise, and the duration of the appointment be not limited as to time by the court, in the order of appointment, the appointment continues until the duties of the office are discharged.<sup>3</sup> Where tenure of a court's office is fixed by the constitution, the incumbent elected to fill the office or a vacancy

<sup>1</sup>Speed v. Crawford, 3 Met. (Ky.) 207.

<sup>2</sup>State v. Crozat, 8 La. Ann. 295.

<sup>3</sup>Williams v. Bowman, 3 Head, 678

is entitled to hold to the full end and term of the period guaranteed by the constitution.<sup>1</sup> If a statute under which a person is elected to office is silent as to his term of office, but provides that an election shall be held every two years, he holds until his successor qualifies;<sup>2</sup> and where such a law provides that an officer, when appointed, shall serve for two years, and until his successor is appointed and qualifies, in the event of a failure to appoint a successor, the incumbent continues to hold as an officer *de jure* until his successor is duly appointed and qualified.<sup>3</sup> Where the constitution of a state provides that certain officers shall be elected by the people, and gives the legislature power to fix the term of office and time and mode of election, after the legislature has taken action in the matter, and the office has been filled, a statute extending the term of the incumbent is unconstitutional.<sup>4</sup> Where the manner of filling a pre-existing office is changed by a constitution, the office and the salary belonging to it are terminated.<sup>5</sup> The tenure of ministerial offices is generally at pleasure.<sup>6</sup>

§ 3807. **When the Term Commences.**—Where no time is fixed by law for the commencement of an official term, it begins to run from the date of the appointment.<sup>7</sup> Usually the constitution or statute by which the office is created fixes the date of its commencement. The term of the first incumbent of an office generally begins on a day certain named in the constitution or statute, and the commencement of subsequent terms is, as a rule, fixed to take place on a day named or on the election and qualifying of the candidate. Where no time is fixed at which a term of office is to

<sup>1</sup> *Banton v. Wilson*, 4 Tex. 400.

<sup>2</sup> *Cordiell v. Frizell*, 1 Nev. 130.

<sup>3</sup> *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 321; *State v. Percy*, 44 Mo. 149.

<sup>4</sup> *People v. Bull*, 46 N. Y. 57; 7 Am. Rep. 302.

<sup>5</sup> *Reynolds v. McAfee*, 44 Ala.

237.

<sup>6</sup> *Field v. Girard College*, 54 Pa. St.

233.

<sup>7</sup> *Attorney-General v. Love*, 39 N.

J. L. 476; 23 Am. Rep. 234.

begin, the party elected may enter upon the discharge of the duties of the office upon receiving his certificate and qualifying.<sup>1</sup> A ballot cannot be so interpreted as to make it contradictory to its terms. If it specifies a certain date on which the term of office is to commence, such specification must control, although the term might have been declared to commence at the date of the election.<sup>2</sup>

ILLUSTRATIONS. — Under the Minnesota Laws of 1883, chapters 1, 2, and 3, adopted January, 1884, that "the official year for the state of Minnesota shall commence on the first Monday in January of each year, and all terms of office shall terminate at that time, and the general election shall be held on the first Tuesday after the first Monday in November"; that after 1884, elections should be biennial, and terms expiring in 1886 should extend to 1887,—*held*, that terms of state, county, or other officers elected in November, 1883, commenced on the first Monday of January, 1884: *State v. Frizzell*, 31 Minn. 460. Relator, having been elected in 1880 to fill an unexpired term as county commissioner, ending in 1882, was, in 1882, elected as his own successor, but the clerk's certificate erroneously recited and relator claimed that his second term did not begin until 1883. No one was elected at the regular election in 1884. Appellant was elected at the general election in 1886. *Held*, that relator was entitled to hold over at the expiration of his second term until his successor was elected and qualified, but appellant, having been elected at the general election in 1886, at which all vacancies were to be filled, was, upon qualifying, entitled to the office: *Parcel v. State*, 110 Ind. 122.

§ 3808. **When the Term Ends.** — As a general rule, an office terminates on the expiration of the period of time for which the officer was elected or appointed, or upon the election and qualification of his successor, or on the completion of the duties of the office, or on the death, removal, or resignation of the incumbent, or on the happening of any other event which may be prescribed by the constitution or law creating the office as that upon which it shall terminate. Where commissioners were appointed to cause a certain work to be completed within

<sup>1</sup> McGee v. Gill, 79 Ky. 106.

<sup>2</sup> Loubat v. Le Roy, 15 Abb. N. C. 1.



three years, their powers ceased at the expiration of the three years, even though the work was not completed.<sup>1</sup> Where officers commissioned before the adoption of a constitution were, upon its adoption, to hold, not until the expiration of their terms of office, but only until new appointments were made under the new government, such new appointments must be made constitutionally, otherwise the incumbents will continue in office.<sup>2</sup> In Mississippi, all officers are elected for a term which expires at the general election for the respective offices, and where a judicial district was created after the general election, and a special election of judge was had, his term of office expired at the general election next succeeding his special election.<sup>3</sup> An election under the provisions of the Maryland constitution to fill a vacancy in the office of clerk of the circuit county court, caused by the death of the incumbent during his term, is not for the unexpired residue of such term, but for the full term of six years from the day of the election.<sup>4</sup> In North Carolina, it is held that the term of a constable expires at the instant when his successor gives bonds and qualifies, and not on the day of the term corresponding with that on which he was appointed.<sup>5</sup> Under the constitution of Wisconsin, which provides that certain officers shall be chosen once in every two years, and as often as vacancies shall happen, it is held that when a person is legally elected to fill such a vacancy it is for a term of two years, and not for the unexpired term of his predecessor.<sup>6</sup> A constitutional provision that no person shall hold the office of judge of any court after he has attained the age of seventy years does not apply to justices of the peace.<sup>7</sup> Where the statute provides that officers shall hold until their successors are qualified, an officer continues such until the qualification

<sup>1</sup> *Nichols v. Comptroller*, 4 Stew. & P. 154; *Banner v. McMurray*, 1 Dev. 218.

<sup>2</sup> *State v. Dubuc*, 9 La. Ann. 237.

<sup>3</sup> *Smith v. Halfacre*, 7 Miss. 582.

<sup>4</sup> *Sansbury v. Middleton*, 11 Md. 296.

<sup>6</sup> *State v. Wilroy*, 10 Ired. 329.

<sup>6</sup> *Attorney-General v. Brunst*, 3 Wis.

787.

<sup>7</sup> *Keniston v. State*, 63 N. H. 37; 56 Am. Rep. 486.

of a successor, notwithstanding the acceptance of his resignation.<sup>1</sup> Where judges are elected by the legislature, and there is no express constitutional provision to the contrary, a judge elected in place of one dying in office holds for the full term, and not simply for the unexpired term.<sup>2</sup>

ILLUSTRATIONS.—The Maryland constitution of 1867, article 2, section 11, provides that "in case of any vacancy, during the recess of the senate, in any office which the governor has power to fill, he shall appoint some suitable person to said office, whose commission shall continue in force until the next session of the legislature, or until some other person is appointed to the same office, whichever shall first occur." *Held*, that the longest term of service of a person so appointed was to the end of the next legislature: *Kroh v. Smoot*, 62 Md. 172. The constitution of Missouri authorizes judges to hold office during a fixed term, and until their "successors" are "elected and qualified." In case of a "vacancy" by death, the governor is to order a new election. A, a judge, was elected for a term expiring on the first Monday of January, 1875. In November, 1874, B was elected as his successor, was duly sworn, and was a person qualified for the office, but two days before the commencement of his term he died. *Held*, that A's right to hold over ceased with B's qualification, and did not revive with his death, and that a new election was authorized: *State v. Seay*, 64 Mo. 89; 27 Am. Rep. 206.

§ 3809. **Vacancies.**—The power to elect to office includes the lesser and necessary power to fill vacancies,<sup>3</sup> but a vacancy does not arise until the term of service expires, or until the death, removal, resignation, abandonment, or disqualification of the incumbent.<sup>4</sup> A vacancy in an office must be established in a proceeding regularly tending to that end,<sup>5</sup> but it may be created by a parol resignation.<sup>6</sup> A right to supply a place, vacant by the death or disability of the incumbent, includes the right to supply a vacancy caused by his resignation.<sup>7</sup> Where a

<sup>1</sup> *Jones v. Jefferson*, 66 Tex. 576.

<sup>5</sup> *Stokes v. Kirkpatrick*, 1 Met. (Ky.)

<sup>2</sup> *Ex parte Meredith*, 33 Gratt. 119; 138.

<sup>3</sup> 36 Am. Rep. 771.

<sup>6</sup> *State v. Allen*, 21 Ind. 516.

<sup>4</sup> *Gorham v. Campbell*, 2 Cal. 135.

<sup>7</sup> *State v. City of Newark*, 27 N. J.

<sup>5</sup> *Johnston v. Wilson*, 2 N. H. 202; 1. 185.

<sup>9</sup> Am. Dec. 50.

resignation has been published to take effect in the future, there is no "existing vacancy" at the time of an election before the resignation takes effect, and an officer chosen in anticipation of the future vacancy is not legally elected.<sup>1</sup> A statute authorizing the board of commissioners of any county in which the office of recorder shall become vacant by death, etc., to appoint some person to supply the vacancy until the next general election, does not conflict with the provision of the constitution that the recorder shall be elected.<sup>2</sup> Under the Louisiana constitution the governor may for a limited time fill vacancies occurring during the recess of the senate, but he has no power to create them.<sup>3</sup> Under the constitution of California the commission of an officer appointed by the governor to fill an existing vacancy expires on the appointment of such officer by the legislature;<sup>4</sup> and where the governor is to appoint with the advice and consent of the senate, an appointment made by him, during a recess, to fill a vacancy then occurring, is good for the rest of the unexpired term, or until the senate signifies its non-concurrence.<sup>5</sup> There is not a vacancy in a public office, within the meaning of the statute authorizing the governor to fill vacancies, while the former incumbent continues to discharge the duties of the office, under the provision in the statute authorizing him to do so until a successor has been appointed.<sup>6</sup> In Arkansas, a justice of the peace, by accepting the office of treasurer, vacates the former, the one being an executive and the other a judicial office, and therefore within the provision of the constitution prohibiting the same person from holding such offices at the same time.<sup>7</sup> Under the provision of the Indiana constitution that "officers shall continue in office until their successors are elected and qualified," no vacancy occurs which the gov-

<sup>1</sup> Biddle v. Willard, 10 Ind. 62.

<sup>2</sup> Hedley v. Comm'rs, 4 Blackf. 116.

<sup>3</sup> State v. Dubuc, 9 La. Ann. 237.

<sup>4</sup> People v. Langdon, 8 Cal. 1.

<sup>5</sup> People v. Addison, 10 Cal. 1;

Weatherbee v. Cazneau, 20 Cal. 503.

<sup>6</sup> Tappan v. Gray, 9 Paige, 507.

<sup>7</sup> State v. Hutt, 2 Ark. 282.

error can fill by appointment, where one holding an appointive office under the general assembly continues to hold it after the expiration of his term, no successor having been appointed by the assembly.<sup>1</sup> Under the constitution and laws of Virginia, county, municipal, and district officers must qualify before the day whereon their terms respectively begin, else their offices are vacant, and the incumbents continue to discharge the duties of the offices after their terms of office have expired, until their successors have qualified.<sup>2</sup> Under a constitutional provision that the governor "may fill any vacancy that may happen . . . . in any judicial or in any other elective office which he is or may be authorized to fill, . . . but in any such case of vacancy in an elective office, a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election," a "vacancy" in the county offices "happens" when a new county is created.<sup>3</sup>

ILLUSTRATIONS.—A statute provides that "every person elected to fill any office in which a vacancy has occurred shall hold such office for the unexpired term thereof." Other provisions provide that in case of a vacancy in the office of county commissioner such vacancy shall be filled by appointment until the next general election. *Held*, that the section applies to the office of county commissioner, and that A's term having become vacant, and B having been appointed to fill the vacancy, and C having been elected at the next general election, C was entitled to the office only for the remainder of A's unexpired term, and not for a full term: *Parmater v. State*, 102 Ind. 90. No term of office was fixed by California act of April 1, 1878, whereunder police commissioners of San Francisco were appointed by the district judges. The California constitution of 1879 abolished the district courts, but made no specific provision for police commissioners. *Held*, that in 1884 there was no vacancy in the office which the governor could fill: *People v. Hammond*, 66 Cal. 654.

<sup>1</sup> *State v. Harrison*, 113 Ind. 234; 3 Am. St. Rep. 663.

<sup>2</sup> *Walsh v. Commonwealth*, 89 Pa. St. 419; 33 Am. Rep. 771.

<sup>3</sup> *Johnson v. Mann*, 77 Va. 265.

The charter of the city of Brooklyn prohibits every alderman from holding "any other public office," and provides that by election to and acceptance of "such public office," "his office as such alderman shall immediately become vacant," and a special election shall be held to fill the vacancy. An alderman was elected representative to Congress, and accepted the office. *Held*, that his office as alderman immediately became vacant; no judicial proceeding was necessary to determine his title; and it was the duty of the defendant to order a special election to fill the vacancy: *People v. Com. Council of Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659.

§ 3810. **Holding over.**—An officer whose term has expired has no right at common law to hold over by reason of the failure of the proper authorities to appoint an officer in his place at the expiration of his term. Acts of officers may sometimes be sustained, under such circumstances, to protect the rights of a third party; but the officer himself cannot claim to hold over, unless by some provision of law authorizing it.<sup>1</sup> An officer elected under a law which is silent as to his term of office, but which requires an election to be held every two years, holds until his successor qualifies.<sup>2</sup> Under the constitution of Virginia the governor is authorized to continue in the discharge of the duties of his office until his successor is qualified.<sup>3</sup> Where a state governor, having received his certificate, and supposing he had been re-elected, held his office after his term had expired, and after his successor had taken his oath of office, approved an act of the legislature, such approval is valid as the act of an officer *de facto*.<sup>4</sup> The provisions of law relative to an officer holding over have no application in the case of one removed from office by competent authority.<sup>5</sup> Where an officer appointed by the governor, by and with the advice and consent of the senate, is authorized by law to hold his office for a term of three years, and until his successor is appointed and

<sup>1</sup> *People v. Tiernan*, 8 Abb. Pr. 359.  
See *contra*, *Stratton v. Oulton*, 28 Cal. 44; *People v. Stratton*, 28 Cal. 382.

<sup>2</sup> *Cordell v. Frizell*, 1 Nev. 130.

<sup>3</sup> *Ex parte Lawhorne*, 18 Gratt. 85.

<sup>4</sup> *State v. Williams*, 5 Wis. 308.

<sup>5</sup> *State v. Hawkins*, 44 Ohio St. 98.

qualified, and no appointment of a successor is made by the regular appointing power at the expiration of his term of three years, the office does not become vacant; but the incumbent holds over as a *de jure* officer until his successor is duly appointed and qualified.<sup>1</sup> Where a state constitution provides that "the general assembly shall not create any office the tenure of which shall be longer than four years," one who holds an office created by the general assembly, the term of which is four years, is not prevented from holding over, after the expiration of his term, until his successor is elected and qualified.<sup>2</sup>

ILLUSTRATIONS.—The law provided that an office should be filled by the governor, by and with the advice of the senate, and that in case of a vacancy happening during a recess of the senate, the governor alone might appoint till the senate met, and that the officer should hold for three years, and until his successor was appointed. The three years' term of an officer duly appointed expired during the recess of the senate. *Held*, that there was no vacancy, that the governor could not appoint, and that the officer should hold until the senate met: *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 321. The constitution of Indiana, article 15, section 3, provides that officers holding for given terms shall hold over until their successors shall have been "elected and qualified." *Held*, to apply to an officer elected by the legislature, and that, where the legislature adjourned without electing a successor to the incumbent of the office, there was no vacancy, and the appointment of a successor by the governor was inoperative: *State v. Harrison*, 113 Ind. 434. A judge of probate, before one term expired, was elected for another term, but died before the new term. The governor appointed a successor to fill the vacancy, and afterwards, at the beginning of the period of the new term, on the supposition that this appointment had run out, appointed another to fill the supposed vacancy. *Held*, that the second appointment was void, that the direction of the constitution was unambiguous, that a probate judge elected to fill a vacancy should continue in office until a successor was elected and qualified, and that his term of office did not expire at the end of the regular term, unless some such elected and qualified person was ready to succeed him: *People v. Lord*, 9 Mich. 227.

<sup>1</sup> *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 321.

<sup>2</sup> *State v. Harrison*, 113 Ind. 434.

An assessor of a city, duly elected and qualified, having served for a term of three years, was re-elected for the following term, but it was not shown that he qualified as such for that term; and in the first year of that term he resigned, and was re-elected to fill the vacancy for the remaining two years of the term. *Held*, that even if he did not qualify for the second term, he held over under the previous election until the vacancy was filled, and his acts as assessor were valid: *Bath v. Reed*, 78 Me. 277.

§ 3811. **Neglect to Qualify — After Election.**—The qualifications after a due election or appointment are usually prescribed by statute, and generally consist in the taking of the proper oath of office and filing the statutory bond, and the neglect to perform these acts within the time limited, as a rule, renders the office vacant, or affords a ground for removal.<sup>1</sup> But although the statute declares that if the oath be not taken, and bond executed within a time named, the office shall be vacant, yet if the person elected or appointed has entered upon the office, and the proper authorities have taken no steps to remove him, the statute does not work that effect;<sup>2</sup> and where no time is fixed within which a town officer shall take the oath of office, his mere neglect to take it does not render the office vacant;<sup>3</sup> but a candidate for office who has not taken the oath required by the constitution of Missouri within fifteen days next preceding his election is ineligible.<sup>4</sup> Where an officer, required to be sworn before entering on his duties, takes his oath before a person not authorized to administer it, it does not follow that his subsequent official acts are void, the general rule being that the acts of officers *de facto*, in which other parties or the public have an interest, are valid.<sup>5</sup> A statute ordering an officer to be sworn in within ten days after election is merely directory, and a neglect to take the official oath does not *ipso facto* vacate the office; but the body of which he is a member may, for that cause, declare his office vacant on the

<sup>1</sup> *Sprowl v. Lawrence*, 33 Ala. 674.

<sup>2</sup> *State v. Cooper*, 53 Miss. 615.

<sup>3</sup> *Glidden v. Towle*, 31 N. H. 147.

<sup>4</sup> *State v. McAdoo*, 36 Mo. 452.

<sup>5</sup> *State v. Perkins*, 24 N. J. L.

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ground of his refusal to assume its responsibilities.<sup>1</sup> In an action for a public office, it is no objection to the right of the relator to recover that he has not taken the oath of office, when it is not shown that he was officially notified of his election.<sup>2</sup> An officer must give the required bond before he can enter on the performance of his duties.<sup>3</sup> In Indiana the failure of an officer to give bond within ten days after the receipt of his commission renders the office vacant.<sup>4</sup> But in Oregon it is held that the right to an elective public office is not lost by a delay in qualifying beyond the time specified in the statute, the statute, in this regard, being directory only.<sup>5</sup> Where the failure of an officer to file his bond seasonably was due to the refusal to approve it of the person whose duty it was to do so, the bond may be filed after judgment in his favor in an action to oust a usurper from the office, and any other act may then be done necessary to entitle him to discharge the duties of the office.<sup>6</sup> Under the Revised Statutes of Texas, article 1718, providing that at the expiration of thirty days from an election, and from time to time thereafter, as the officers elect may qualify, each county judge shall certify to the secretary of state a statement showing who were elected, to what offices, and the date of their qualification, county commissioners have at least thirty days to qualify.<sup>7</sup> The failure of a district attorney to file with the secretary of state his certificate of election, with his oath of office indorsed thereon, as required by the statute, prevents his entering upon the duties of the office until he has complied with the statute in that regard.<sup>8</sup> The provision of the Revised Statutes of Missouri, section 652, requiring the appointment of a deputy constable to be filed in the office of the county clerk of the county in

<sup>1</sup> *Kearney v. Andrews*, 10 N. J. Eq. 70; *State v. Weatherby*, 17 Neb. 553.

<sup>2</sup> *People v. McManus*, 34 Barb. 620.

<sup>3</sup> *Jackson v. Simonton*, 4 Cranch C. C. 255.

<sup>4</sup> *State v. Hadley*, 27 Ind. 496.

<sup>5</sup> *State v. Colvig*, 15 Or. 57; *Carpenier v. Titus*, 33 Kan. 7.

<sup>6</sup> *State v. Dahl*, 65 Wis. 510.

<sup>7</sup> *Cassin v. Zavalla County*, 70 Tex. 419.

<sup>8</sup> *State v. Colvig*, 15 Or. 57.



which he is appointed, is directory only, and a failure to do so does not affect the official *status* as constable.<sup>1</sup>

§ 3812. **Resignation.**—A civil officer may resign his office at any time, and the President has no power to refuse a resignation, and compel the officer to continue in office,<sup>2</sup> and a resignation is sometimes effectual without being accepted by the appointing power;<sup>3</sup> but after election the officer elect cannot resign until he has qualified and taken possession of the office,<sup>4</sup> and a resignation is not, in general, complete until it has been accepted by the authority capable of receiving it, with the knowledge and consent of the person resigning.<sup>5</sup> Where a resignation of an office is tendered in writing to the person authorized by law to receive it, and is placed on file by him without objection, the office will be vacated, and the officer cannot resume it without a new appointment.<sup>6</sup> Where no particular mode of resigning an office is prescribed by statute, and the appointment is not by deed, the resignation and its acceptance may be by parol.<sup>7</sup> The resignation of an officer received by the court and filed by the clerk is an acceptance of the resignation without an entry of an order.<sup>8</sup> A person elected to the office of county judge for the full term may signify his refusal to qualify before the expiration of the twenty days given by law for that purpose, and thereupon the office becomes vacant, and an appointment may be made immediately.<sup>9</sup> A coroner's resignation does not take effect until accepted by the governor.<sup>10</sup> In the absence of a statute requiring a resignation of an office to be in writing, it may be by

<sup>1</sup> *State v. Dierberger*, 96 Mo. 666; 9 Am. St. Rep. 380.

<sup>2</sup> *United States v. Wright*, 1 McLean, 509.

<sup>3</sup> *People v. Porter*, 6 Cal. 26; *State v. Fitts*, 49 Ala. 402.

<sup>4</sup> *Miller v. Board of Supervisors*, 25 Cal. 93.

<sup>5</sup> *State v. Boecker*, 56 Mo. 17; *State*

*v. Clayton*, 27 Kan. 442; 41 Am. Rep. 418.

<sup>6</sup> *Gates v. Delaware*, 12 Iowa, 405; *State v. Hauss*, 43 Ind. 105; 13 Am. Rep. 384.

<sup>7</sup> *Van Orsdall v. Hazard*, 3 Hill, 243.

<sup>8</sup> *Pace v. People*, 50 Ill. 432.

<sup>9</sup> *Finch v. Washburn*, 17 Wis. 658.

<sup>10</sup> *Rogers v. Slonaker*, 52 Kan. 191.

parol, and may be express or implied.<sup>1</sup> In Michigan, the common-law rule is in force that the resignation of a public officer is not complete until the proper authority accepts it, or does something tantamount thereto, such as to appoint a successor.<sup>2</sup> If a resignation tendered by an officer while of unsound mind is accepted, and a successor appointed, who takes the office, the loss must fall on the former.<sup>3</sup> The revocation of an order of dismissal and acceptance of a resignation, after appointment of a successor, do not operate to displace the successor.<sup>4</sup> A deputy collector of customs has an absolute right to resign his office. After his resignation is final, it cannot be withdrawn, but a prospective resignation may be withdrawn at any time before acceptance, and after acceptance it may be withdrawn if the authority accepting it consents, and no new rights have intervened.<sup>5</sup> A judge of the superior court has no power to allow a motion for a new trial, after a resignation of his office has taken effect, in a case tried before him while in office.<sup>6</sup>

ILLUSTRATIONS. — A county superintendent of schools addressed and presented to the county court of his county a paper, as follows: "The undersigned hereby tenders his resignation as county superintendent of schools." This paper was received by the court, and handed to their clerk to be placed on the files of the court, and was by him so filed. *Held*, that this was a virtual acceptance of the resignation, which was not subject to be revoked by the party presenting it: *Pace v. People*, 50 Ill. 432. A county clerk filed in the office of the court his resignation, to take effect at a future date, but before that date forwarded to the court his written withdrawal of it: but the resignation, without his consent, and against his express directions, had been forwarded to the governor and by him accepted, and another person had been appointed clerk. *Held*, that the office did not become vacant, and that with the sanction of the court he might at the same term legally withdraw

<sup>1</sup> *Barbour v. United States*, 17 Ct. of Cl. 149.

<sup>2</sup> *Edwards v. United States*, 103 U. S. 471.

<sup>3</sup> *Blake v. United States*, 13 Ct. of Cl. 462.

<sup>4</sup> *McElrath v. United States*, 12 Ct. of Cl. 201.

<sup>5</sup> *Bunting v. Willis*, 27 Gratt. 144; 21 Am. Rep. 338.

<sup>6</sup> *Griffing v. Danbury*, 41 Conn. 96.

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his resignation, notwithstanding the governor's new appointment: *State v. Boecker*, 56 Mo. 17.

§ 3813. **Forfeiture.**—The right or title to an office may be forfeited in numerous ways, as, for instance, by failure to qualify in the mode and within the time prescribed by law, by refusal to serve, by abandonment, by permanent removal from the county or district in which the duties of the office have to be performed, by the acceptance of another incompatible office, or by malfeasance or misfeasance in office. In many of the states, it is held that the failure of an officer elect to file his official bond, and take the oath required by law within the time prescribed, work a forfeiture of the office, and that no judicial ascertainment of the forfeiture is necessary before proceeding to fill the vacancy.<sup>1</sup> In other states it is held that statutes requiring officers to qualify within a certain time after their election or appointment, or that they should be deemed to have refused the office, and that the same should be filled by appointment, are merely directory as to the time, and that the failure of an officer elect to file his bond and take the oath of office does not *ipso facto* work a forfeiture of his office.<sup>2</sup> After an officer has accepted an office, his refusal to serve is not in itself a forfeiture, but only a cause of forfeiture, of the office.<sup>3</sup> In Alabama the failure of an officer elect to give the bond required by law, as a condition precedent to entering upon the discharge of the duties of the office, is in legal contemplation a failure to accept; and a failure to give additional bonds, where required by law, is a forfeiture of the office.<sup>4</sup> A county or district officer who permanently

<sup>1</sup> *State v. Tucker*, 54 Ala. 205; *People v. Taylor*, 57 Cal. 620; *Carpenter v. Titus*, 33 Kan. 7; *State v. Beard*, 34 La. Ann. 273; *Johnson v. Mann*, 77 Va. 265; *Branham v. Long*, 78 Va. 352.

<sup>2</sup> *Ross v. Williamson*, 44 Ga. 501; *City of Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182; *State v. Porter*, 7

Ind. 204; *State v. Churchill*, 41 Mo. 41; *State v. County Court*, 44 Mo. 230; *Kearney v. Andrews*, 10 N. J. Eq. 70; *People v. Holley*, 12 Wend. 481; *Cronin v. Gundy*, 16 Hun. 520; *State v. Toomer*, 7 Rich. 216.

<sup>3</sup> *Van Orsdall v. Hazard*, 3 Hill, 243.

<sup>4</sup> *Thompson v. Holt*, 52 Ala. 491.



ILLUSTRATIONS.—H., a state treasurer, who had been duly commissioned, discharged in person the duties of his office until the 23d of April, 1872, when he left the state. He left his chief clerk, B., in possession of the office. The governor then notified B. that he must execute a bond for the faithful administration of the office. The bond was not executed to the governor's satisfaction, and on the 27th of May, 1872, the office was seized by military force under the orders of the governor, who then issued a proclamation declaring the office vacant. He then appointed G. as treasurer, and the military put him in possession of the office and ousted the employees of H. H. then brought suit to oust G. *Held*, that the governor is in no case authorized to adjudge an office vacant, and that the right of trial by jury exists in every case where it is charged that an office has been forfeited: *Honey v. Graham*, 39 Tex. 1. The code of North Carolina, sections 706 and 707, requires the board of county commissioners to meet on a day named to accept the bonds of county officers who are required to tender their bonds on that day. *Held*, that the board may adjourn on that day, and declare vacant an office, where the person elected to it has not perfected his bond: *Cole v. Patterson*, 97 N. C. 360.

## CHAPTER CXCV.

## APPOINTMENT OF OFFICERS.

§ 3814. Appointment by public officers.

§ 3815. Executive appointments.

§ 3814. **Appointment by Public Officers.** — The power exercised by public officers to make appointments of inferior or subordinate officers is derived from the constitutions and laws, whether federal or state. The President of the United States is thus invested with the power to appoint numerous officers, — some with the advice and consent of the Senate, and others at his sole discretion. Such power is, also, frequently given to supply vacancies occurring between the periods fixed for the taking place of an election to the several offices designated.<sup>1</sup> Where questions arise whether there is a vacancy to be filled by election or appointment, or whether the law authorizes election or appointment in a given case, the courts have jurisdiction to determine the law of the case.<sup>2</sup> By the appointment of a successor, the appointing power recognizes the fact that a vacancy has occurred.<sup>3</sup> An appointment to office, made by a board of overseers, is not complete until the certificate of appointment has been made out in due form, under the seal of the board, and signed by the officers of the board.<sup>4</sup> A quorum of township trustees must be present to make their appointment of county superintendent valid.<sup>5</sup> The power vested by statute in the judges of certain judicial districts in California to appoint police commissioners for San Francisco is not a judicial power, and was not continued in force by the new constitution.<sup>6</sup> Where the power is given to appoint

<sup>1</sup> See the provisions of the federal and state constitutions and statutes.

<sup>2</sup> *Robertson v. State*, 109 Ind. 79; *Commonwealth v. Messer*, 44 Pa. 341; *State v. Francis*, 26 Kan. 724.

<sup>3</sup> *McGee v. State*, 103 Ind. 444.

<sup>4</sup> *Conger v. Gilmer*, 32 Cal. 75.

<sup>5</sup> *State v. Porter*, 113 Ind. 79.

<sup>6</sup> *Heinlen v. Sullivan*, 64 Cal. 378.

the successors to public officers "at" the expiration of their respective terms, an appointment is not invalid because made on the day on which the term expired.<sup>1</sup> A court is presumed to know judicially of the expiration of the term of office of the sheriff, its executive officer, whether by limitations or death, and in the appointment of another officer, to have acted on its judicial knowledge.<sup>2</sup> A justice of the peace has no authority to appoint a special constable to hold office during the continuance of a camp-meeting, under a statute of Indiana providing that when an emergency exists for the services of a constable, and one is not convenient, the justice may appoint one to act in a particular cause for the purpose of serving process.<sup>3</sup>

ILLUSTRATIONS. — The common council of Hartford, Connecticut, having power in joint convention to appoint a prosecuting attorney, appointed one person to that office by ballot, and then two resolutions were offered and passed, one declaring the ballot just taken null and of no effect, and the other declaring the appointment of another person. *Held*, that the person appointed by ballot was entitled to the office: *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65. A statute vested the appointment of officers in the board of supervisors and the judges of two courts to act by joint ballot. *Held*, that, on due notice to all, a majority of all constituted a quorum able to make the appointment: *People v. Walker*, 23 Barb. 304. A county court was authorized by law to fill a vacancy in the office of sheriff, whenever occurring. On *quo warranto*, judgment of ouster was obtained against the incumbent, on the ground that the relator had a superior title. *Held*, that no such vacancy existed: *State v. Ralls County Court*, 45 Mo. 58.

§ 3815. **Executive Appointments.** — By the American constitutions the power of appointing and removing subordinate executive officers is usually vested in the chief executive.<sup>4</sup> Appointments to office by whomsoever made are intrinsically executive acts.<sup>5</sup> A commission issued

<sup>1</sup> *People v. Blanding*, 63 Cal. 333.

<sup>2</sup> *Saltonstall v. Riley*, 28 Ala. 164; 65 Am. Dec. 334.

<sup>3</sup> *McLain v. Matlock*, 7 Ind. 525; 65 Am. Dec. 746.

<sup>4</sup> *In re Farron*, 4 Woods, 491.

<sup>5</sup> *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65; *Taylor v. Commonwealth*, 3 J. J. Marsh. 401; *Achley's Case*, 4 Abb. Pr. 35; *Marbury v. Madison*, 1 Cranch, 137.

during the recess of the Senate to fill a vacancy in an office continues until the end of the next session of Congress, unless sooner determined by the President.<sup>1</sup> Under a statute which empowers the governor, whenever a vacancy shall occur in the office of supreme judge, to order an election after two months' notice, and to appoint a person to fill the vacancy until the election of a successor, the governor cannot appoint a person to fill out the unexpired term of a resigning judge.<sup>2</sup> An appointment to office by the executive is complete upon delivery of the commission, which is the only legal evidence of title to the office.<sup>3</sup> But the authority conferred by law upon the executive to fill vacancies does not confer upon him the power of ultimately determining whether the vacancies actually exist, and a claimant has the right to have such question determined in the courts.<sup>4</sup> And in the absence of express constitutional authority, the legislature cannot confer on the governor power to remove state or county officers arbitrarily and without hearing.<sup>5</sup> When a governor ascertains that he has issued a commission to a person constitutionally ineligible, he may issue another to the person legally entitled to the office.<sup>6</sup> Where a person has been nominated to an office by the President, confirmed by the Senate, and his commission is signed and sealed, his appointment is complete; and on complying with the conditions established by law, his title to enter on the possession of his office is also complete.<sup>7</sup> The appointment by a state governor to an office the term of which has expired during a recess of the legislature does not merely endure till the next meeting of the legislature, but vests the office in the appointee,

<sup>1</sup> In re Alabama Marshals, 20 Fed. Rep. 379.

<sup>2</sup> Calloway v. Sturm, 1 Heisk. 764.

<sup>3</sup> Wetherbee v. Cazneau, 20 Cal. 503; Marbury v. Madison, 1 Cranch, 137; State v. Allen, 21 Ind. 516; 83 Am. Dec. 367.

<sup>4</sup> State v. Harrison, 113 Ind. 234; 3 Am. St. Rep. 663.

<sup>5</sup> Dullam v. Wilson, 53 Mich. 392; 51 Am. Rep. 128.

<sup>6</sup> Gulick v. New, 14 Ind. 93; 77 Am. Dec. 49.

<sup>7</sup> United States v. Le Baron, 19 How. 73.



subject only to the approval of the legislature.<sup>1</sup> The state governor cannot make an appointment in the recess of the general assembly, unless the vacancy occurred since the adjournment of that body.<sup>2</sup> A public officer appointed by the governor during the recess of the senate, and afterwards confirmed, dates his term from the original appointment, and not from the time of the confirmation.<sup>3</sup>

<sup>1</sup> *People v. Mizner*, 7 Cal. 519.

<sup>2</sup> *People v. Forquer*, 1 Ill. 68.

<sup>3</sup> *Shepard v. Haralson*, 16 La. Ann. 134.

## CHAPTER CXCVI.

## REMOVAL OF OFFICERS.

§ 3816. By whom removable.

§ 3817. When removable.

§ 3818. Mode of removing.

§ 3819. Revisory power.

§ 3816. **By Whom Removable.**—The doctrine that the power to remove is incidental to the power to appoint does not apply to governors of states. Their power of removal is limited to the particular cases provided for by statutory enactments.<sup>1</sup> The power to remove from office belongs to the power of appointment only when the tenure is not fixed by law, but the office is held at the pleasure of the authority making the appointment;<sup>2</sup> but in the absence of any constitutional or statutory prohibition, the power of removal is incident to the power of appointment.<sup>3</sup> Where the power of appointment by one person or officer is made dependent upon the action of other officers, the power of removal is not a necessary incident of the power of appointment.<sup>4</sup> The provision of a constitution giving to the appointing power the right of removal at pleasure of incumbents, the duration of whose term is not provided for by the constitution or declared by law, must be construed to deny the right of removal in those cases where the tenure is defined;<sup>5</sup> but the constitutional right of the appointing power to remove at pleasure is not abridged by an act providing for removal in a certain way or for a certain cause.<sup>6</sup> A state governor has no power to revoke a commission once regularly

<sup>1</sup> *Dubuc v. Voss*, 19 La. Ann. 210; 92 Am. Dec. 526.

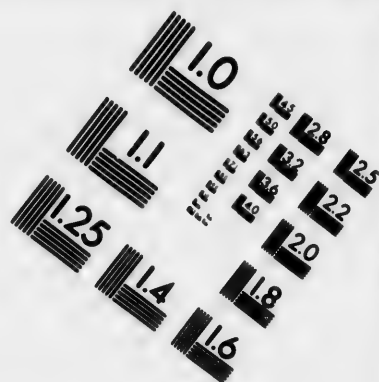
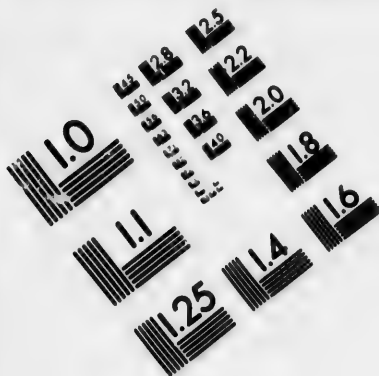
<sup>2</sup> *Collins v. Tracy*, 36 Tex. 546.

<sup>3</sup> *Newsom v. Cocke*, 44 Miss. 352; 7 Am. Rep. 686.

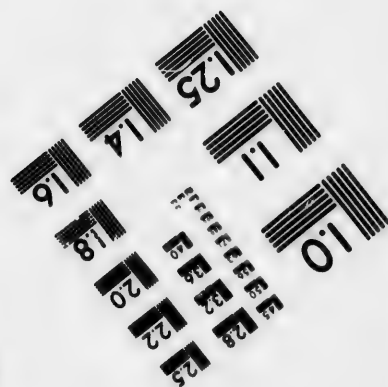
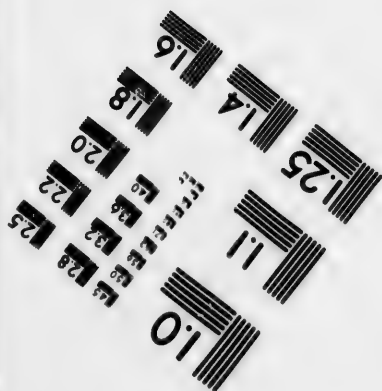
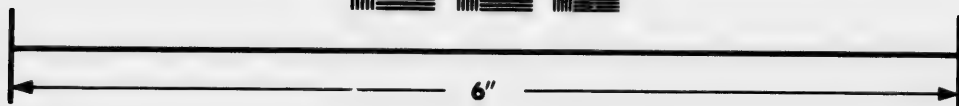
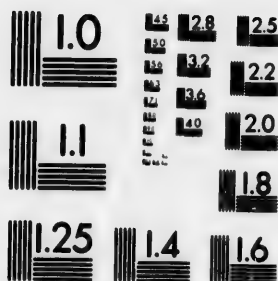
<sup>4</sup> *Carr v. State*, 111 Ind. 101.

<sup>5</sup> *People v. Jewett*, 6 Cal. 291.

<sup>6</sup> *People v. Hill*, 7 Cal. 97.



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issued to an officer who is not removable at his pleasure, whether the appointing power be in the governor or elsewhere.<sup>1</sup> Where an officer is removable at the pleasure of the governor for certain specified causes and deficiencies, the governor need not specify the causes of his removal, and his decision is final.<sup>2</sup> Under the provisions of 1 New York Revised Statutes, page 123, section 42, the governor has the sole and exclusive power of removal and appointment to office during the recess of the senate.<sup>3</sup> A court has no jurisdiction to remove an officer in no way connected with the administration of justice in the court, and over whose appointment it has no control, from an office the duties of which he is discharging under color of an appointment by the governor.<sup>4</sup> A state officer in by right cannot be ousted by the governor.<sup>5</sup>

ILLUSTRATIONS.—The constitution of Kansas declares that each house of the legislature "shall be judge of the elections, returns, and qualifications of its own members." The legislature enacted that "any state, district, city, county, or township officer for whose removal from office by impeachment there is no provision," on conviction of intoxication shall be removed from office by the court. The constitution also provides that "the governor, and all other officers under the constitution, shall be subject to impeachment." *Held*, that the act is unconstitutional, as vesting in others the power exclusively delegated by the constitution to each house: *State v. Gilmore*, 20 Kan. 551; 27 Am. Rep. 189. A Kentucky statute provides that the commissioners of the sinking fund "shall have power, in their discretion, to remove any warden," and "if the general assembly fail or refuse to concur in said removal within twenty days after the fact of removal is communicated to it, then it shall be the duty of said commissioners to reinstate said warden." *Held*, that a removal without notice or hearing was legal, and such removal immediately terminated, the right of the warden to perform the duties of the office or receive its emoluments: *South v. Sinking Fund Comm'rs*, 86 Ky. 186.

<sup>1</sup> *Ewing v. Thompson*, 43 Pa. St. 372.

<sup>2</sup> *Keenan v. Perry*, 24 Tex. 253; *State v. Doherty*, 25 La. Ann. 119; 13 Am. Rep. 131.

<sup>3</sup> *Matter of Bartlett*, 9 How. Pr. 414.

<sup>4</sup> *Tappan v. Gray*, 9 Paige, 507; *Mayor etc. of New York v. Conover*, 5 Abb. Pr. 171.

<sup>5</sup> *State v. Draper*, 48 Mo. 213.

§ 3817. **When Removable.** — When a public officer holds his office for a definite term, or during good behavior, he cannot be removed until the expiration of such term, or until he commits some breach of good conduct or offense constituting a ground for forfeiting the office. An overcharge, if made from corrupt motives, but not otherwise, is cause for removing a clerk of the court. And erasing the name of a person returned upon a panel of grand jurors, and permitting a replevin bond returned into his office to be altered, are causes for removal.<sup>1</sup> A constitution which confers upon the governor power to fill vacancies that may happen during the recess of the senate, by granting commissions, etc., gives him no power to make a vacancy by a declaration that one exists, and granting a commission to fill such supposed vacancy; and the decision of the governor that a vacancy exists is not conclusive upon the rights of others.<sup>2</sup> The reappointment of an officer, with knowledge of his previous misconduct in matters involving no moral delinquency, is a condonation thereof, so far as affects the right to remove him therefor;<sup>3</sup> but the new appointment to an office necessarily operates as a removal of the then incumbent.<sup>4</sup> Under a constitutional provision that persons appointed to fill vacancies in office shall hold until the next general election and the qualification of their successors, a board of supervisors may not remove at pleasure one whom they have appointed to fill a vacancy in the office of sheriff.<sup>5</sup> Where the duration or time of holding an office is not prescribed by law or by the constitution, the appointing power may remove the incumbent of the office at its pleasure.<sup>6</sup> Where the statute requires a board to appoint an officer and to fix his term of office, and provides that he can be removed only for cause, the latter provision

<sup>1</sup> *Commonwealth v. Barry, Hardin*,  
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<sup>4</sup> *Keenan v. Perry*, 24 Tex. 253.

<sup>2</sup> *Page v. Hardin*, 8 B. Mon. 648.

<sup>5</sup> *State v. Chatburn*, 63 Iowa, 659;  
50 Am. Rep. 760.

<sup>3</sup> *State v. Common Council*, 9 Wis.  
254.

<sup>6</sup> *Smith v. Brown*, 59 Cal. 672.

cannot be evaded either by neglecting or purposely omitting to fix his term of office.<sup>1</sup>

ILLUSTRATIONS. — Under the New Jersey Revision, page 1253, providing that the county jailer "may at any time be removed from office by a vote of two thirds of all the chosen freeholders," *held*, that the jailer might be removed at any time without notice, hearing, or cause assigned: *Sweeney v. Stevens*, 46 N. J. L. 344. A statute provided for the removal of certain commissioners in event they should "refuse or willfully neglect to perform" the duties of their office. *Held*, that these words should be construed to mean non-feasance only, and that an order of the proper judge removing them for misfeasance, based upon this provision of the act, was improper, and should be reversed: *People v. Burnside*, 3 Lans. 74. An ordinance creating an office reserved to the municipal council the right to remove the incumbent. The ordinance was repealed by the council, and the incumbent of the office notified. *Held*, that the refusal and notice operated as a removal: *Chandler v. Lawrence*, 128 Mass. 213.

§ 3818. **Mode of Removing.** — This may be by the signification of the pleasure of the appointing power, when the office is so held, or by an action to try the title to the office, or by proceedings at the suit of the attorney-general. The right of a person acting *colore officii* to the office in which he acts can be tried only in a proceeding to which he is a party directly presenting that question, and not in a collateral way between third persons.<sup>2</sup> Where it appears *prima facie* that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office.<sup>3</sup> The title to an office may be determined by an action by the claimant thereof for money had and received, to re-

<sup>1</sup> *State v. St. Louis Police Commissioners*, 88 Mo. 144.

<sup>2</sup> *Douglass v. Wickwire*, 19 Conn. 489; *Commonwealth v. McCombs*, 56 Pa. St. 436; *State v. Lewis*, 22 La.

Ann. 33; *Cooper v. Moore*, 44 Miss 386; *Eaton v. Harris*, 42 Ala. 491; *Kaufman v. Stone*, 25 Ark. 336.

<sup>3</sup> *State v. Jones*, 19 Ind. 356.

cover the fees against a wrongful intruder.<sup>1</sup> A proceeding against a clerk of the court to remove him from office must be in the name of the commonwealth; the attorney-general should carry on the prosecution; it must be instituted by leave of the court on probable cause shown; it must be confined to misconduct in office; and the question whether the clerk is an alien or not cannot be inquired into on such a proceeding.<sup>2</sup> Statutory provisions which prescribe the mode by which a person who usurps an office to which he is not entitled may be deprived thereof do not have the effect of precluding an inquiry into the legality of his title to the office, when it is directly put in issue in an action against the officer himself, in which he sets up and relies upon that title as sufficient to protect him from liability.<sup>3</sup> The imposition of a fine for usurpation of a public office is discretionary with the court.<sup>4</sup> In an action to determine the right to an office, evidence beyond the returns and ballot-boxes, and even as to certain facts showing the intent of the voters, is admissible.<sup>5</sup> *Mandamus* will not lie to compel the admission of a claimant into a disputed office. The title of the incumbent must first be tried on *quo warranto*.<sup>6</sup> A sheriff cannot be removed from office by information for permitting a prisoner to go at large without paying the fine and costs. The proceeding must be by indictment.<sup>7</sup> The provision made by law to try the title to a public office is exclusive, and not cumulative. Whenever it is alleged that a person has usurped a public office, the attorney-general is authorized to institute an action on behalf of the people to try the right of such person to the office, and in such action the right of any other claimant to the office may also be determined.<sup>8</sup> The removal of a state

<sup>1</sup> *Glascok v. Lyons*, 20 Ind. 1; 83 Am. Dec. 299; *United States v. Addison*, 22 How. 174. *Contra*, *Hunter v. Chandler*, 45 Mo. 452.

<sup>2</sup> *Com. v. Barry, Hardin*, 229.

<sup>3</sup> *Patterson v. Miller*, 2 Met. (Ky.) 493.

<sup>4</sup> *People v. Miller*, 16 Mich. 205.

<sup>5</sup> *People v. Cook*, 14 Barb. 259.

<sup>6</sup> *Wood v. Fitzgerald*, 3 Or. 568; *Duane v. McDonald*, 41 Conn. 517.

<sup>7</sup> *Haskins v. State*, 47 Ark. 243.

<sup>8</sup> *Palmer v. Foley*, 45 How. Pr. 110; *State v. Pierpoint*, 29 Wis. 608.

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officer for malfeasance is a judicial act, belonging, not to the executive office, but to the court of impeachment.<sup>1</sup> The writ of *quo warranto* is the proper and only mode of questioning the official authority of a person exercising judicial functions.<sup>2</sup>

ILLUSTRATIONS. — The district court, upon its own motion, suspended the sheriff, and appointed his deputy to temporarily discharge the duties of the office. Afterwards, the board of supervisors selected another person, to temporarily fill the office. *Held*, that it was competent for the district court to decide, without an action of *quo warranto*, that the latter was entitled to the possession of the office: *McCue v. Wapello Co. Court*, 51 Iowa, 60. The defendant, under an appointment by the city controller to the office of deputy chamberlain, undertook, by threats, etc., to intrude into and take possession of that office, and to oust the deputy in possession and doing the duties of the office under the appointment of the chamberlain, the plaintiff. *Held*, that jurisdiction would not be assumed to oust an officer from an office under color of title until his right to such office had been settled in the mode prescribed by law: *Palmer v. Foley*, 36 N. Y. Sup. Ct. 14.

§ 3819. **Revisory Power.** — In all cases where a public office is held during good behavior, and no specified term is prescribed for its continuance, the incumbent, on being charged with misconduct in office and threatened with removal, may apply to the courts to investigate the charges made against him, and the proper judicial tribunal has jurisdiction to entertain the matter and review the action of the authority seeking to effect such removal. In the absence of any statute specially authorizing the appointing power to remove an officer holding during good behavior, he can be removed only on conviction by a jury of some malfeasance, non-feasance, or misfeasance in office.<sup>3</sup> But, as we have seen, where an officer is removable at the pleasure of the appointing power for specified cause, the cause need not be specified, and the decision is final.<sup>4</sup>

<sup>1</sup> *State v. Pritchard*, 36 N. J. L. 101; *People v. Jewett*, 6 Cal. 291; *State v. Page v. Hardin*, 8 B. Mon. 648. *Doherty*, 25 La. Ann. 119.

<sup>2</sup> *Grant v. Chambers*, 34 Tex. 574.

<sup>4</sup> See *ante*, § 3816.

<sup>3</sup> *Collins v. Tracy*, 36 Kan. 549;

## CHAPTER CXCVII.

## DIFFERENT KINDS OF OFFICERS, AND RIGHTS AND LIABILITIES.

§ 3820. Judges.

§ 3821. Officers of court.

§ 3822. Civil officers.

§ 3820. **Judges.**—No action can be maintained against a person acting judicially, though he act illegally and erroneously, unless he acts from impure and corrupt motives.<sup>1</sup> The judges of elections are judicial officers, and are not liable to an action for damages for mere errors of judgment in the discharge of their duties, where their conduct has not been corrupt or malicious.<sup>2</sup> It is the duty of a judge to be personally present in court, and to find judicially the facts upon which his conclusions are based. Where, therefore, a judge, being at a distance from the court, telegraphed to the clerk to discharge the jury, which the clerk did, it was held error.<sup>3</sup> A judge of probate is not liable for neglecting to take security from the guardian of an infant, although such infant had personal estate, and the guardian was a bankrupt.<sup>4</sup> A board of pilot commissioners is a *quasi* judicial body intrusted with duties the performance of which requires the exercise of judgment and discretion, and its members are not civilly answerable for their acts as such.<sup>5</sup> A public officer, judicial or otherwise, has no right under color of his office to extort from an individual a bond as a condition on which he will render to him rights and privileges which he may justly claim.<sup>6</sup> A salary once given to or which has become legally vested in a chancellor or judge

<sup>1</sup> *Morgan v. Dudley*, 18 B. Mon. 693; 68 Am. Dec. 735; *Craig v. Burnett*, 32 Ala. 728; *Lincoln v. Hapgood*, 11 Mass. 350; *Reed v. Conway*, 20 Mo. 22; *Hill v. Sellick*, 21 Barb. 207.  
<sup>2</sup> *Rail v. Potts*, 8 Humph. 225.

<sup>3</sup> *State v. Jefferson*, 66 N. C. 309.

<sup>4</sup> *Phelps v. Sill*, 1 Day, 315.

<sup>5</sup> *Downer v. Lent*, 6 Cal. 94; 65 Am. Dec. 489.

<sup>6</sup> *Whiteled v. Governor*, 6 Port. 335.

cannot be constitutionally diminished or withheld in any way during the continuance of his commission.<sup>1</sup> The treasurer has no power to determine when a circuit judge has been guilty of such neglect as to authorize a deduction from his salary; nor has he the right to refuse payment of the warrant of the auditor drawn in favor of a circuit judge for a portion of his salary, although the same amount has been paid a *pro tem* judge for services rendered during the same period for which the warrant was issued.<sup>2</sup> A law providing that a judge shall be paid annually "such sum as shall be determined by the board, not to exceed three thousand dollars," does not entitle the judge, as of right, to claim as much as three thousand dollars; and if the board determine upon a less sum, *mandamus* will not lie to compel payment of the difference.<sup>3</sup> A magistrate is a judicial officer having summary jurisdiction in matters of criminal or *quasi* criminal nature. Justices of the peace, police justices, and American consuls in foreign ports are magistrates.<sup>4</sup> A magistrate of an inferior court acting without or in excess of jurisdiction is liable in damages to a party injured thereby, and he can show no legal justification under any judicial record.<sup>5</sup> And if a ministerial duty is annexed to a judicial office, and the officer execute that ministerial duty wrongfully, whether by mistake or fraud, he is answerable to the party injured in a suit at law.<sup>6</sup> Where a judge has been elected by the legislature, the legislature may curtail the territory of his jurisdiction down to the constitutional minimum, although it diminishes his compensation.<sup>7</sup> A judge of the court from which an execution issues may lawfully buy property sold under it.<sup>8</sup>

<sup>1</sup> Chancellor's Case, 1 Bland, 595.

<sup>2</sup> Garrard v. Nuttall, 2 Met. (Ky.) 106.

<sup>3</sup> Hart v. Johnson, 17 Cal. 305.

<sup>4</sup> Kurtz v. State, 22 Fla. 36; 1 Am. St. Rep. 173.

<sup>5</sup> Piper v. Pearson, 2 Gray, 120; 61 Am. Dec. 438.

<sup>6</sup> Taylor v. Doremus, 16 N. J. L.

473; Stone v. Graves, 8 Mo. 148.

<sup>7</sup> Foster v. Jones, 79 Va. 642; 52

Am. Rep. 637.

<sup>8</sup> Cooper v. Galbraith, 3 Wash.

546.

**ILLUSTRATIONS.** — Defendant was indicted for larceny. *Held*, that the mere fact that the judge belonged to an illegal association (a vigilance committee), who had exiled the defendant on grounds unconnected with the present charge, did not legally disqualify the judge from sitting at his trial: *People v. Mahoney*, 18 Cal. 180. It was charged that the judge connived at waste by the administrator. *Held*, that if his orders were complained of, they might be corrected by appeal or *certiorari*; if the charges related to matters not involved in his official conduct, the remedy was by suit against him personally: *Glavecke v. Tijirina*, 24 Tex. 663.

**§ 3821. Officers of Court.** — The rights, powers, duties, and compensation of the various court officials, whether federal or state, are for the most part prescribed and defined by the several constitutions or statutes of the general or state governments, and the liabilities for breach of duty are, also, in many instances, the subject of statutory regulation. The acts of an officer *de facto*, whether judicial or ministerial, are valid, so far as the rights of the public or third persons having an interest in such acts are concerned.<sup>1</sup> The clerk of a court may maintain *assumpsit* against a plaintiff for the lawful fees, where they cannot be collected from the defendant.<sup>2</sup> The allowance of compensation to an officer of the court, in addition to the sum allowed by law, and not to exceed a certain sum, as the judge may deem just and proper, is a judicial, not a clerical, act, which must be evidenced by some order entered under the authority of the judge, and purporting to do so.<sup>3</sup> In the absence of express legislative enactment, an officer is to be allowed a fair and just compensation for the custody of property attached by him, to be determined by the court in the exercise of a sound discretion.<sup>4</sup> Courts have no power to determine the compensation of their officers, or costs, or fees, in advance, but only to tax costs in cases not previously

<sup>1</sup> *State v. Brennan*, 25 Conn. 278;

*McInstry v. Tanner*, 9 Johns. 135;

*Gumberts v. Adams Ex. Co.*, 28 Ind.

181; *Savage v. Ball*, 17 N. J. Eq. 142.

<sup>2</sup> *Ewing v. Lusk*, 4 Yerg. 459.

<sup>3</sup> *Baltimore v. Baltimore*, 19 Md.

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<sup>4</sup> *Hesse v. Kim*, 14 Mo. 395.

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provided for.<sup>1</sup> In an action against an officer to recover the penalty for taking an illegal fee, the declaration should state the particular service for which the officer took the fee.<sup>2</sup>

ILLUSTRATIONS. — A clerk of the circuit court whose term had expired, but whose successor had not been qualified, procured a third person to act for him in his absence. This person had charge of the books and papers, and transacted the business of the office, but was not a deputy *de jure*. A judgment rendered in said court was paid to him. *Held*, that he was a *de facto* deputy, and the payment was a satisfaction of the judgment: *Kelley v. Story*, 6 Heisk. 202. A was re-elected clerk of court November 7, 1876. He qualified and was commissioned afterwards. November 2, 1880, B was elected. *Held*, that A's term was for four years from the date of his election, and afterwards until B was qualified: *Macoy v. Curtis*, 14 S. C. 367. The clerk of a court presented a fee-bill for certain services as clerk. The statutes provide that no fee-bill shall be made out or compensation allowed for any *ex officio* services rendered by any officer. *Held*, that the *ex officio* services intended by the statute are those services which relate to the public interests or business of the county or state, as distinguished from those relating to the private interests of individuals: *Gilbert v. Justices*, 18 B. Mon. 427.

§ 3822. **Civil Officers.** — Where power or jurisdiction is delegated to a public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, their acts are binding as to such subject-matter.<sup>3</sup> Officers having a discretionary power to act are not liable for errors of judgment.<sup>4</sup> An officer will not be presumed to have exceeded his authority, especially the officer of a foreign government.<sup>5</sup> The rule that the acts of *de facto* officials who fail to qualify themselves by taking an oath or giving bond are valid as to third parties should be restricted to those who hold office under some degree of notoriety, or are in the continuance of official acts, or are in possession of a place which has the character of a

<sup>1</sup> *Ripley v. Gifford*, 11 Iowa, 367.

<sup>2</sup> *Aechternacht v. Watmough*, 8 Watts & S. 162.

<sup>3</sup> *United States v. Arredondo*, 6 Pet. 691; *Allen v. Blunt*, 2 Story, 742.

<sup>4</sup> *Schoettgen v. Wilson*, 48 Mo. 253.

<sup>5</sup> *Den v. Den*, 6 Cal. 81.

public office.<sup>1</sup> The legal presumption is, that persons acting in an official capacity are properly authorized so to do, and that their official signatures are genuine.<sup>2</sup> Where a public office is instituted by the legislature, an implied authority is conferred on the officer to bring all suits, as incident to his office, which the proper and faithful discharge of his official duties requires.<sup>3</sup> It is contrary to public policy to permit state officers to transact the business of the state and to contract in their own name. All contracts relating to money due the state must be made in the name of the state, and all suits relating thereto be brought in the name of the state.<sup>4</sup> The officers of government have authority, derived from the general rights of the government, without any statute whatever on the subject, to exercise all necessary force for the prevention of crime, either by the arrest of individuals or by the seizure or detention of the instruments for committing crime.<sup>5</sup> The state is concluded by the act of one of its officers acting within the authority of his office. Such act can only be judicially reviewed by a court of competent jurisdiction, and not by the legislature.<sup>6</sup> But the acts of officers beyond their lawful authority create no legal claim against the state;<sup>7</sup> though officers are presumed not to abuse their functions, and one lawfully employing them is not liable if they do, unless he orders, encourages, or sanctions it.<sup>8</sup> A public ministerial officer is answerable in a civil action for any act of negligence or misconduct whereby damage proximately results to the party complaining,<sup>9</sup> and public officers who are intrusted with public funds, and required to give bonds for the faithful discharge of their official duties, are not mere bailees of

<sup>1</sup> Vaccari v. Maxwell, 3 Blatchf. 368.

<sup>2</sup> Lowell v. Flint, 20 Me. 401.

<sup>3</sup> Pittstown v. Plattsburg, 18 Johns. 407.

<sup>4</sup> Hunter v. Field, 20 Ohio, 340.

<sup>5</sup> Spalding v. Preston, 21 Vt. 9; 50 Am. Dec. 68.

<sup>6</sup> Boyers v. Crane, 1 W. Va. 176.

<sup>7</sup> State v. Hastings, 12 Wis. 596.

<sup>8</sup> Sutherland v. Ingalls, 63 Mich. 620; 6 Am. St. Rep. 332.

<sup>9</sup> Eslava v. Jones, 83 Ala. 139; 3 Am. St. Rep. 699; Insurance Co. v. Leland, 90 Mo. 177; 59 Am. Rep. 9.

the money, to be exonerated by the exercise of ordinary care and diligence. Their liability is fixed by their bonds, and the fact that money is stolen from them, without any fault or negligence upon their part, does not release them from liability thereon.<sup>1</sup>

ILLUSTRATIONS.—A commissioner was appointed to run a boundary line under a treaty. *Held*, not authorized to draw drafts upon the treasury department of the United States for his compensation: *Goodman v. United States*, 1 Ct. of Cl. 166. The legislature made an appropriation for certain services to be performed by the secretary of state, and a part of the services was performed by the secretary then in office, and a part by his successor. *Held*, that the latter could not maintain an action for money had and received against the former: *Trumbull v. Campbell*, 8 Ill. 502. An instrument from which it appeared that the grantors in the deed intended to execute the same in their official capacity as "commissioners of the sinking fund of the city of San Francisco," though attaching thereto their private seals and signatures only, *held*, within the purview of the California act of 1858 (Stats. 1858, p. 84), which validates such sales and conveyances of the commissioners: *Ellis v. Eastman*, 38 Cal. 195. H. was appointed superintendent of Indian affairs to succeed himself, and at the date of the execution of his second bond there was a balance due the United States of the moneys received by him under his first bond. *Held*, that there could be no presumption that this sum had previously been illegally appropriated by the officer. Presumably it was in his hands to be accounted for under his second bond: *United States v. Earhart*, 4 Saw. 245. Where the statute fixed the salary of a county superintendent in counties having a population less than fifteen thousand at six hundred dollars per annum, and by the state census in March the population was less than that number, and was so at the time the salary was fixed, *held*, that the salary continued fixed through the year, though the United States census of June showed a population of over fifteen thousand: *Turner v. Neosho County Comm'rs*, 27 Kan. 639.

<sup>1</sup> *State v. Nevins*, 19 Nev. 162; 3 Am. St. Rep. 873; *Ward v. School District*, 10 Neb. 293; 35 Am. Rep. 477; *State Township v. Powell*, 67 Mo. 395; 29 Am. Rep. 512; *Comm'rs of Jefferson Co. v. Lineberger*, 3 Mont. 231; 35

Am. Rep. 462; *Lowry v. Polk Co.*, 51 Iowa, 50; 33 Am. Rep. 114. *Contra*, *Cumberland v. Pennell*, 69 Me. 357; 31 Am. Rep. 284; *York Co. v. Watson*, 15 S. C. 1; 40 Am. Rep. 675.

## CHAPTER CXCVIII.

## SHERIFFS.

- § 3823. Appointment of sheriffs.
- § 3824. Bonds of.
- § 3825. Powers of.
- § 3826. Liabilities and duties of.
- § 3827. Unlawful seizures.
- § 3828. False returns.
- § 3829. Failure to state returns.
- § 3830. Collection of money.

§ 3823. **Appointment of Sheriffs.** — In all the states except New Hampshire and Rhode Island, the sheriff is appointed by popular election, and no property qualification is necessary; the only requirements being that the candidate must be a man over the age of twenty-one years, a citizen of the United States and of the state in which he seeks to hold office, and a resident of the county in which he is to serve.<sup>1</sup> But notwithstanding the possession of these qualifications, the candidate is held ineligible in some of the states by reason of his holding some other office which is incompatible with his also holding that of sheriff, and it is provided in some of the constitutions that a sheriff is not eligible for re-election until the expiration of a certain period after the termination of his term of office.<sup>2</sup> In Alabama the governor is authorized by statute to appoint a sheriff, in case of a vacancy, "to continue in office until the next general election," and a sheriff so appointed holds until the next annual election of representatives to the general assembly, and not for the residue of the term for which his predecessor was chosen.<sup>3</sup> Where a new county is formed by an act lim-

<sup>1</sup> Const. N. H., art. 46; Gen. Stats. R. I., p. 57; *State v. Smith*, 14 Wis. 497; *Patterson v. Miller*, 2 Met. (Ky.) 493.

<sup>2</sup> Const. Tenn., art. 7, sec. 1; Const. Pa., art. 6, sec. 1.

<sup>3</sup> *State v. Ayres*, Minor, 323.



ited to take effect at a future day, an appointment of sheriff before that day is illegal.<sup>1</sup> The election and qualification of a defaulter to the office of sheriff is null and void, and confers no authority upon him to discharge the duties of the office.<sup>2</sup> Strictly speaking, there can be no vacancy in the office of sheriff; for on his death, etc., the coroner, by the operation of law, becomes sheriff until another is appointed.<sup>3</sup> Though the appointment of a sheriff by a county judge may be void, yet the acts of such sheriff as a *de facto* officer are valid.<sup>4</sup> And a sheriff duly elected, but not having executed a bond according to law within thirty days after his election, is an officer *de facto*, and his acts are valid when they concern the public, or third persons who have an interest in them.<sup>5</sup> When a person has been duly elected sheriff, his title to the office is fixed, and the perverse refusal to approve his bond for a time does not prevent his being entitled to the benefits of his office.<sup>6</sup>

ILLUSTRATIONS. — Where two persons who were successively commissioned to execute the office of sheriff in a county failed to give bonds within the time prescribed by law, and the governor thereupon issued a second commission to the person first commissioned, *held*, that the latter commission was improvidently issued, and was therefore void: *Bowers v. Miller*, 3 Munf. 492. E. was elected sheriff on the second Tuesday of October, 1859, for two years, and entered on the duties of his office in January, 1860. On the second Tuesday of October, 1861, H. was elected for two years, and a commission was issued to him. C. was elected coroner at the same time. On December 12, 1861, H. died, before giving bond or taking the oath of office. On December 23, 1861, a commission was issued to C. as sheriff, and on the 27th he took the oath of office. *Held*, that on January 1, 1862, C. rightfully succeeded E. in the office of sheriff: *State v. Epler*, 12 Ohio St. 428. The Oregon constitution provides for the election of a sheriff, "who shall be the

<sup>1</sup> Commonwealth v. Fowler, 10 Mass. 290.

<sup>2</sup> Newman v. Justices of Jefferson, 6 Humph. 41. But see Bates v. Dyer, 9 Humph. 162.

<sup>3</sup> People v. Phoenix, 6 Cal. 92.

<sup>4</sup> People v. Roberts, 6 Cal. 214; Buckman v. Ruggles, 15 Mass. 180; 3 Am. Dec. 98; Merrill v. Palmer, 13 N. H. 184.

<sup>5</sup> Crawford v. Howard, 9 Ga. 314.

<sup>6</sup> State v. Yates, Riley, 256.

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ministerial officer of the circuit and county courts, and shall perform such other duties as may be prescribed by law." *Held*, that the legislature might impose upon the sheriff the duties of tax collector without extra compensation: *Lane v. Coos Co.*, 10 Or. 123.

§ 3824. **Bonds of.**—The form and amount of the official bond of the sheriff are prescribed by the statutes of the various states. The neglect of the sheriff or of the court to have the bond approved does not *proprio vigore* vacate the office.<sup>1</sup> After his election, one of the first duties of the sheriff is to execute the statutory bond, which is conditioned for the faithful discharge of the general duties of his office. The bond must be accepted and approved by the court or officer named in the statute for that purpose. This is a ministerial, not a judicial, duty, and may be enforced by *mandamus*.<sup>2</sup> The liabilities of the sureties on a sheriff's bond are co-extensive with the duties of his office, but are limited to those duties enumerated in the bond, and do not extend to other duties which might be included in a general description recited in the bond.<sup>3</sup> In an action on a sheriff's bond, against his sureties, for not paying over money, a demand must be proved and by whom it was made.<sup>4</sup> The sheriff's bond does not cover money collected on execution, and retained for the sheriff's own use by consent of the execution plaintiff.<sup>5</sup> And the sureties are not liable for money intrusted to him, but which by law should have been intrusted to a different officer.<sup>6</sup> Where a bond is conditioned for the performance of the duties of the office, it extends to duties imposed by statute after the execution of the bond.<sup>7</sup> Where the sheriff *de jure* recovers the office from the sheriff *de facto*, the sureties on the

<sup>1</sup> *McCracken v. Todd*, 1 Kan. 148; *State v. Ely*, 43 Ala. 568; *Ex parte Candee*, 48 Ala. 386.

<sup>2</sup> *Ex parte Candee*, 48 Ala. 386.

<sup>3</sup> *Eaton v. Kelly*, 72 N. C. 110; *State v. Brown*, 11 Ired. 141.

<sup>4</sup> *Barton v. Peck*, 1 Stew. & P. 486; *Governor v. Pleasants*, 4 Ark. 193; *State v. Hays*, 30 W. Va. 107.

<sup>5</sup> *Hill v. Kemble*, 9 Cal. 71;

<sup>6</sup> *Sample v. Davis*, 4 G. Greene, 117.

<sup>7</sup> *Bartlett v. Governor*, 2 Bibb, 219.

official bond of the latter are not liable for the emoluments of the office received while the intruder exercised its functions.<sup>1</sup> A statute authorizing judgment on motion against a sheriff and the sureties on his official bond, "for so much money" as the person moving "is entitled by virtue of such bond to recover by action, includes damages in tort as well as cases where the amount can be arithmetically calculated.<sup>2</sup> Where a sheriff, acting as special master commissioner, sells mortgaged premises, and misappropriates a balance remaining to await the determination of disputed claims therefor, the sureties on his official bonds are liable to the extent of the misappropriation.<sup>3</sup>

ILLUSTRATIONS.—An official bond ran, "That we, A, as principal, and B, C, D, as sureties, are held, etc., in the several sums as hereinafter specified and affixed to our names, viz., B in the penal sum of ten thousand dollars, C in the penal sum of five thousand dollars, D in the penal sum of three thousand dollars, for the which payment we severally bind ourselves, our heirs," etc. *Held*, that the principal and each of the sureties were bound jointly and severally, and that the signature of the principal was essential to make it valid and binding on the sureties: *People v. Hartley*, 21 Cal. 585; 82 Am. Dec. 758. A sheriff, elected to hold office for two successive terms, levied an execution on property during the first term, and a writ of *renditioni exponas* was issued near the expiration of the first term, upon which he did not make a return until thirty days after the proper return day, which was after the commencement of the second term. *Held*, that the duty of executing this writ was devolved upon him by his first and not his second term of office, and that the bond sued on, which related only to his second term, did not bind either him or his sureties for the performance of that duty which appertained to his first term: *Colyer v. Higgins*, 1 Duvall, 6; 85 Am. Dec. 601. A and B each claimed the priority of their respective attachments on certain personalty. B gave to the deputy sheriff an indemnity bond, and the deputy levied under B's execution. A recovered judgment against the sheriff, which the sheriff satisfied, and the sheriff recovered a judgment against the surety on the deputy's official bond, which the surety satisfied. The

<sup>1</sup> *Curry v. Wright*, 86 Tenn. 636.

<sup>2</sup> *Hubbard v. Elden*, 43 Ohio St.

<sup>3</sup> *Shepherd v. Brown*, 30 W. Va. 13. 380.

surety then brought a suit in equity against B. *Held*, that the suit could be maintained, notwithstanding that the deputy had died insolvent: *Philbrick v. Shaw*, 63 N. H. 81.

§ 3825. **Powers of.**—A sheriff has a right to enter a house to execute civil process, if the outer door is open, and to break open inner doors if property is concealed, and he may use the force necessary to execute his writ;<sup>1</sup> but he has not and can give no authority, in the execution of a *feri facias*, to break open the outer door of a dwelling.<sup>2</sup> But where distinct portions of the same building are used for a shop and for a dwelling, and have a common outer entrance, an officer in enforcing process may break it;<sup>3</sup> and he may do so to levy an execution on the property of a third person in the house, upon a demand and denial of admittance.<sup>4</sup> A sheriff of a county cannot make legal service of process either in favor of or against a town of which he is an inhabitant,<sup>5</sup> and where he has in his hands a writ for service, he has no authority in his official capacity to settle the demand, and receive the money from the debtor.<sup>6</sup> A sheriff cannot execute a writ or warrant of attachment out of his own county, and where he did so under a mistake as to the boundary of the county, the property attached was ordered to be released;<sup>7</sup> and the sheriff of another state cannot pursue and retake a prisoner, who has escaped from his custody, on civil process.<sup>8</sup> A sheriff may summon aid to assist him in executing a writ of execution, without having previously attempted to levy, and having been resisted;<sup>9</sup> and he may summon the power of the county, after resistance, if necessary, to execute process; and every man is bound to be aiding and assisting, upon order or summons, in preserving the

<sup>1</sup> *Prettyman v. Dean*, 2 Harr. (Del.) 494; *State v. Thackam*, 1 Bay, 358.

<sup>2</sup> *Calvert v. Stone*, 10 B. Mon. 152.

<sup>3</sup> *Tea as v. Vincent*, 50 Mich. 209; 45 Am. Rep. 37.

<sup>4</sup> *De Graffenreid v. Mitchell*, 3 McCord, 506; 15 Am. Dec. 648; *Barton*

*v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145; *Platt v. Brown*, 16 Pick. 553.

<sup>5</sup> *State v. Walpole*, 15 N. H. 26.

<sup>6</sup> *Waite v. Delesdernier*, 15 Me. 144.

<sup>7</sup> *Matter of Tilton*, 19 Abb. Pr. 50.

<sup>8</sup> *Bromley v. Hutchins*, 8 Vt. 194.

<sup>9</sup> *Bell v. North*, 4 Litt. 133.

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peace and apprehending offenders, and is punishable if he refuses;<sup>1</sup> but a sheriff is not bound to summon the power of the county on mesne process.<sup>2</sup> Where the sheriff has a warrant for the arrest of a person on a criminal charge, and has reasonable cause to believe, and does believe, that he is in the house of another, he may, after being admitted into the outer door thereof, lawfully search the premises for the person named in his warrant, if he acts in good faith and in a reasonable manner, although in fact the person sought for is not there;<sup>3</sup> but he has no power to admit to bail in criminal cases, or to take a recognizance for the appearance of a person arrested for a contempt of court.<sup>4</sup> A sheriff has no authority to receive anything in satisfaction of an execution but the legal currency;<sup>5</sup> and the creditor has the right to direct the officer to whom he delivers the execution not to collect the whole amount, and in such case the sheriff has no authority to receive any more than he is directed to receive.<sup>6</sup> The power of a sheriff to execute a deed for land sold by his predecessor in office is derived entirely from the statute; and where this power by the express terms of the statute is restricted to cases when the sheriff may go out of office not having executed deeds for land sold by him while in office, in those cases alone is the successor empowered to execute the deed.<sup>7</sup> Whenever the sheriff in good faith, and in the exercise of his official discretion, doubts whether personal property levied upon by him under execution is subject to levy or sale, the law gives him the right to demand a bond of indemnity;<sup>8</sup> and he may demand indemnity before serving a writ of possession, as against one claiming to hold rightfully, and not in privity with the defendant,

<sup>1</sup> *Coyles v. Hurtin*, 10 Johns. 85; *Sutton v. Allison*, 2 Jones, 339.

<sup>2</sup> *Houser v. Hampton*, 7 Ired. 333.

<sup>3</sup> *Commonwealth v. Irwin*, 1 Allen, 587.

<sup>4</sup> *State v. Walker*, 1 Mo. 546; *State v. Howell*, 11 Mo. 613.

<sup>5</sup> *Planters' Bank v. Scott*, 6 Miss. 246; *Mitchell v. Hackett*, 14 Cal. 661; *Draper v. State*, 1 Head, 262.

<sup>6</sup> *Rogers v. McDermid*, 7 N. H. 506.

<sup>7</sup> *Wortham v. Cherry*, 3 Head, 468.

<sup>8</sup> *Board v. Helm*, 2 Met. (Ky.) 500.

though the premises are specifically described in the writ, and if the indemnity is refused, he may refuse to execute the writ.<sup>1</sup> But if goods in the hands of the defendant are pointed out to the sheriff by the plaintiff, and he is requested to levy upon them, he is bound to do it without indemnity, if no claim is made by third persons.<sup>2</sup> And he cannot demand security from the plaintiff before levying the execution, unless there exists a well-grounded apprehension that the title to the property to be levied on is not in the defendant;<sup>3</sup> but where a writ of attachment is issued only on the plaintiff executing a bond to indemnify the defendant, in case the attachment should be held to be wrongfully sued out, such bond inures to the benefit of the sheriff, and he cannot demand any other one.<sup>4</sup>

ILLUSTRATIONS.—A sheriff returned a summons before service was made, and afterwards the same summons was again placed in his hands and executed, and again returned. *Held*, that the execution was a nullity, as his authority was determined by the first return: *Eaton v. Fullett*, 11 Ill. 491. Information against a town for not keeping a highway in repair; summons issued and served by the sheriff of the county, who was an inhabitant of the town in question. *Held*, that the sheriff was an interested party, and could not legally serve the summons, and that it must be quashed: *State v. Walpole*, 15 N. H. 26. The defendant went to the plaintiff's house with process, which he was authorized to serve. The person on whom he was to make the service was in the house. The door was open, and he entered peaceably. When in, the wife of the plaintiff ordered him out. *Held*, that, being legally in the house, he was not bound to leave it when ordered, and was justified in using sufficient force against the wife to enable him to serve the process: *Hager v. Danforth*, 20 Barb. 16. A sheriff culpably neglected to serve two executions. The court fined him in the amount of the judgments and costs. He paid the fines to the plaintiffs in the executions. The judgments were assigned to a third person for the benefit of the sheriff, and he sold land of the judgment debtors to satisfy the same. *Held*, that he had no authority

<sup>1</sup> *Long v. Neville*, 36 Cal. 455; 95 Am. Dec. 664; *Spangler v. Commonwealth*, 16 Serg. & R. 68; 16 Am. Dec. 199.

<sup>2</sup> *Williams v. Louwndes*, 1 Hall, 548.

<sup>3</sup> *Stevenson v. McLean*, 5 Humph. 579.

<sup>4</sup> *Adair v. McDaniel*, 1 Bail. 158; 19 332; 42 Am. Dec. 434.

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to serve them for his own indemnity: *Carpenter v. Stilwell*, 11 N. Y. 61. A county was divided and a new county erected, and provision made that the sheriff of the old county should act as sheriff in the new, until one was elected. *Held*, that the old sheriff should make sales under executions of land lying in the new county at the court-house of the old county, even where execution issued from a court holden in the new county: *Morris v. Allen*, 10 Ired. 203. A sheriff, having two executions in his hands, sold the defendant's personal property for a sum that was insufficient to satisfy the first writ, and made a levy on the defendant's real estate for the balance; subsequently the defendant gave to the sheriff a sum of money, with directions to pay it to the creditor in the junior execution. *Held*, that the sheriff could not make a levy on the money so paid to him under the first execution; and that he was justified in returning that it was made on the second writ, and paying it to the plaintiffs therein: *Rudy v. Commonwealth*, 35 Pa. St. 166; 78 Am. Dec. 330.

§ 3826. **Liabilities and Duties of.**—It is the duty of the sheriff to be at all times in attendance on the court, either in person or by competent deputy; and absence in the discharge of other official duties is no excuse. He is bound to have sufficient deputies to execute the mandates of the court within proper time, and want of time does not exonerate him from failure to execute process or for delay in doing so;<sup>1</sup> but he is allowed a reasonable time, depending upon the circumstances and needs of the case.<sup>2</sup> It is his duty to obey every precept put into his hands for service which appears on its face to have issued from competent authority, and with legal regularity. His knowledge of facts in relation to the cause of action does not affect his duty or liability;<sup>3</sup> and he is bound to execute process against the same defendant in the execution of writs are received by him.<sup>4</sup> He is not bound to look to the judgment, the execution being his warrant;<sup>5</sup> and he cannot excuse himself from the service of process because

<sup>1</sup> In the matter of Lawson, 3 Ark. 23 Am. Dec. 324; *Cody v. Quinn*, 5 363; *Hallett v. Lee*, 3 Ala. 28. Ired. 191; 44 Am. Dec. 75.

<sup>2</sup> *Whitney v. Butterfield*, 13 Cal. 335; 73 Am. Dec. 584.

<sup>4</sup> *Rust v. Pritchett*, 5 Harr. (Del.) 260.

<sup>3</sup> *Watson v. Watson*, 9 Conn. 140; <sup>5</sup> *Kleissendorff v. Fore*, 3 B. Mon. 471.

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it is erroneous or irregular, but only when it is absolutely void.<sup>1</sup> A sheriff is liable for gross neglect of official duty when he fails to execute a writ of arrest placed in his hands at nightfall, with notice that the absconding debtor is in a hotel, in a city near the state line, and intends to abscond before daylight, such being the fact, and the debtor so escaping into another state.<sup>2</sup> It is the duty of a sheriff who arrests a debtor on a *capias ad satisfaciendum* to commit him to the jail of his own county, although the writ issued from the court of another county.<sup>3</sup> The law requires of sheriffs a strict degree of diligence and caution in the discharge of their duties, and if a party is injured by the want of such diligence in the officer, he has his remedy against him for the injury.<sup>4</sup> And it is his duty in good faith to levy on sufficient of the property of the defendant, if to be had, as will in all reasonable probability yield at a public sale the necessary amount of money.<sup>5</sup> An execution creditor is not bound to point out property to be levied on; he has done all that the law requires of him when he has placed his execution in the hands of the sheriff, whose duty it is to make the money;<sup>6</sup> and he has no right to return an execution *nulla bona*, without having made any effort to find any of the goods of the defendant, and a general report that the defendant has no property will not excuse such return.<sup>7</sup> Where two writs, one of execution and the other of attachment, against the same person, are in the hands of the same officer, he must first levy the writ which first comes to his hands.<sup>8</sup> A sheriff leaves property in the debtor's possession at his peril, and it is his duty to put movables which have come into his

<sup>1</sup> *Stoddard v. Tarbell*, 20 Vt. 321;

*Woodruff v. Barret*, 15 N. J. L. 40;

*Stevenson v. McLean*, 5 Humph. 332;

42 Am. Dec. 434.

<sup>2</sup> *Phillips v. Ronald*, 3 Bush, 244;

96 Am. Dec. 216.

<sup>3</sup> *Avery v. Seely*, 3 Watts & S. 494.

<sup>4</sup> *McKinney v. Craig*, 4 Sneed, 577.

<sup>5</sup> *Governor v. Powell*, 9 Ala. 83.

<sup>6</sup> *Albany City Bank v. Dorr*, Walk.

Ch. 317; *Vance v. McNairy*, 3 Yerg.

171; 24 Am. Dec. 553.

<sup>7</sup> *Parks v. Alexander*, 7 Ired. 412.

<sup>8</sup> *Moore v. Fitz*, 15 Ind. 43.



possession in a place of safety, and reasonable expenses and compensation should be allowed him;<sup>1</sup> and when he attaches cattle he is bound to provide for their support, if the defendant neglects to do so, and the expense is no excuse for neglect.<sup>2</sup> It is the duty of the sheriff to return the process to the proper court, whether executed or not;<sup>3</sup> but the sheriff of another county, to whom an execution is issued, is not required to return it, either in person or by deputy. If he deposits it in the post-office, properly directed, in time to reach the clerk of the court from which it issued, by the return day, it is sufficient.<sup>4</sup> It is not necessary that an execution should remain in the hands of the officer sixty days. He may return it sooner, unsatisfied, at his own risk.<sup>5</sup> A sheriff is not liable to an action by a party injured by his neglect to preserve the peace, but only for his misfeasance, or neglect to serve process, in which the plaintiff is interested, or for maliciously hindering or preventing the plaintiff from exercising some special right or privilege.<sup>6</sup> If process is regular on its face, and not absolutely void, by having been issued without authority of law, the officer can never be made a trespasser, although it may have been erroneously issued. It is no justification for suffering an escape, therefore, by an officer, or for making a false return, or for refusal to execute the process, that the forms of law in suing out such process have not been all observed.<sup>7</sup> If a precept commands an officer to break and enter a dwelling-house without stating any sufficient cause, he could not justify such act under such a precept;<sup>8</sup> but where a court of competent jurisdiction issues a *supersedeas* to an execution in the hands of a sheriff, he need look no fur-

<sup>1</sup> *Silliven v. Bellocq*, 20 La. Ann. 305.

<sup>2</sup> *Sewall v. Mattoon*, 9 Mass. 535.

<sup>3</sup> *Brown v. Baker*, 9 Port. 503; *Webster v. Quimby*, 8 N. H. 382.

<sup>4</sup> *Underwood v. Russell*, 4 Tex. 175.

<sup>5</sup> *Morange v. Edwards*, 1 E. D. Smith, 414.

<sup>6</sup> *South v. Maryland*, 18 How. 396.

<sup>7</sup> *Brother v. Cannon*, 2 Ill. 200.

<sup>8</sup> See *Higdon v. Conway*, 12 Mo. 295;

*Hecker v. Jarret*, 3 Binn. 404.

<sup>9</sup> *Sandford v. Nichols*, 13 Mass. 286.

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ther, but he is bound to obey it.<sup>1</sup> It is the imperative duty of the sheriff to take bail for persons under arrest upon civil process, and he must do so at his peril, and he is responsible for the acceptance of insufficient bail.<sup>2</sup> In several of the states, however, if he fails to discharge his duty by taking sufficient bail, he becomes, by statute, responsible as special bail.<sup>3</sup> If a rescue is effected, the officer is responsible; but he is not liable for the escape of a debtor whom he has arrested on a process which was insufficient to authorize the arrest.<sup>4</sup>

ILLUSTRATIONS.—A sheriff had a writ against a resident of another state, who was known by the sheriff to be in his county on a temporary visit, and he was also informed that the person sought would be at a particular place near the county line, on a certain day mentioned, on his way out of the state, and he failed to be present on the day mentioned, when, if he had been there, he might have arrested the defendant, and showed no reasons for not going there. *Held*, that it was negligence: *Jenkins v. Troutman*, 7 Jones, 169. An officer on a writ attached A's goods in the hands of an express company, paid the express charges, and took the goods away. *Held*, that the express company had no right of action against the officer: *Livingston v. Miller*, 48 Hun, 232. The Iowa Code, section 3013, provides that a sheriff shall be allowed by the court the reasonable expenses of keeping attached property to be paid by the plaintiff, and taxed in the costs. *Held*, that the sheriff is liable in the first instance to one whom he employs to guard attached property: *Rowley v. Painter*, 69 Iowa, 432. A sheriff sold on execution property that was exempt, after he had been notified that it was so exempt. *Held*, that he was liable to the owner for its value: *Spencer v. Long*, 39 Cal. 700. A sheriff seized and sold on execution, out of a district court, goods which were held by a constable on attachment out of a justice's court. *Held*, that the sheriff, though he was responsible to the constable, was not liable to the creditor in the attachment suit: *Foulds v. Pegg*, 6 Nev. 136. A sheriff elected in 1872 continued to exercise the duties of the office after his failure to renew his bond and produce his receipts, and was re-elected in 1874, and failed to collect and pay over the taxes for that year. *Held*,

<sup>1</sup> *Williams v. Stewart*, 20 Miss. 533. *ple v. Dikeman*, 3 Abb. App. 520; *Metcalf v. Stryker*, 31 N. Y. 62.

<sup>2</sup> *Rayner v. Bell*, 15 Mass. 378.

<sup>3</sup> *Gray v. Hoover*, 4 Dev. 475; *Peo-* <sup>4</sup> *State v. Lowry*, 8 Mo. 48; *Hitch-* *cock v. Baker*, 2 Allen, 431.

that he was liable on his bond of 1872: *Vann v. Pipkin*, 77 N. C. 408. W. & Co. had execution levied on the property of defendant. He was subsequently declared a bankrupt, and an injunction issued by the district court of the United States restraining W. & Co. and the sheriff from disposing of the property. W. & Co. thereupon filed their petition in the latter court, praying that the injunction be so modified as to allow the sheriff to sell. This was done, the order directing that the proceeds be brought into the district court. The order was served on the sheriff, who sold the property and paid the proceeds into court. *Held*, that the sheriff was not liable to W. & Co. for not paying the money to them upon their execution: *O'Brien v. Weld*, 92 U. S. 81.

§ 3827. **Unlawful Seizures.**—Where a sheriff levies an execution upon property in which the defendant had no interest, it is his duty to stop all further proceedings under the levy as soon as he ascertains the fact.<sup>1</sup> And where personal property is taken from the possession of a purchaser by a sheriff, under an execution issued upon a void judgment against his vendor, the taking is wrongful.<sup>2</sup> Where merchandise belonging to a debtor was fraudulently mixed with that of his father, and the latter pointed out such goods as he preferred should be taken on an attachment against the son, the sheriff is not liable for taking the goods pointed out, although they did not belong to the debtor;<sup>3</sup> and where one permits his goods to be so intermingled with those of a debtor that an officer having a writ of execution against such debtor, after making reasonable inquiry, is unable to distinguish the one from the other, and he does not himself identify and point them out, the officer is justified in taking and selling the whole as the property of the debtor.<sup>4</sup> Where two corporations had the same name, and the sheriff served an execution on one of them in mistake for the other, he is liable in trespass.<sup>5</sup> An officer in making a

<sup>1</sup> *State v. Swigart*, 22 Ark. 528.

<sup>2</sup> *White v. Jones*, 38 Ill. 159.

<sup>3</sup> *Slattery v. Stewart*, 45 Ill. 293.

<sup>4</sup> *Robinson v. Holt*, 39 N. H. 557;  
75 Am. Dec. 233.

<sup>5</sup> *Hallowell etc. Bank v. Howard*,  
14 Mass. 181.

levy is bound to exercise ordinary care in ascertaining the value of the property levied on; and if by reason of lack of skill or judgment he makes an excessive levy on property of an extra value on account of some peculiar quality, he is liable.<sup>1</sup> Where the officer knows that payment of the execution has been made by one of two joint co-defendants, although the same may not have been indorsed thereon, he is not justified in levying upon the property of the non-paying defendant.<sup>2</sup> A sheriff is liable in trespass for seizing goods which are exempt from levy. And when the value of the goods is clearly within the amount exempted he has no right to seize them; but if the amount of their value is doubtful, he may seize them for safe-keeping until the value can be determined by an appraisement;<sup>3</sup> but where the officer attached a flock of sheep without leaving the defendant the ten sheep exempt by law, he cannot justify the wrong by claiming that he did not know which to leave, when he did not request the defendant to designate them.<sup>4</sup> Where an officer levies on the goods of one person under an execution against another, he is liable in an action of trover. Proof of the sale is evidence of the conversion, and no demand is necessary.<sup>5</sup> Where a sheriff, instigated by the plaintiffs in a writ of attachment, abuses the process by willfully seizing too much property, he and his confederates are liable to an action, which may be brought in the county of the sheriff's residence, without regard to the residence of his confederates.<sup>6</sup> Where the sheriff seizes under an attachment property in the possession of a stranger to the writ, no presumption obtains in favor of the officer having done his duty. Such a seizure is *prima facie* wrongful.<sup>7</sup>

<sup>1</sup> Vance v. Vanarsdale, 1 Bush, 504.

<sup>2</sup> Stanley v. Nutter, 16 N. H. 22.

<sup>3</sup> Bonnel v. Dunn, 28 N. J. L. 153.

<sup>4</sup> Frost v. Mote, 34 N. Y. 253.

<sup>5</sup> Hanchett v. Williams, 24 Ill. App. 56.

<sup>6</sup> Hilliard v. Wilson, 65 Tex. 286.

<sup>7</sup> State v. Hope, 88 Mo. 430.

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ILLUSTRATIONS. — A debtor drove his sheep into the close of A, without A's consent or knowledge, in order to prevent their being seized on execution, and the officer who had the execution entered into A's close and took and drove away not only the sheep of the debtor, but some of the sheep of A also. *Held*, that, admitting the officer had a right to enter and seize the debtor's sheep, he was bound to see that he did not take the sheep of A, and that the taking was illegal: *Kingsbury v. Pond*, 3 N. H. 511. A sheriff attached a wagon as the property of A. B, to whom the property belonged, demanded it from the sheriff, who refused to give it up. At a subsequent conversation B told the sheriff that all he wished was to have the wagon returned to the place from which it had been taken, which the sheriff immediately did. *Held*, that whether the understanding between them was that such return should be a discharge of all claim B had upon the sheriff for the taking and detention, as well as for the wagon itself, was a question for the jury, and that the question of the acceptance of the wagon by B was immaterial: *Spalding v. Stewart*, 38 Vt. 78. A sheriff, on the expiration of his term of office, turned over to his successor chattels belonging to A, which had been seized under an attachment against B. *Held*, that the fact that when these chattels were thus turned over the new sheriff had no notice of A's rights afforded the sheriff no defense in an action by A, who gave notice of his rights and demanded the chattels: *Vaughn v. Allgaier*, 27 Mo. App. 523. A sheriff before sale upon execution caused grain, which he had previously levied on in the stack or shock, to be thrashed and placed in an elevator. *Held*, not to be such an abuse of his discretion in the care and management of the property as to make him a trespasser *ab initio*: *Ladd v. Newell*, 34 Minn. 107. B had possession of property, which, as between himself and A, was A's property, but which, as between the parties and B's creditors, might have been reached by them. An officer seized it under an execution on a void judgment against B. *Held*, that A could maintain an action against the officer: *State v. Rucker*, 19 Mo. App. 587.

§ 3828. **False Returns.** — A sheriff is liable to an action of damages for a false return, as where he returns *nulla bona* to a writ of *feri facias* when he has had the opportunity of making a levy, or has not used due diligence in ascertaining whether he could or not; or where he returns *non est inventus*, without having made proper and reasonable search for the defendant. But he may, at any time

before suit is brought against him for a false return, be permitted to amend his return according to the facts.<sup>1</sup> Where the sheriff has returned his writ "executed," and he does not ask permission to alter or modify his return, the court has no power to do it, and cannot compel him to make any alteration in it as to matter of fact; and he is responsible for a false return to the party injured.<sup>2</sup> The return is deemed to speak as of the return day; and if it would not be true if made on that day, the sheriff is responsible as for a false return.<sup>3</sup> The sheriff's return that he has left a true copy of the writ with the defendant is conclusive upon the parties, and cannot be contradicted for the purpose of defeating the suit in which such return is made; but the remedy is by an action against the officer for a false return.<sup>4</sup> The sheriff's return is conclusive evidence of the escape of a defendant arrested on a *capias*; and such defendant may be punished for contempt without the usual examination or interrogatories, as no denial will excuse him. If the sheriff's return is false, the defendant's remedy is against him for a false return.<sup>5</sup> Where a purchaser, knowing of a mortgage on the property, colludes with the sheriff, and procures from him a false return of a levy, before the giving of the mortgage, and purchases the property on condition that such false return shall be made in a suit between the mortgagee and the purchaser, such fraudulent collusion may be shown, and any effect of the return on the rights of the mortgagee defeated on the ground of the fraud.<sup>6</sup> An officer is not admissible as a witness to falsify his own return.<sup>7</sup> Where a sheriff, in answer to a rule to bring in the body of a defendant, returns that he discharged him from custody on his giving bond and complying with the requirements

<sup>1</sup> Brinkley v. Mooney, 9 Ark. 445.

<sup>2</sup> Sawyer v. Curtis, 2 Ashm. 127.

<sup>3</sup> Bowen v. Parkhurst, 24 Ill. 257.

<sup>4</sup> Bolles v. Bowen, 45 N. H. 124; Angell v. Bowler, 3 R. I. 77.

<sup>5</sup> State v. Clerk of Bergen, 25 N. J. L. 209.

<sup>6</sup> Messer v. Bailey, 31 N. H. 9.

<sup>7</sup> Eastman v. Bennett, 6 Wis. 232.

of the insolvent debtor's act, he will not be amerced.<sup>1</sup> If a sheriff returns that the levies on two several writs were contemporaneous, when in fact one levy was precedent to the other, the plaintiff whose writ was first levied may maintain an action for a false return.<sup>2</sup> The fact that a sheriff in serving a writ of attachment seizes certain property as defendant's, and files a return, does not estop him, when sued for making a false return, from showing that the property belonged to a third person, although the burden of proving this is on the sheriff.<sup>3</sup> The fact that in the regular course of practice an order of publication intervened between an officer's false return of *non est* to a summons and judgment by default will not shield the officer from liability for the false return.<sup>4</sup>

ILLUSTRATIONS. — M. was arrested on mesne process, and gave bail. After judgment, an execution against his body was placed in the sheriff's hands, and a return was made that M. could not be found. The bail were charged, and paid the judgment. One of them sued the sheriff for a false return, and proved that the sheriff either arrested M. and negligently allowed him to escape, or that he might have arrested him. *Held*, that the plaintiff was entitled to recover, as the return was conclusive against him in an action upon the bail bond: *McArthur v. Pease*, 46 Barb. 423. The plaintiff in certain executions claimed priority in the distribution of the proceeds, on the ground that previous levies were invalid. *Held*, that, as the sheriff had returned on the plaintiff's writs that the levies thereon were made subject to prior levies, the plaintiff could not contradict the returns, but must resort to his remedy by action, if false returns had been made: *Paxson's Appeal*, 49 Pa. St. 195. A sheriff was sued for the statutory penalty provided for in case of a false return. It appeared merely, from the complaint, that the return was defective in not stating that the execution debtor had paid to the sheriff the sum of \$2.50 on account of the execution. *Held*, that the complaint was demurrable: *Harrell v. Warren*, 100 N. C. 259.

§ 3829. **Failure to State Returns.** — At common law no duty was cast upon the sheriff to make any return to the

<sup>1</sup> *Louis v. Kaskel*, 49 N. J. L. 158.

<sup>2</sup> *Buffalo Bank v. Elliott*, 42 Hun.

<sup>3</sup> *State v. Harrington*, 28 Mo. App. 121.

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<sup>4</sup> *State v. Finn*, 87 Mo. 310.

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writ. If such were desired, the plaintiff or defendant could rule him to do so. But in most of the states the sheriff is now required by statute to return all process that comes to his hands within a limited time, which varies in the different states. Such statutes also provide special remedies for the default of the sheriff in making the returns as required by law.<sup>1</sup> When the sheriff fails to return the writ, the debt is assumed to be lost, and the execution creditor is *prima facie* entitled to recover the full amount from him. The sheriff, however, is entitled to show that, notwithstanding his utmost efforts to have made the amount, they would have been unavailing, as the defendant had no property in his county.<sup>2</sup> Such evidence is admissible in mitigation of damages only, and proof that the return was made within a short time after the prescribed time is not competent for any purpose.<sup>3</sup> In an action against a sheriff for damages for a failure to return an execution, it is sufficient for the plaintiff to prove the delivery of the writ, and the burden of proof is then thrown on the sheriff to show what he has done with it.<sup>4</sup> The measure of damages is the amount of loss actually sustained by the plaintiff in consequence of the sheriff's breach of duty.<sup>5</sup> And the sheriff is liable only for nominal damages, in case of a technical false return, when the actual damages result from the plaintiff's own negligence, or may be attributed to the conduct of third parties.<sup>6</sup> The insolvency of an execution defendant does not in itself justify the sheriff in failing to return the execution.<sup>7</sup> Although a sheriff is liable to a fine, at the discretion of

<sup>1</sup> *State v. Clymer*, 3 Houst. 20; *Noble v. Whetstone*, 45 Ala. 361; *Tyler v. Willis*, 33 Barb. 327; *Spencer v. Cuyler*, 17 How. Pr. 157.

<sup>2</sup> *Dunphy v. Whipple*, 25 Mich. 10; *Bowman v. Conell*, 39 Barb. 70.

<sup>3</sup> *Brookfield v. Remsen*, 1 Abb. App. 210.

<sup>4</sup> *State v. Schar*, 50 Mo. 393.

<sup>5</sup> *Dobson v. Saxton*, 11 Hun, 565;

*Lummis v. Kasson*, 43 Barb. 373;

*Crooker v. Melick*, 18 Neb. 227; *Hellman v. Spielman*, 19 Neb. 152; *People v. Johnson*, 4 Ill. App. 346.

<sup>6</sup> *Tutein v. Hurley*, 98 Mass. 211; 93 Am. Dec. 154; *Carter v. Towne*, 103 Mass. 507; *Parker v. Cohoes*, 10 Hun, 531; *State v. Finn*, 11 Mo. App. 401; *Prosser v. Coots*, 50 Mich. 262.

<sup>7</sup> *Atkinson v. Heer*, 44 Ark. 174; *Cox v. Ross*, 56 Miss. 481.



the proper court, for his failure to make due return of an execution, he is also liable to an action on his official bond by the party injured by his failure.<sup>1</sup>

ILLUSTRATIONS. — In an action against a sheriff for neglecting to levy on real estate, and to return the execution in proper time, where he was not requested by the creditor to levy on real and he had levied on personal estate, and before the levy was completed the real estate had been attached by another creditor, and there was no other attachable property, *held*, that the sheriff was not bound to levy the execution upon the real estate until a sufficient time had elapsed to sell the personal property, and that the defendant was liable only in nominal damages for neglect to return the execution within its life: *Bank of Newbury v. Baldwin*, 31 Vt. 311.

§ 3830. **Collection of Money.** — A sheriff is an insurer of the safety of all money officially received by him against loss by any means whatever, including such losses as arise from the act of God or the public enemy.<sup>2</sup> The sheriff and his sureties are liable for all moneys collected by him in his official capacity, which he neglects or refuses to pay over on demand, and for the penalties imposed by the statute when he does not act in good faith. They are also liable for all moneys collected by him from the sale of property levied upon before the return day of the writ of execution, notwithstanding intermediate the levy and sale or payment of the money the writ may have become *functus officio*.<sup>3</sup> A sheriff is liable for failure to pay over the money paid him for a note and mortgage taken for the deferred payment of purchase-money of land sold on partition, though no special order of distribution was made, and the money was paid him after the expiration of his term.<sup>4</sup> Where, by consent of the parties in interest, the sheriff receives the purchase-money of land sold under a judgment in partition, before the same is payable under the order of sale, he will be deemed to have

<sup>1</sup> *Grandstaff v. Ridgely*, 30 Gratt. 1. *Brobst v. Skillen*, 16 Ohio St. 382; 88

<sup>2</sup> *State v. Clarke*, 73 N. C. 255. *Am. Dec.* 458.

<sup>3</sup> *Nash v. Muldoon*, 16 Nev. 404; <sup>4</sup> *Calvin v. Bruen*, 39 Ohio St. 610.

return of an official bond

for neglecting action in proper time to levy on property before the levy is made by another person, held, that action upon the bond to sell the property is only in nominal value within its life:

is an insurer of the property delivered by him, and is liable for such losses as may be sustained by his enemy.<sup>2</sup> The sheriff is not liable for moneys collected on execution, if he neglects or refuses to pay over the moneys collected on execution, where he acts in good faith, being unable to decide between conflicting claimants to the money.<sup>3</sup> It is doubtful whether a sheriff who has collected an illegal levy voluntarily paid by the tax-payers, and not superseded by them, can retain it and refuse to pay it, because illegal.<sup>4</sup> Though, as a general rule, a sheriff, who, under execution, has levied upon and sold certain property belonging to the defendant therein, will not be permitted to allege that the property did not belong to said defendant, yet where the defendant has testified that the property did not belong to him, the recovery of an alleged surplus should not be enforced on summary application.<sup>5</sup> Mere notice to a sheriff to detain money which he has collected on legal process will not justify him in holding it.<sup>6</sup> A sheriff called on by rule to pay over to the execution plaintiff the proceeds of the sale cannot set up superior privileges in favor of attaching creditors, who, although made parties to the rule, do not make such claim for themselves.<sup>7</sup> And where a sheriff pays over the proceeds of property sold on execution to a junior judgment creditor, under an order of court, in proceedings to which the senior judgment creditor was not made a party, he is not thereby released from his liability to the latter.<sup>8</sup>

ILLUSTRATIONS. — After A had assigned property, a sheriff attached it as his in a suit brought by B, who gave an indemnifying bond. The sheriff sold and paid over the surplus beyond the

<sup>1</sup> *State v. Cayce*, 85 Mo. 456.

<sup>2</sup> *Harris v. Ellis*, 30 Tex. 4; 94 Am. Dec. 296.

<sup>3</sup> *Johnson v. Gorham*, 6 Cal. 195; 65 Am. Dec. 501.

<sup>4</sup> *State v. Phares*, 24 W. Va. 657.

<sup>5</sup> *Frankel v. Elias*, 60 How. Pr. 74.

<sup>6</sup> *Smith v. Wade*, 64 Ga. 116.

<sup>7</sup> *Chase v. Bell*, 32 La. Ann. 460.

<sup>8</sup> *State v. Boles*, 13 S. C. 283.

received it in his official capacity, and the sureties on his bond are liable for his default in paying it over to the persons entitled to it.<sup>1</sup> The authority of a sheriff to collect a judgment ceases after the return day of the writ of execution, if there has been no previous levy under it.<sup>2</sup> A statutory penalty is not recoverable from a sheriff who refuses to pay over money collected on execution, where he acts in good faith, being unable to decide between conflicting claimants to the money.<sup>3</sup> It is doubtful whether a sheriff who has collected an illegal levy voluntarily paid by the tax-payers, and not superseded by them, can retain it and refuse to pay it, because illegal.<sup>4</sup> Though, as a general rule, a sheriff, who, under execution, has levied upon and sold certain property belonging to the defendant therein, will not be permitted to allege that the property did not belong to said defendant, yet where the defendant has testified that the property did not belong to him, the recovery of an alleged surplus should not be enforced on summary application.<sup>5</sup> Mere notice to a sheriff to detain money which he has collected on legal process will not justify him in holding it.<sup>6</sup> A sheriff called on by rule to pay over to the execution plaintiff the proceeds of the sale cannot set up superior privileges in favor of attaching creditors, who, although made parties to the rule, do not make such claim for themselves.<sup>7</sup> And where a sheriff pays over the proceeds of property sold on execution to a junior judgment creditor, under an order of court, in proceedings to which the senior judgment creditor was not made a party, he is not thereby released from his liability to the latter.<sup>8</sup>

amount of the attachment to A. A's assignee recovered judgment against B, who paid the judgment. *Held*, that the sheriff, on B's motion, should be ordered to pay over to B the proceeds of the sale: *Adler v. Lang*, 28 Mo. App. 440. A and B, as judgment creditors, purchased certain cord-wood at sheriff's sale on execution, no money being paid, but each intending that his bid should be credited on his execution. The sheriff demanded money for his fees, and also for the purpose of paying preferred labor liens upon the property. A and B, at his suggestion, disposed of their interests to C, who thereafter paid the money to the sheriff, who neglected and refused to pay the same, or any part thereof, to A and B. *Held*, that the disposal of the interests of A and B to C was a transfer of the bids instead of a sale of the property, and that the sheriff received the money in his official capacity: *Nash v. Muldoon*, 16 Nev. 404. A sued a sheriff for money collected and not paid over. The sheriff answered that he held it pending the decision of a judge on the question of the amount due as fees. Pending the action, the fees were taxed. There was evidence tending to show that the sheriff had levied on property sufficient in amount to pay judgment and fees. *Held*, that a verdict for the full amount of the judgment should not be disturbed: *Davis v. Bowe*, 50 N. Y. Sup. Ct. 298.

recovered judgment that the sheriff, the proceeds of, as judgment, sale on execution that his bid demanded preferred suggestion, dis- the money to the same, or any of the interest of a sale the money in his. A. A. sued a. The sheriff a judge on the the action, the to show that amount to pay full amount of *Bowe*, 50 N. Y.

## PART V.—CIVIL RIGHTS.

### CHAPTER CXCIX.

#### CITIZENSHIP.

- § 3831. Citizenship — In general.
- § 3832. Privileges and immunities of citizens.
- § 3833. Equal protection of the laws.
- § 3834. Aliens — Rights and disabilities of.
- § 3835. Naturalization — Who may be naturalized.
- § 3836. Procedure.
- § 3837. Elections — Suffrage — The right to vote.
- § 3838. Registration laws.
- § 3839. Interference with secrecy of voting.
- § 3840. Domicile defined — Different kinds of.
- § 3841. Husband and wife.
- § 3842. Parent and child.
- § 3843. Guardian and ward.
- § 3844. Corporations.
- § 3845. Other persons.
- § 3846. Change of domicile — Requisites of.
- § 3847. *Animus revertendi*.
- § 3848. Domicile continues until new one acquired.
- § 3849. Burden of proof — Evidence.

§ 3831. **Citizenship — In General.** — Citizenship denotes membership in the political society or state. Mere inhabitants are not citizens; for these may be strangers, or aliens, who, while they are permitted to settle and stay in the country, are not permitted to enjoy the privileges or share in the rights which pertain to those who are members of the political society. A person may have citizenship in one country and be an inhabitant of another country. So he may be a citizen of one country and have his domicile in another. There is in this country a twofold citizenship, — a citizenship of the United States, and also a citizenship of the several states, and the two co-exist in the same persons. The Fourteenth Amendment

provides that all persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. Children born within the United States of foreign parents (not ministers or ambassadors) are citizens of the United States.<sup>1</sup> Indians preserving their tribal relations, and recognizing the headship of their chiefs, are not citizens, even though residing within a state or an organized territory.<sup>2</sup> But when any individual withdraws from the tribal relations and makes himself a member of the civilized community, adopting its habits and subjecting himself to its jurisdiction, his right to protection in person, property, and privilege becomes as complete as that of any other native-born inhabitant.<sup>3</sup> And persons born in the United States of Chinese parents are citizens.<sup>4</sup> Children born abroad of parents who are American citizens temporarily residing abroad or traveling in foreign countries are citizens of the United States by birth.<sup>5</sup> A person born in Canada of parents of African blood who were born in Virginia, and held there as slaves until they emigrated to Canada, is an alien.<sup>6</sup>

<sup>1</sup> *McKay v. Campbell*, 2 Saw. 118; *Lynch v. Clarke*, 1 Sand. Ch. 583.

<sup>2</sup> *Goodell v. Jackson*, 20 Johns. 693, 700; 11 Am. Dec. 351; *McKay v. Campbell*, 2 Saw. 118; *Ex parte Reynolds*, 18 Alb. L. J. 18; *United States v. Osborne*, 6 Saw. 406.

<sup>3</sup> Story on Constitution, 4th ed., sec. 1993; Cooley on Constitutional Law, 243.

<sup>4</sup> *In re Wy Shing*, 36 Fed. Rep. 553; *Ex parte Chin King*, 35 Fed. Rep. 354; *In re Yung Hing Hee*, 36 Fed. Rep. 437; *In re Fook Tin Sing*, 10 Saw. 353.

<sup>5</sup> U. S. Rev. Stats. 1878, sec. 1993; *Olborn v. Inhabitants*, 58 Me. 353.

<sup>6</sup> *People v. Board of Registration*, 26 Mich. 51; 12 Am. Rep. 297. As to the effect of her marriage upon the citizenship of a woman, it is said by Wharton that "a married woman ordinarily partakes of her husband's nationality": *Conflict of Laws*, sec. 11;

*Knickerbocker Life Ins. Co. v. Gorbach*, 70 Pa. St. 150. Under the laws of the United States, the marriage of a woman "who might lawfully be naturalized" to a citizen of the United States makes her a citizen, and she becomes a citizen although she never resided in this country: *Kane v. McCarthy*, 63 N. C. 299; *Burton v. Burton*, 1 Keyes, 359; *Headman v. Rose*, 63 Ga. 458; and any free white woman already married to an alien becomes naturalized by the naturalization of her husband: *Kelly v. Owen*, 7 Wall. 496; *Leonard v. Grant*, 6 Saw. 603. In some early cases it is held that the marriage of a female citizen with an alien does not produce a dissolution of her native allegiance: *Shanks v. Dupont*, 3 Pet. 242; *Beck v. McGillis*, 9 Barb. 35; but this conclusion is denied in the federal court recently, in a case (*Pequinot v. City of Detroit*, 16 Fed. Rep. 211) in which it was held

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"The United States recognized the right of every one to expatriate himself and choose another country. This right would seem to follow from the greater right proclaimed to the world in the memorable document in which the American colonies declared their independence and separation from the British crown as belonging to every human being, God-given and inalienable, — the right to pursue his own happiness. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject wherever he goes, has never taken root in this country, although there are judicial *dicta* that a citizen cannot renounce his allegiance to the United States without the permission of the government under regulations prescribed by law; this would seem to have been the opinion of Chancellor Kent when he published his Commentaries. But a different doctrine prevails now."<sup>1</sup> The government, to prevent abuse and secure the public welfare, may regulate the mode of expatriation.<sup>2</sup> Allegiance to the United States may be repudiated by a native as well as an adopted citizen, without any formal or express sanction of the government.<sup>3</sup> A citizen of the United States may renounce his allegiance by taking an oath of allegiance to a foreign power, and his son, born abroad afterwards, is not a citizen of the United States.<sup>4</sup> The United States courts will not recognize as an American one who has deliberately renounced his citizenship, placed himself under the dominion of another government, and for eighteen years held himself out as an alien.<sup>5</sup> But the fact that one has resided several years in Canada does not of itself justify the inference that he is an alien.<sup>6</sup> The

that an alien woman who had once become an American citizen by a marriage which was subsequently dissolved may resume her alienage by a marriage to an unnaturalized native of her own country.

<sup>1</sup> Field, J., in *In re Look Tin Sing*, 10 Saw. 353.

<sup>2</sup> *Alsberry v. Hawkins*, 9 Dana, 177; 33 Am. Dec. 546.

<sup>3</sup> *Alsberry v. Hawkins*, 9 Dana, 177; 33 Am. Dec. 546.

<sup>4</sup> *Browne v. Dexter*, 66 Cal. 39.

<sup>5</sup> *Green v. Salas*, 31 Fed. Rep. 106.

<sup>6</sup> *Gilman v. Thompson*, 11 Vt. 643; 34 Am. Dec. 714.

intended temporary absence of an infant from his native country, prolonged until he arrives of age, does not, where he has no other disabilities of citizenship than those arising from nonage, and where a previously appointed guardian represents him at home, attach the disability of alienage to him upon his return to assert his rights.<sup>1</sup> A child born in foreign parts of parents who were originally residents of this state, and who were married here, is not necessarily an alien, nor will the presumption that he is be indulged.<sup>2</sup> In the absence of proof that an alien has become a citizen of the United States, his original *status* is presumed to continue.<sup>3</sup>

ILLUSTRATIONS. — A foreigner alleged to be illegitimate came to this country as a member of the family of his reputed father, whose wife was the mother of the boy. The reputed father was naturalized while the alleged illegitimate child was an infant. *Held*, that, as the child was a member of his reputed father's family when his father was naturalized, and was an infant, he became naturalized; and that the question of his legitimacy would not be inquired into in a proceeding to contest an election: *Dale v. Irwin*, 78 Ill. 170. A's grandfather was born in Connecticut, removed to Canada in 1790, with the intention of making that his permanent domicile, and there remained till his death, in 1838. A's father was born in Canada, and served in the Canadian military service through compulsion. A was also born in Canada, but removed to Iowa. *Held*, that A was a citizen of the United States; in the absence of evidence it would be presumed that the grandfather intended to renounce his citizenship: *State v. Adams*, 45 Iowa, 99; 24 Am. Rep. 760.

#### § 3832. "Privileges and Immunities" of Citizens. —

A citizen of any of the states is entitled to all privileges and immunities of citizens of the several states.<sup>4</sup> Therefore a citizen of any of the states can hold, enjoy, devise, or

<sup>1</sup> *Portis v. Hill*, 14 Tex. 69; 65 Am. Dec. 100.

<sup>2</sup> *Campbell v. Wallace*, 12 N. H. 362; 37 Am. Dec. 220.

<sup>3</sup> *Hauenstein v. Lynham*, 100 U. S. 483.

<sup>4</sup> U. S. Const., art. 4, sec. 2. But a "corporation" is not a citi-

zen of a state within this provision: *Tatem v. Wright*, 23 N. J. L. 429; *Slaughter's Case*, 13 Gratt. 767; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Commonwealth v. Milton*, 12 B. Mon. 212; 54 Am. Dec. 522.

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inherit real estate situate in any other, as a native thereof.<sup>1</sup> And this provision secures to a citizen of any state the right to pass into any other state of the Union for the purpose of engaging in lawful commerce or business; to maintain actions in the courts of the state; and to be exempt from higher taxes or excises than are imposed by the state upon its own citizens.<sup>2</sup> A provision of a revenue law discriminating against publishers of books, etc., in other states is unconstitutional.<sup>3</sup> But this clause of the federal constitution does not give a citizen of another state a right to vote or hold office immediately on his entering the state;<sup>4</sup> nor is the right of a woman to vote within the clause;<sup>5</sup> nor the right to practice law;<sup>6</sup> nor is the right to take oysters, even in tide-waters.<sup>7</sup> A statute providing that an attachment may be issued against a non-resident of the state without the undertaking which is required in the case of a resident is not in conflict with the constitution;<sup>8</sup> nor is a statute providing that no Chinese shall be permitted to give evidence in favor of or against any white man.<sup>9</sup> Citizens of sister states are not exempted from the operation of our laws when they come here.<sup>10</sup> The Fourteenth Amendment, although prohibitory in terms, confers a positive immunity

<sup>1</sup> 1 Lead. Cas. Real Prop., 494.

<sup>2</sup> Ward v. Maryland, 12 Wall. 418. But when a uniform tax is imposed upon all sales at auction in the state, the fact that goods sold are the property of citizens of other states does not affect the validity of the tax: Woodruff v. Parnham, 8 Wall. 123.

<sup>3</sup> Ex parte Rollins, 80 Va. 314.

<sup>4</sup> Story on Constitution, sec. 1800.

<sup>5</sup> Van Valkenburgh v. Brown, 43 Cal. 43; 13 Am. Rep. 136.

<sup>6</sup> In re Taylor, 48 Md. 28; 30 Am. Rep. 451.

<sup>7</sup> McCready v. Virginia, 94 U. S. 391. "The planting of oysters in the soil covered by water owned in common by the people of the state is not different in principle," the court say, "from that of planting corn upon dry land held in the same way. Both

are for the purposes of cultivation and profit; and if the state, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow that it might, by appropriate legislation, confine the use of the whole to its own people alone."

<sup>8</sup> Marsh v. Steele, 9 Neb. 96; 31 Am. Rep. 406.

<sup>9</sup> People v. Brady, 40 Cal. 198; 6 Am. Rep. 604.

<sup>10</sup> Harrison v. Mayor of Vicksburg, 3 Smedes & M. 581; 41 Am. Dec. 634.



or right to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored.<sup>1</sup> A statute which denies to colored citizens the right and privilege of participating in the administration of the law as jurors because of their color is a discrimination against them which is forbidden by the Fourteenth Amendment.<sup>2</sup> The right to make a separation on a public conveyance between white and colored passengers can be upheld when, and only when, the carrier in good faith furnishes accommodations equal in quality and convenience to both classes.<sup>3</sup> According to the weight of authority, the legislature has the power to authorize the board of education of any city, or the officers of any school district, to establish separate schools for the education of white and colored children, and to exclude the colored children from the white schools, notwithstanding the Fourteenth Amendment.<sup>4</sup>

ILLUSTRATIONS. — A statute required all traders resident in the state to take out licenses, and to pay therefor certain sums, regulated by a scale of from \$12 to \$150, in proportion to their stock in trade, while any person not a permanent resident of the state was prohibited from selling any goods, other than agricultural products and articles manufactured in the state, either by card, sample, or by written or printed trade list, without obtaining a license, for which the sum of \$300 was to be paid. *Held*, unconstitutional: *Ward v. Maryland*, 12 Wall. 418.

§ 3833. "Equal Protection of the Laws." — The Fourteenth Amendment also declares that no state shall "deny

<sup>1</sup> *Strauder v. West Virginia*, 100 U. S. 303.

<sup>2</sup> *Strauder v. West Virginia*, 100 U. S. 303.

<sup>3</sup> *The Sue*, 22 Fed. Rep. 843; *Logwood v. R. R. Co.*, 23 Fed. Rep. 318; *Murphy v. R. R. Co.*, 23 Fed. Rep. 637.

<sup>4</sup> *State v. McCann*, 21 Ohio St. 198; *Cory v. Carter*, 48 Ind. 337; 17 Am. Rep. 728; *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405; *Bertonneau v. Directors of the City Schools*, 3 Woods, 177; *Ottawa Board of Education v.*

*Tinnon*, 26 Kan. 1; *People v. Gallagher*, 93 N. Y. 438; 45 Am. Rep. 232. But see *Clark v. Board etc.*, 24 Iowa, 266; *Smith v. Directors etc.*, 40 Iowa, 518; *Dove v. Independent School District*, 41 Iowa, 689. Where the state has not authorized separate common schools for colored children, a city board of education has no right to establish them, and exclude such children from the other schools: *People v. Board of Education*, 101 Ill. 308; 49 Am. Rep. 196.

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to any person within its jurisdiction the equal protection of the laws." The supreme court of the United States, in a recent case, says that this section contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment does not prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion. It is the right of every state to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The restriction as to the equal protection of the laws is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. In like manner, any state may adopt any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York

City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.<sup>1</sup> The Four-

<sup>1</sup> *Bowman v. Lewis*, 101 U. S. 22. In this case it appears that by the constitution and laws of Missouri a court called the St. Louis court of appeals has exclusive jurisdiction in certain cases of all appeals from the circuit courts in St. Louis and some adjoining counties; the supreme court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the state. The supreme court held that this adjustment of appellate jurisdiction is not forbidden by the Fourteenth Amendment. Mr. Justice Bradley said: "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards different parts of a state, provided that in each and all there is no infraction of the constitu-

tional provision. Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions, — trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies. If a Mexican state should be acquired by treaty and added to an adjoining state, or part of a state, in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard to the welfare of all classes within the particular territory or jurisdiction. It is not impossible that a distinct territorial establishment and jurisdiction might be intended, or might have the effect

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teenth Amendment, forbidding a state to deny to any "person" the equal protection of the laws, embraces corporations.<sup>1</sup> A statute providing that no person shall recover damages from a municipality for an injury from a defect in a highway, unless he resides in a country where similar injuries constitute a like cause of action, is unconstitutional.<sup>2</sup>

**ILLUSTRATIONS.**—A statute of New York provided that foreign insurance companies doing business in New York should be charged license fees equal to those imposed on New York companies by states wherein such foreign companies were created. *Held*, not unconstitutional as denying the equal protection of the laws, for a state may attach conditions to its permission that a foreign insurance company shall do business in that state: *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110.

**§ 3834. Aliens — Rights and Disabilities of.**— Aliens are the subjects of foreign governments not naturalized under the laws of the United States. The principal difference between a citizen and an alien is, that the former is entitled to all the privileges of the state of which he is a member, while the latter, while he resides in the country, is there by sufferance merely; he cannot own real estate therein, and he cannot exercise political rights.<sup>3</sup> But in most of the states, by statute, aliens, whether resident or not, may purchase and hold property, real or personal, in like manner as natives or citizens.<sup>4</sup> The disability of alienage is now generally removed in this

of a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise it will be time enough then to consider it. No such case is pretended to exist in the present instance."

<sup>1</sup> *Santa Clara County v. R. R. Co.*, 118 U. S. 394.

<sup>2</sup> *Pearson v. City of Portland*, 69 Me. 278; 31 Am. Rep. 276.

<sup>3</sup> *Cooley on Constitutional Law*, 77; *Alsberry v. Harkness*, 9 Dana, 177; 35 Am. Dec. 546.

<sup>4</sup> *Stimson's American Statute Law*, sec. 6013. The legislature, nothing in the constitution forbidding, may confer on non-resident aliens the power to acquire, enjoy, and transmit property: *State v. Smith*, 70 Cal. 153. A statute says that aliens may inherit. *Held*, that the term "alien" is not limited to a resident alien: *Lyons v. State*, 67 Cal. 380. An act permitting non-resident aliens to inherit land is constitutional: *State v. Rogers*, 13 Cal. 159. See *Billings v. Hauver*, 65 Cal. 593.

country.<sup>1</sup> The rule that an alien could not inherit land formerly obtained in California.<sup>2</sup> But even non-resident aliens may now inherit lands in that state,<sup>3</sup> and are entitled to share equally with heirs of the same degree residing in the state;<sup>4</sup> and he may assign property inherited by him, and the assignee may appear and claim it.<sup>5</sup> So in Massachusetts, resident or non-resident aliens may take land by descent, and may transmit the same.<sup>6</sup> It is held in New York that alienism is an impediment to taking land by descent only when it comes between the stock of descent and the person claiming to take; if some of the persons who answer the description of heirs are incapable of taking by reason of alienage, they are disregarded, and the whole title vests in those heirs who are competent, except they are compelled to trace inheritance through an alien.<sup>7</sup> Under the constitution and the act of 1840 in Texas, an alien can inherit land in that state.<sup>8</sup> So in Missouri, an alien may take real estate by descent from an alien.<sup>9</sup> In Michigan there was no law down to 1828 by which an alien could have heirs and inherit estate.<sup>10</sup> The law existing at the time of descent cast governs the right of aliens to inherit realty.<sup>11</sup> Where an alien is entitled to estate by inheritance, it is not necessary, in order to obtain the property, that the alien should appear in person and claim it; he may act through an attorney.<sup>12</sup>

<sup>1</sup> Note to *Elmendorff v. Carmichael*, 3 Litt. 472, in 14 Am. Dec. 86.

<sup>2</sup> *Siemssen v. Bofer*, 6 Cal. 250; *Norris v. Hoyt*, 18 Cal. 217.

<sup>3</sup> *Escheated Estate of Guilford*, 67 Cal. 380.

<sup>4</sup> *Billings v. Hauver*, 65 Cal. 593.

<sup>5</sup> *Escheated Estate of Leopold*, 67 Cal. 385.

<sup>6</sup> *Lumb v. Jenkins*, 100 Mass. 527. Provisions are made under the statutes of all the states regarding aliens and their right to inherit and transmit property, some specifying alien friends, and other special provisions exist to the above rule. The states of Idaho, Kansas, Louisiana, and Vermont seem to make no provision.

<sup>7</sup> *Luhres v. Eimer*, 80 N. Y. 171. As to the rights of aliens under the early laws of New York, see *McLean v. Swanton*, 13 N. Y. 535; *Levy's Lessee v. McCartee*, 6 Pet. 102, 113.

<sup>8</sup> *Hanrick v. Hanrick*, 61 Tex. 596; 63 Tex. 618; 54 Tex. 101.

<sup>9</sup> *Burke v. Adams*, 80 Mo. 504.

<sup>10</sup> *Crane v. Reeder*, 21 Mich. 24, 70; 4 Am. Rep. 430. See *Greenhold v. Morrison*, 21 Iowa, 538, as to law then in force in Iowa.

<sup>11</sup> *Pilla v. German School Ass'n*, 23 Fed. Rep. 700.

<sup>12</sup> *Escheated Estate of Guilford*, 67 Cal. 380.

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Although an alien is capable of inheriting, the word "alien" does not include or designate a naturalized citizen.<sup>1</sup> And an alien who was naturalized subsequent to the death of the testator has been held in North Carolina to be incapable of inheriting.<sup>2</sup> Where an alien female intermarries with a citizen, by virtue of the marriage she becomes a citizen, and capable of taking and holding lands in New York by purchase and descent.<sup>3</sup> A foreign sovereign may sue in the courts of this country.<sup>4</sup> An alien may maintain a suit to protect his right to a trade-mark.<sup>5</sup>

An alien who has not declared his intentions to become a citizen of the United States may be elected to a public office, and may hold the same in case his disability be removed before the term of office begins.<sup>6</sup> An alien cannot be a juryman.<sup>7</sup>

**§ 3835. Naturalization—Who may be Naturalized.**—Congress is given power by the constitution "to establish a uniform rule of naturalization."<sup>8</sup> Naturalization is the act by which the rights, privileges, and immunities of citizenship are conferred upon a person born an alien. When Congress has prescribed a rule, its power is exclusive.<sup>9</sup> Therefore, no state can confer rights of citizenship upon an alien who has not complied with the laws of Congress so as to make him a citizen of the United

<sup>1</sup> *Luhrs v. Eimer*, 80 N. Y. 171.

<sup>2</sup> *Harman v. Ferral*, 64 N. C. 474.

<sup>3</sup> *Luhrs v. Eimer*, 80 N. Y. 171.

An alien-born woman becomes a citizen under the act of Congress of February 10, 1855, where any such woman who might be naturalized is in a state of marriage to a citizen, nor is her citizenship lost by her husband's subsequent death, and her afterwards intermarrying with an alien: *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349, 376.

<sup>4</sup> *King of Prussia v. Kuepper*, 22 Mo. 550; 66 Am. Dec. 639.

<sup>5</sup> *Taylor v. Carpenter*, 11 Paige, 292; 42 Am. Dec. 114.

<sup>6</sup> *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489.

<sup>7</sup> *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501. But the term "alien" applies to one not a citizen of Indiana. A citizen of Indiana is eligible, even though he is not a citizen of the United States: *McDonel v. State*, 90 Ind. 320.

<sup>8</sup> U. S. Const., c. 4, art. 1, sec. 8.

<sup>9</sup> *Chirac v. Chirac*, 2 Wheat. 259; *Houston v. Moore*, 5 Wheat. 1, 48; *Thurlow v. Massachusetts*, 5 How. 504; *Smith v. Turner*, 7 How. 283; *United States v. Villato*, 2 Dall. 370.

States, and entitled to the rights and privileges guaranteed to citizens by the federal constitution.<sup>1</sup> But the act of naturalization, when performed by a state court in the mode prescribed by Congress, has given to it the same effect that it would have if performed by a court of the United States.<sup>2</sup> Citizenship is acquired by naturalization in three ways: 1. By special laws conferring the privilege upon individuals named in the laws; 2. By means of general naturalization laws, whereby individuals renounce their foreign allegiance, and take upon themselves the obligations of citizenship; 3. By the acquisition by the United States of foreign territory, with its people, who thereby become citizens of the United States.<sup>3</sup> The original naturalization laws only extended to free "white" persons. In 1870 and 1875 this was altered, and the naturalization laws were extended to aliens of African nativity and to persons of African descent. But it has been held that they do not include natives of China of the Mongolian race.<sup>4</sup> And a person of half-white and half-Indian blood is not a "white person" within the meaning of this phrase as used in the naturalization laws.<sup>5</sup> Children of naturalized citizens who are residents of the United States, being minors at the time of their father's naturalization, become citizens.<sup>6</sup>

Under the language of the statute requiring the applicant to be "of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same," it has been held that one who "knew of no constitutional law against polygamy" was not competent.<sup>7</sup> An alien,

<sup>1</sup> In re Wehlitz, 16 Wis. 443; 84 Am. Dec. 700.

<sup>2</sup> Morgan v. Dudley, 18 B. Mon. 693; 68 Am. Dec. 735.

<sup>3</sup> Cooley on Constitutional Law, 243. In the United States, naturalized persons are entitled to all the privileges and immunities of natural-born subjects, except that a residence of seven years is required to enable

them to hold a seat in Congress, and no person except a native citizen is eligible to the office of governor in some of the states, or to the office of President of the United States: 2 Kent's Com. 6.

<sup>4</sup> In re Ah Yup, 5 Saw. 155.

<sup>5</sup> In re Camille, 6 Saw. 541.

<sup>6</sup> U. S. Rev. Stats., sec. 2172.

<sup>7</sup> In re Sanders, 1 Cent. L. J. 514.

to be entitled to admission to citizenship, must prove that he has behaved as a man of good moral character during all the period of his residence in the United States.<sup>1</sup>

§ 3836. **Procedure.**—The courts authorized by the act of Congress to admit aliens to citizenship need not possess general common-law jurisdiction over all classes of actions, but must be courts of record for all purposes, possessing powers incident to such courts, with common-law jurisdiction over all subjects upon which they have authority to adjudicate, and must exercise their powers according to the course of the common law.<sup>2</sup> And the following have been held to be within the statute, and to have power to naturalize, viz.: The criminal court of St. Louis, being a court of record, having common-law jurisdiction of a certain class of cases, a seal, and a clerk,<sup>3</sup> and county courts,<sup>4</sup> and a city court of record.<sup>5</sup> But it has been held that the marine court of New York was not within the statute;<sup>6</sup> nor a court in which the justice is the recording officer.<sup>7</sup> A probate court is not a "court having common-law jurisdiction" because it may allot dower, partition estates, and take cognizance of matters concerning bastards and bastardy.<sup>8</sup> The declaration of intention must be made in open court or in the clerk's office;<sup>9</sup> but the intention must be declared in such

<sup>1</sup> In re Spenser, 5 Saw. 195. In this case it was held that what constitutes good moral character may vary in different times and places, but a person who commits perjury does not behave as a man of good moral character, and is not therefore entitled to admission to citizenship, even though he has been pardoned for the offense; for a pardon is prospective, and not retrospective.

<sup>2</sup> People v. McGowan, 77 Ill. 644; 20 Am. Rep. 254; In re Connor, 39 Cal. 98; 2 Am. Rep. 427; Morgan v. Dudley, 18 B. Mon. 693; 68 Am. Dec. 735.

<sup>3</sup> People v. McGowan, 77 Ill. 644; 20 Am. Rep. 254.

<sup>4</sup> Dale v. Irwin, 78 Ill. 170; People v. Pease, 30 Barb. 588; Ex parte Burkhardt, 16 Tex. 470; People v. McGowan, 77 Ill. 644; 20 Am. Rep. 254.

<sup>5</sup> Morgan v. Dudley, 18 B. Mon. 693; 68 Am. Dec. 735.

<sup>6</sup> Mills v. McCabe, 44 Ill. 194.

<sup>7</sup> Ex parte Cregg, 2 Curt. 98; State v. Whittemore, 50 N. H. 245; 9 Am. Rep. 196.

<sup>8</sup> Ex parte Tweedy, 22 Fed. Rep. 84.

<sup>9</sup> In re Langtrey, 31 Fed. Rep. 879.

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form as to show the time when it was actually formed.<sup>1</sup> A record of naturalization made by a court of competent jurisdiction cannot be impeached in a collateral proceeding, by showing by parol that the preliminary steps required by law had not in fact been taken.<sup>2</sup> The certificate of the clerk of the district court, reciting that the applicant has been duly admitted to citizenship, but failing to show or verify any extract from the record or minute of the action of the court, is not competent evidence to show naturalization. Nor can it be helped out by parol evidence.<sup>3</sup> Nor can citizenship be presumed from the holding of real estate or of office.<sup>4</sup> The court cannot make its order of naturalization retroactive.<sup>5</sup> It is competent for a court to amend *nunc pro tunc* the record of naturalization proceedings had therein, so as to correct an error of the clerk and make the record conform to the truth.<sup>6</sup>

§ 3837. Elections — Suffrage — The Right to Vote. —

Participation in the suffrage is not of right, — it is not a necessary incident of citizenship, — but it is granted by the state on a consideration of what is most for the interest of the state.<sup>7</sup> Therefore, although the federal constitution makes women born or naturalized within the United States citizens, and capable of becoming voters, yet that provision does not execute itself, but requires legislative action to authorize them to vote; and where the legislature have only enacted that male citizens may vote, women have no right to vote.<sup>8</sup> Under the federal constitution, each state has the right to prescribe the qualifications of its own voters.<sup>9</sup> Citizenship and the right to vote are neither identical nor inseparable; and

<sup>1</sup> *Ex parte Randall*, 14 Phila. 224.

<sup>2</sup> *People v. McGowan*, 77 Ill. 644; 20 Am. Rep. 254.

<sup>3</sup> *Green v. Salas*, 31 Fed. Rep. 106.

<sup>4</sup> *Dryden v. Swinburne*, 20 W. Va. 89.

<sup>5</sup> *Id.*

<sup>6</sup> *State v. McDonald*, 24 Minn. 48.

<sup>7</sup> *Cooley on Constitutional Law*, 237; *Minor v. Happersett*, 21 Wall. 162.

<sup>8</sup> *Spencer v. Board of Registration*, *Webster v. Superintendents of Election*, 1 McAr. 169; 29 Am. Rep. 582.

<sup>9</sup> U. S. Const., art. 1, p. 2.

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the constitution of a state, although it authorizes resident unnaturalized foreigners to vote at state elections and hold office, does not make them citizens of the state.<sup>1</sup>

§ 3838. **Registration Laws.** — Laws enacted for the purpose of procuring a fair and honest vote, such as registration laws, are constitutional and valid.<sup>2</sup> But a registry law, to be valid, must be reasonable and impartial, and calculated to facilitate and secure the constitutional right of suffrage, and not to subvert or injuriously, unreasonably, or unnecessarily restrain, impair, or impede the right.<sup>3</sup> Laws which provide for the registration of voters, and that electors who have not registered previous to the day of election shall make oath to their qualifications, etc., are valid.<sup>4</sup> Registry laws which make race or class distinctions which provide for the payment of a special tax as a prerequisite to voting, or which increase the time of residence required by the constitution,

<sup>1</sup> *Lanz v. Randall*, 3 Cent. L. J. 688.

<sup>2</sup> *People v. Hoffmann*, 116 Ill. 587; 56 Am. Rep. 793; *Edmonds v. Banbury*, 28 Iowa, 267; 4 Am. Rep. 177; *State v. Butts*, 31 Kan. 537. But *Taylor, J.*, dissenting in *Dells v. Kennedy*, 49 Wis. 555, 35 Am. Rep. 786, says: "Experience has demonstrated that registry laws are necessary to insure a fair and honest vote in all large cities, and such laws have been enacted and enforced in such cities in very many of the states of the Union for many years. In order to preserve even a pretense of priority in election in the large centers of population, it is necessary that evidence of this right of the electors to vote should be produced before the day of election, in order to enable the real electors to vote on that day; and it would be highly inconvenient, if not impossible, to make the necessary investigations on that day. Registration is, in fact, nothing more than a method of taking evidence beforehand of the right of the elector to vote on the day of election." So in *Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632, *Shaw, C. J.*, said: "The constitution, by carefully prescribing the

qualifications of voters, necessarily requires that an examination of the claims of persons to vote on the ground of possessing these qualifications must at some time be had by those who are to decide on them. . . . If, then, the constitution has made no provision in regard to the time, place, and manner in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects respecting the mode of exercising the right in relation to which it is competent to the legislature to make suitable and reasonable regulations not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right."

<sup>3</sup> *State v. Corner*, 22 Neb. 265; *People v. Canady*, 73 N. C. 198; 21 Am. Rep. 465.

<sup>4</sup> *Hyde v. Brush*, 34 Conn. 454; *Edmonds v. Banbury*, 28 Iowa, 267; 4 Am. Rep. 177; *In re McDonough*, 105 Pa. St. 490; *State v. Hilmantel*, 21 Wis. 566; *State v. Baker*, 38 Wis. 71.

increase the qualifications of electors, and are invalid.<sup>1</sup> It is held in some states that a law absolutely depriving the voter of his right to vote, unless registered a certain number of days before the election, is invalid;<sup>2</sup> while in others such laws have been sustained.<sup>3</sup>

<sup>1</sup> *Monroe v. Collins*, 17 Ohio St. 665; *United States v. Slater*, 4 Woods, 358; *Page v. Allen*, 58 Pa. St. 338; 98 Am. Dec. 272; *State v. Williams*, 5 Wis. 308; *People v. Canady*, 73 N. C. 198; 21 Am. Rep. 465. But see *Davis v. School District*, 44 N. H. 398; *McMahon v. Savannah*, 66 Ga. 217; 42 Am. Rep. 65.

<sup>2</sup> *State v. Corner*, 22 Neb. 265; *Daggett v. Hudson*, 43 Ohio St. 548; 54 Am. Rep. 832; *White v. Multnomah County*, 13 Or. 317; *Dells v. Kennedy*, 49 Wis. 555; 35 Am. Rep. 786. In *Daggett v. Hudson*, 43 Ohio St. 548, 54 Am. Rep. 832, the court say: "The necessary absence of a voter on the seven days provided by statute for registration, either by sickness, business, imprisonment, death, or other lawful reason, absolutely forfeits for the time being his constitutional right of suffrage. He cannot anticipate expected absence, and register at an earlier period. He cannot prove his right by his affidavit or the affidavit of others, and excuse his personal presence at the place of registration. He cannot, on the day of election, or within five days prior thereto, by any proof of constitutional qualification, supply the want of former registration. A foreigner, who has taken out his first papers, and made his necessary declaration to become a citizen, and whose right to full citizenship and the elective franchise will ripen during the five days before or on the day of election, cannot secure registration or the right to vote, because he cannot prove in advance that the action of the court will naturalize him." So in *Dells v. Kennedy*, 49 Wis. 555, 35 Am. Rep. 786, the court say: "By the effect of this law, the elector may, and in many cases must and will, lose his vote, by being utterly unable to comply with this law, by reason of absence, physical disability, or nonage, and an elector can lose his vote, without his own default or negli-

gence in these particulars. This language of the learned counsel is most strikingly suggestive of the very vice of this law, which is fatal to its validity. That vice is, that the law disfranchises a constitutionally qualified elector, without his default or negligence, and makes no exception in his favor, and provides no method, chance, or opportunity for him to make proof of his qualifications on the day of election, the only time, perchance, when he could possibly do so. This law undertakes to do what no law can do, and that is, to deprive a person of an absolute right, without his laches, default, negligence, or consent, and, in order to exercise and enjoy it, to require him to accomplish an impossibility. No registry law can be sustained which prescribes qualifications for an elector additional to those named in the constitution, and a registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election. If the mode or method or regulations prescribed by law for such purpose and to such end deprive a fully qualified elector of his right to vote at an election, without his fault, and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform, they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily disfranchised him without any pretended cause or reason, or required of an elector qualifications additional to those named in the constitution. It would be attempting to do indirectly what no one would claim could be done directly."

<sup>3</sup> *Capen v. Foster*, 12 Pick. 455; 23 Am. Dec. 632; *In re Polling Lists*, 13 R. I. 729; *Keenan v. Cook*, 12 R. I.

§ 3839. **Interference with Secrecy of Voting.** — As a ballot requires secrecy of voting, a constitutional provision that "all elections by the people shall be by ballot" has been held infringed by a statute requiring the officers of election to mark the ballots with a number corresponding to the elector's number upon the roll.<sup>1</sup>

§ 3840. **Domicile Defined — Different Kinds of.** — "The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law."<sup>2</sup> The legal idea of domicile includes home, residence, and business as material elements, and means the place where a man has his permanent residence and established busi-

ness; *People v. Wilson*, 62 N. Y. 186; *Webster v. Byrnes*, 34 Cal. 273; *People v. Laine*, 33 Cal. 55; *People v. Koppelman*, 16 Mich. 342; *Eusworth v. Albin*, 46 Mo. 450; *Weil v. Calhoun*, 25 Fed. Rep. 805; *United States v. Quinn*, 8 Blatchf. 48; *Edmonds v. Banbury*, 28 Iowa, 267; 4 Am. Rep. 177; *McMahon v. Savannah*, 66 Ga. 217; 42 Am. Rep. 65; *People v. Hoffman*, 116 Ill. 587; 56 Am. Rep. 793, where the court say: "What evidence shall be required to establish a voter's qualifications, and how that evidence shall be presented to a body acting upon it, is a matter of discretion with the legislature. . . . If cases can be supposed where the three weeks' requirement will deprive qualified electors of the privilege of depositing their votes, cases can also be supposed where one day's requirement will work the same result. This mode of reasoning, carried out to its logical sequence, will make any kind of registry law unconstitutional; for it would be a physical impossibility for the judges of the election to receive the votes and make up the register at the same time and on the same day. . . . If closing the registry three weeks before election may deprive a few persons, becoming qualified during that period, of the privilege of

casting their ballots, keeping it open until a late day may admit to the polls hundreds of persons who should never have been allowed to vote. When the ballot-box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed. . . . Where the law-making department of the government, in the exercise of a discretion not prohibited by the constitution, has declared that a certain period of time is needed for a special investigation, it is not the duty of this court to declare that such period is unreasonably long." And in *State v. Butts*, 31 Kan. 537, the court says: "It is true, isolated instances may occur where a party, through absence or sickness, is unable to register, and so loses his vote; but the same result may follow where any failure to produce the required evidence occurs. It is a mistake to suppose that there is any special virtue in the mere day of election. If the legislature has the right to require proof of a man's qualification, it has a right to say when such proof shall be furnished, and before what tribunal; and unless this power is abused, the courts may not interfere."

<sup>1</sup> *Williams v. Stein*, 38 Ind. 89; 10 Am. Rep. 97.

<sup>2</sup> *Dacey on Domicile*, 3.

ness.<sup>1</sup> Domicile is of two kinds: of origin and of choice; the former being that which every person receives at his birth, the latter being that which he acquires by a subsequent change of country. The terms "residence" and "domicile" are not necessarily synonymous, the former having a more restricted meaning. A residence, although implying an established abode, is not inconsistent with the existence of a domicile elsewhere.<sup>2</sup> It is not enough that one lives and does business in a place to make it his domicile. There must be, also, the intention of remaining and making a home there.<sup>3</sup> The terms "resident" and "inhabitant" are not synonymous; the latter implies a more fixed and permanent abode than the former, and frequently imports many privileges and duties to which a mere resident could not lay claim or be subject.<sup>4</sup> A domicile may be in one state and a residence in another.<sup>5</sup> A party may have a wife and family resident in one state, while he himself is domiciled in another.<sup>6</sup> The domicile of a married man is in the county in which he resides, rather than that in which he transacts business.<sup>7</sup> A man may change his habitancy or domicile from one place to another merely because he wishes to diminish the amount of his taxes.<sup>8</sup> For purposes of taxation, a residence, once acquired, will not be presumed to be changed from the mere fact that, leaving his family, a man has gone elsewhere and entered into business.<sup>9</sup>

<sup>1</sup> *Pearce v. State*, 1 Sneed, 63; 60 Am. Dec. 135.

<sup>2</sup> *Krone v. Cooper*, 43 Ark. 547; *Foster v. Hall*, 4 Humph. 346; *Long v. Ryan*, 30 Gratt. 718; *Mayor v. Genet*, 4 Hun, 487. But in an attachment act the words "not a resident" and "domicile" must be held to be used with reference to the same subject-matter, and to denote opposite conditions with reference to habitancy, but not differing in degree. One who has a domicile in Missouri cannot be a non-resident while temporarily absent: *Chariton County v. Moberly*, 59 Mo. 238.

<sup>3</sup> *State v. Dayton*, 77 Mo. 678.

<sup>4</sup> *Tazewell County v. Davenport*, 40 Ill. 197; *Bartlett v. City of New York*, 5 Sand. 44; *Chaine v. Wilson*, 1 Bosw. 673; *Matter of Hawley*, 1 Daly, 531.

<sup>5</sup> *Frost v. Brisbin*, 19 Wend. 11; 32 Am. Dec. 422.

<sup>6</sup> *Exchange Bank v. Cooper*, 40 Mo. 169.

<sup>7</sup> *Blucher v. Milsted*, 31 Tex. 621.

<sup>8</sup> *Draper v. Hatfield*, 124 Mass. 53; *Thayer v. Boston*, 124 Mass. 132; 26 Am. Rep. 650.

<sup>9</sup> *Nugent v. Bates*, 51 Iowa, 77; 33 Am. Rep. 117.

**ILLUSTRATIONS.**—A, a foreigner without parents or home, kept her trunk and clothes with her brother in a certain county, and, though frequently going out to work in another county, always returned there when sick or out of work. *Held*, that that county was her residence: *Cerro Gordo County v. Hancock County*, 58 Iowa, 114.

§ 3841. **Husband and Wife.**—The domicile of a married woman is, during coverture, the same as and changes with the domicile of her husband; this rule resting on the legal duty of the wife to follow and dwell with the husband wherever he goes.<sup>1</sup> The desertion of the husband will not affect the domicile of the wife,<sup>2</sup> and a change of the wife's domicile will not change the domicile of the husband.<sup>3</sup> The actual domicile of the wife, where the husband is confined in the prison of another state, is not the legal domicile of the husband; nor can it be regarded, contrary to the fact, as his actual residence, within the meaning of the statute regulating the service of process.<sup>4</sup> In England a wife can, under no circumstances, have any other domicile or home than that of her husband. A woman, of whatever age, acquires at marriage the domicile of her husband, and her domicile continues to be the same as his, and changes with his, throughout their married life. The fact that a wife actually lives apart from

<sup>1</sup> *Dougherty v. Snyder*, 15 Serg. & R. 84; 16 Am. Dec. 520; *Greene v. Greene*, 11 Pick. 410; *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 530; *Smith v. Morehead*, 6 Jones Eq. 360; *Williams v. Saunders*, 5 Cold. 60; *Hackettstown Bank v. Mitchell*, 28 N. J. L. 516; *McAfee v. Kentucky University*, 7 Bush, 135; *Lacey v. Clements*, 26 Tex. 665; *Hicks v. Skinner*, 71 N. C. 539, 543; 17 Am. Rep. 16; *Dow v. Gould* etc. Mfg Co., 31 Cal. 629; *Barber v. Barber*, 21 How. 582; *Hick v. Hick*, 5 Bush, 670; *Muller v. Hilton*, 13 La. Ann. 1; 71 Am. Dec. 504; *Neal v. Her Husband*, 1 La. Ann. 315; *Hair v. Hair*, 10 Rich. Eq. 176; *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129; *Hood Hood*, 11 Allen, 197; 87 Am. Dec. 709; *Hanbury v. Hanbury*, 29 Ala. 719. As

to this duty to follow the husband wherever he goes, it is said that "the weight of opinion is, that when this emigration is to a neighboring civilized state, she is bound. But it is otherwise when the ocean is to be crossed, and countries of different type and grace of civilization sought. When such questions arise, each particular case is to be judged by its own circumstances": *Wharton on Conflict of Laws*, sec. 45.

<sup>2</sup> *Cox v. Cox*, 19 Ohio St. 502; 2 Am. Rep. 415.

<sup>3</sup> *Scholes v. Murray Iron Works*, 44 Iowa, 196; *Porterfield v. Augusta*, 67 Me. 556.

<sup>4</sup> *McPherson v. Housel*, 13 N. J. Eq. 35.

her husband,<sup>1</sup> that they have separated by agreement,<sup>2</sup> that the husband has been guilty of misconduct such as would furnish defense to a suit by him for restitution of conjugal rights,<sup>3</sup> does not enable the wife to acquire a separate domicile.<sup>4</sup> This rule has been adopted in a few cases in the United States.<sup>5</sup> But according to the weight of authority the American doctrine is, that a wife may acquire a separate domicile from that of her husband whenever the latter has been guilty of such misconduct in the marital relation as entitles her to have it dissolved.<sup>6</sup> So where the wife voluntarily absents herself, under circumstances amounting to a wrongful abandonment of the husband, and permanently resides in another state.<sup>7</sup>

§ 3842. **Parent and Child.**—The domicile of a legitimate or legitimated infant is, during the lifetime of the father, the same as and changes with the domicile of the father.<sup>8</sup> It does not lose this domicile, though then in

<sup>1</sup> *Warrender v. Warrender*, 2 Clark & F. 488.

<sup>2</sup> *Dolphin v. Robins*, 7 H. L. Cas. 390.

<sup>3</sup> *Yelverton v. Yelverton*, 1 Swab. & T. 574.

<sup>4</sup> *Dacey on Domicile*, 104.

<sup>5</sup> *Jackson v. Jackson*, 1 Johns. 424; *Maguire v. Maguire*, 7 Dana, 181; *Harrison v. Harrison*, 20 Ala. 629; 56 Am. Dec. 227.

<sup>6</sup> *Cheever v. Wilson*, 9 Wall. 108; *Harding v. Alden*, 9 Me. 140; 23 Am. Dec. 549; *Payson v. Payson*, 34 N. H. 518; *Hopkins v. Hopkins*, 35 N. H. 474; *Jenness v. Jenness*, 24 Ind. 355; 87 Am. Dec. 335; *Dutcher v. Dutcher*, 39 Wis. 659; *Craven v. Craven*, 27 Wis. 418; *Shafner v. Bushnell*, 24 Wis. 372; *Gould v. Crow*, 57 Mo. 204; *Harteau v. Harteau*, 14 Pick. 181; 25 Am. Dec. 372; *Burlen v. Shannon*, 115 Mass. 448; *Barber v. Barber*, 21 How. 594; *Brett v. Brett*, 5 Met. 235; *Ditson v. Ditson*, 4 R. I. 87; the court saying: "Although, as a general doctrine, the domicile of the husband is, by law, that of the wife, yet when he commits an offense, or is guilty of such dereliction of duty in the relation,

such as entitles her to have it either partially or totally dissolved, she not only may, but must to avoid condonation, establish a separate domicile of her own. This she may establish, nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish, in a different judicial or *staté* jurisdiction than that of her husband, according to the residence of her family or friends."

<sup>7</sup> *Prater v. Prater*, 87 Tenn. 78; 10 Am. St. Rep. 623.

<sup>8</sup> *Somerville v. Somerville*, 5 Ves. 749 a; *Sharpe v. Crispin*, L. R. 1 Pro. & D. 611; *Forbes v. Forbes*, 23 L. J. Ch. 724; *Allen v. Thomason*, 11 Humph. 536; 54 Am. Dec. 55; *Hiestand v. Kuns*, 8 Blackf. 345; 46 Am. Dec. 345; *Wheeler v. Burrow*, 18 Ind. 14; *McCollem v. White*, 23 Ind. 43; *Guier v. O'Daniel*, 1 Binn. 349; *School Directors v. James*, 2 Watts & S. 568; 37 Am. Dec. 525; *Andrews v. Perriott*, 4 Cow. 516, note. A minor whose father and adopted mother reside in Massachusetts will be considered to have his domicile in that state: *Foley's Estate*, 11 Phila. 47.

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another state attending school.<sup>1</sup> Upon the death of the father his domicile continues to be that of his infant children.<sup>2</sup> A legitimate infant takes the domicile of its father, although such infant be posthumous, and its mother again married,<sup>3</sup> or not actually residing with such parent.<sup>4</sup> On the death of the father the mother can change the child's domicile during the widowhood, provided it is not done fraudulently to change the succession of property.<sup>5</sup> But after she has remarried, her power to effect a change in the domicile of her children is at an end.<sup>6</sup> If an infant's father dies, the infant's domicile "follows, in the absence of fraud, that of its mother, until such time as the mother remarries; when by reason of her own domicile being subordinate to that of her husband, that of the infant ceases to follow any further change by the mother, or in other words, does not follow that of its step-father."<sup>7</sup> The domicile of an illegitimate child is that of its mother.<sup>8</sup> A child under ten years of age, who, with the assent of its guardian after the death of its parents, resides with its paternal grandparent in another state, who is its next kin and the head of the family, acquires the domicile of the grandparent.<sup>9</sup> A minor cannot acquire a domicile of his own;<sup>10</sup> nor, it is held in New Jersey, can a minor *feme covert*.<sup>11</sup>

<sup>1</sup> Kelly v. Garrett, 67 Ala. 304.

<sup>2</sup> Trammell v. Trammell, 20 Tex. 406.

<sup>3</sup> Oxford v. Bethany, 19 Conn. 229.

<sup>4</sup> Adams v. Oaks, 20 Johns. 282; Parsonfield v. Kennebunkport, 4 Me. 47; Ryall v. Kennedy, 40 N. Y. Sup. Ct. 347; Brown v. Lynch, 2 Bradf. 214; Helfenstein v. Thomas, 5 Rawle, 209.

<sup>5</sup> Carlisle v. Tuttle, 30 Ala. 613.

<sup>6</sup> Johnson v. Copeland, 35 Ala. 526; Allen v. Thomason, 11 Humph. 536; 54 Am. Dec. 55; Mears v. Sinclair, 1 W. Va. 185.

<sup>7</sup> Ryall v. Kennedy, 40 N. Y. Sup. Ct. 347; Lamar v. Micou, 112 U. S. 452.

<sup>8</sup> Forbes v. Forbes, 23 L. J. Ch. 724;

Pottinger v. Wightman, 3 Mer. 67; Holyoke v. Haskins, 5 Pick. 20; 16 Am. Dec. 372.

<sup>9</sup> Lamar v. Micou, 114 U. S. 218.

<sup>10</sup> Guier v. O'Daniel, 1 Binn. 349; School Director v. James, 2 Watts & S. 568; 37 Am. Dec. 525; Hiestand v. Kuns, 8 Blackf. 345; 46 Am. Dec. 481; Allen v. Thomason, 11 Humph. 536; 54 Am. Dec. 55.

<sup>11</sup> Blumenthal v. Tannenholtz, 31 N. J. Eq. 194. In this case an infant whose parents resided in Canada filed a bill in the New Jersey court to annul her marriage on the ground of fraud. It appeared that she had resided in that state for eighteen months previous to the filing of the bill. The court held that she was incapable of



ILLUSTRATIONS.—A minor sixteen years old, living with his parents, was sent by them to Germany for a course of study, after which he returned home before coming of age. *Held*, that his legal residence had continued to be in this country during his absence: *In re Rice*, 7 Daly, 22. A child three years old, upon the death of its parents in Tennessee, the place of their domicile, was brought to the District of Columbia by its uncle, not its guardian. *Held*, that the domicile of the child continued in Tennessee, and it dying in the District of Columbia, its estate must be distributed according to the law of Tennessee: *In re Afflick*, 3 McAr. 95. A widow remarried, and after living for some time at her first husband's residence in Georgia, removed with her minor children to Tennessee, where her second husband became pastor of a church, but they always avowed their intention to return. *Held*, that they did not lose their domicile in Georgia, and were entitled to a homestead from the estate of the first husband: *Harkins v. Arnold*, 46 Ga. 656.

§ 3843. **Guardian and Ward.**—While the guardian cannot change the ward's domicile with a fraudulent or injurious intent,<sup>1</sup> yet he may make the change in the absence of any proof that the change was injurious to the interests of the ward, and that it was not done for the purpose of affecting the descent of the ward's property in case of his death.<sup>2</sup> So the domicile of a person *non compos mentis* may be changed by the direction or consent,

changing her domicile, and that it had consequently no jurisdiction, and dismissed the bill. "Unless," say the court, "one of the parties was domiciled here when the suit was brought, the court has no jurisdiction in the case. The fact that the marriage took place here will not confer jurisdiction. The complainant, indeed, swears that she resides here, but she also swears that her parents reside in Montreal, in Canada, and have resided there for the past ten years, and that, when this suit was instituted, she was and still is a minor. She does not claim to have been emancipated from her parents, nor does she give any reason for her change of abode from Canada to New Jersey. Her domicile, therefore, must be adjudged to be that of her parents. The domicile of the legitimate unemancipated minor who

is not *sui juris*, and whose will, therefore, cannot concur with the fact of his residence, is, if his father be alive, the domicile of the latter. It is an undisputed position of all jurists, says that writer, that, of his own accord, *proprio Marte*, the minor cannot change his domicile. The burden of proof to establish the change of domicile on the part of the minor is on him. It is not claimed that the complainant has gained domicile through her marriage. The defendant does not appear to have ever resided in this state.

<sup>1</sup> *Trammell v. Trammell*, 20 Tex. 405.

<sup>2</sup> *Wheeler v. Hollis*, 19 Tex. 522; 70 Am. Dec. 363; 33 Tex. 512; *Holyoke v. Haskins*, 5 Pick. 21; 16 Am. Dec. 372; *Anderson v. Anderson*, 42 Vt. 380; *Pedan v. Ribb*, 8 Ohio, 225; *Hiestand v. Kuns*, 8 Blackf. 345; 46 Am. Dec. 481.

either express or implied, of the guardian of such person.' When a ward has arrived at years of discretion, the residence of the guardian is not the residence of the ward, unless the ward choose to make it such.<sup>2</sup>

§ 3844. **Corporations.**—The domicile of a corporation is distinct from that of the persons who compose it.<sup>3</sup> A corporation has its domicile in the state or country which created it,<sup>4</sup> and it cannot change its domicile without the consent of the state.<sup>5</sup> It may be permitted to do business in another state by the courtesy of the latter state, but it does not thereby become a resident of the latter. Its residence, so far as residence may be predicated of a corporation, still remains within the territorial jurisdiction of the law-making power to which it owes its existence.<sup>6</sup> It has been held in New York that where a foreign corporation had sought and obtained the privilege of carrying on its business there under regulations fixed by the statutes of that state, and had established there a permanent general agency, and conducted its business as a distinct organization in the same manner as domestic corporations, that as to the business transacted in New York, the corporation was to be regarded as domiciled and subject to the same obligations and liabilities as domestic institutions.<sup>7</sup>

<sup>1</sup> *Holyoke v. Haskins*, 5 Pick. 20; 16 Am. Dec. 372. A, a resident of S., had a conservator there. A's mind was weak, but he was able to choose his residence. He afterwards moved to W., with intent to remain, and there lived for a year and a half, when he died. The conservator did not consent to his removal, but did consent to his remaining for a while, and paid his board. A voted in W. Held, that he became domiciled there: *Calver's Appeal*, 48 Conn. 165.

<sup>2</sup> *Roberts v. Walker*, 18 Ga. 5.

<sup>3</sup> *Calcutta Jute Co. v. Nicholson*, 1 Ex. Div. 446.

<sup>4</sup> *Potter on Corporation*, sec. 611;

*Bank of Augusta v. Earle*, 13 Pet. 519; the court saying: "A corporation can have no legal existence out of the boundary of the sovereignty by which it is created. It exists only in contemplation of law, and by force of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

<sup>5</sup> *Aspinwall v. R. R. Co.*, 20 Ind. 492; 83 Am. Dec. 329.

<sup>6</sup> *Cook v. Hager*, 3 Col. 386.

<sup>7</sup> *Martine v. Ins. Co.*, 53 N. Y. 339; 13 Am. Rep. 529.

§ 3845. **Other Persons.**—Though an employee of the United States or state government cannot gain or lose a residence by reason of his presence or absence while employed in the service, yet he can establish his domicile and gain a residence at such a point as he may desire, by taking the proper and appropriate steps to do so, independently of his employment.<sup>1</sup> A soldier may abandon his domicile and acquire a new one, as other persons. His purchasing or renting a dwelling, to which he removes his family and in which he lives, is evidence of a change of domicile, in the absence of facts manifesting an intention not to remain permanently in such dwelling; and the removal of his family to a place where they take board is evidence of such change.<sup>2</sup> A foreigner continuously and exclusively employed in the vessels of a nation may, by length of time, acquire a residence in that nation as effectually as though he had remained on land within its boundaries. Vessels are subject to the jurisdiction of the country to which they belong, and for certain purposes regarded as part of its territory.<sup>3</sup>

§ 3846. **Change of Domicile—Requisites of.**—A domicile of choice is acquired by the combination of residence with the intention of permanently or indefinitely remaining at the place of residence; there must concur both the fact of residence (*factum*) and the intent (*animus manendi*). And where either of these is wanting, a new domicile cannot be acquired.<sup>4</sup> The old domicile is not

<sup>1</sup> Wood v. Fitzgerald, 3 Or. 568.

<sup>2</sup> Ames v. Duryea, 6 Lans. 155; 61 N. Y. 607.

<sup>3</sup> Matter of Bye, 2 Daly, 528.

<sup>4</sup> Udny v. Udny, L. R. 1 Sc. App. 441; Hart v. Horn, 4 Kan. 232; McClerry v. Matson, 2 Ind. 79; Burgess v. Clark, 3 Ind. 250; Hairston v. Hairston, 27 Miss. 704; 61 Am. Dec. 530; Adams v. Evans, 19 Kan. 174; Stiles v. Lay, 9 Ala. 795; White v. White, 3 Head, 404; Layne v. Pardee, 2 Swan, 232; Harvard College v.

Gore, 5 Pick. 370; Gilman v. Gilman, 52 Me. 165; 83 Am. Dec. 502; Stockton v. Staples, 66 Me. 197; Ensor v. Graff, 43 Md. 291; Wilkins v. Marshall, 80 Ill. 74; Lyman v. Fiske, 17 Pick. 231; 28 Am. Dec. 293; Gravillon v. Richards, 13 La. 293; 33 Am. Dec. 563; Ringgold v. Barley, 5 Md. 186; 59 Am. Dec. 107; Folger v. Slaughter, 19 La. Ann. 323; Bangs v. Brewster, 111 Mass. 385. In Doyle v. Clark, 1 Flp. 536, the court say: "Two things must concur to effectuate a change of domici-

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lost, nor a new one gained, by mere intention, unaccompanied by removal and actual residence.<sup>1</sup> "A mere intention to remove permanently, without an actual removal, works no change of domicile; nor does a mere removal from the state, without an intention to reside elsewhere."<sup>2</sup> But where a change has actually been made, *animo et facto*, the old domicile is at once lost, and a new one is gained at the same time. "Length of time will not alone do it; intention alone will not do it; but the two taken together do constitute a change of domicile. No particular time is required, but when the two circumstances of actual residence and intentional residence concur, then it is that a change of domicile is effected."<sup>3</sup> And this intent must be a definitely formed one.<sup>4</sup> "The time may be shorter or longer, according to the circumstances. In all cases, the question whether a person has or has not acquired a domicile must depend mainly upon his actual or presumed intention. . . . The apparent or avowed intention of residence, not the manner of it, constitutes domicile."<sup>5</sup> Domicile may be acquired by longer

cile; 1. An actual change or removal of residence; 2. An intention to make such change or removal permanent. If both of these requisites concur in point of time, the place to which removal is made becomes instantly the place of domicile, notwithstanding the party may entertain a floating intention to return at some future period: Story on Conflict of Laws, sec. 46. This is illustrated in the ordinary case of an emigrant who transports his family and household effects to a new state and settles upon a farm. A change of domicile takes place instantly upon his arrival. On the other hand, a person may transport his family and household effects in like manner to another state for a temporary purpose, as, for instance, the settlement of some particular business, or for a change of climate in summer, without thereby disturbing his former residence. The leading English case on this question is that of Summerville v. Lord Summerville, 5 Ves. 750,

and the principles there laid down have been since so often reaffirmed as to have become the unquestioned law of both countries."

<sup>1</sup> Maddox v. State, 32 Ind. 111; Carey's Appeal, 75 Pa. St. 201; McKown v. McGuire, 15 La. Ann. 657; Leach v. Pillsbury, 15 N. H. 137; State v. Daniels, 44 N. H. 383; Boardman v. House, 18 Wend. 512; Ely v. Lyons, 18 Wend. 644; Frost v. Brishin, 19 Wend. 11; Graham v. Public Administrator, 4 Bradf. 127; Hegeman v. Fox, 31 Barb. 475; Henrietta v. Oxford, 2 Ohio St. 32; McIntyre v. Chappell, 4 Tex. 187.

<sup>2</sup> Hindman's Appeal, 85 Pa. St. 466; Kemna v. Brockhaus, 10 Biss. 128; Hart v. Lindsey, 17 N. H. 235; 43 Am. Dec. 597.

<sup>3</sup> Collier v. Rivaz, 2 Curt. 855; Verret v. Bonvillian, 33 La. Ann. 1304.

<sup>4</sup> Walker v. Walker, 1 Mo. App. 404.

<sup>5</sup> Hairston v. Hairston, 27 Miss. 704; 61 Am. Dec. 530

or shorter residence, no definite period of time being necessary to create it; the true basis and foundation of domicile is the intention, the *quo animo* of the residence.<sup>1</sup> A prolonged absence from the place where citizenship has once been acquired is not alone enough to justify the conclusion that a change has taken place.<sup>2</sup> The fact that a person has voted in one state, and even become a candidate for the legislature there, is not sufficient to show a change of domicile from another state, if it be proved that he never made a permanent change in his residence.<sup>3</sup> But long-continued residence is the controlling circumstance in determining the question of domicile, in the absence of any avowed intention, or of any acts evincing a contrary intention, and in most cases it is unavoidably conclusive.<sup>4</sup> The mode of living is not conclusive in determining whether a new domicile has been acquired. If the party has entered a state, intending to make a permanent settlement therein, it becomes his domicile, whether he opens a house of his own or lives in lodgings or with a friend.<sup>5</sup> To retain a domicile once acquired, actual residence is not indispensable; but it may be retained by the intention not to change it.<sup>6</sup> If, while absent from his place of residence, a person form an intention to abandon it, his residence then as effectually ceases as if he had intended not to return when he left it.<sup>7</sup> Where a man is the head of a family and is a housekeeper, his domicile is presumed to be where his family reside.<sup>8</sup> But the residence of a married man's family is not necessarily his domicile.<sup>9</sup>

<sup>1</sup> *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 530.

<sup>2</sup> *Woodworth v. R. R. Co.*, 18 Fed. Rep. 282; 5 McCrary, 574.

<sup>3</sup> *Mandeville v. Huston*, 15 La. Ann. 281.

<sup>4</sup> *Hairston v. Hairston*, 27 Miss. 704.

<sup>5</sup> *Lowry v. Bradley*, 1 Speers Eq. 1; 39 Am. Dec. 142.

<sup>6</sup> *Hart v. Lindsey*, 17 N. H. 235; 43 Am. Dec. 597.

<sup>7</sup> *Hampden v. Levant*, 59 Me. 557.

<sup>8</sup> *Yonkey v. State*, 27 Ind. 236. If a married man has two places of residence at different times of the year, that will be deemed his domicile which he himself selects or describes, or deems to be his home, or which appears to be the center of his affairs, or where he votes or exercises the rights and duties of a citizen: *Charlton County v. Moberly*, 59 Mo. 238.

<sup>9</sup> *Pease v. State*, 1 Sneed, 63; *Exchange Bank v. Cooper*, 40 Mo. 169;

ILLUSTRATIONS. — A resident of Georgia went to Alabama for the purpose of settling, leased land and purchased materials for the erection of a foundry, and returned to Georgia for his family, and after some detention, returned with his family and took up his residence in Alabama. *Held*, that he did not lose his domicile in Georgia, or acquire one in Alabama, until his actual removal with the intention of remaining: *State v. Hallett*, 8 Ala. 159.<sup>1</sup> A was married to B in England, both parties being domiciled English subjects. A afterwards went to the United States in order to avoid his creditors, but it was not proved that he had abandoned his English domicile. He obtained a divorce in the state of Kansas on the ground of his wife's desertion, and was afterwards married in Kansas to C. *Held*, that no change of his domicile of origin was shown, and the divorce in Kansas would not be recognized in England: *Briggs v. Briggs*, L. R. 5 P. Div. 163. A sister, designing with the knowledge and consent of her brother, of whose family she was a member, to remove with him to another town, was delayed upon the road by bodily ailments. *Held*, not to change her domicile until her actual arrival: *Fayette v. Livermore*, 62 Me. 229. A left his home with the intention of settling elsewhere, and after remaining for a short time in several places, went, with indefinite intentions as to remaining, to his mother's home, where he married, made his will, and soon died. *Held*, that, for purposes of administration, his domicile was where he died: *Olson's Will*, 63 Iowa, 145.

*Ennis v. Smith*, 14 How. 400; the court saying: "It is residence elsewhere, or where a person lives out of the domicile of origin. That repels the presumption of its continuance, and casts upon him who denies the domicile of choice the burden of disproving it. Where a person lives is taken *prima facie* to be his domicile, until other facts establish the contrary. . . . A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, it does change the domicile. The result is, that the place of residence is *prima facie* the domicile, unless there be some motive for that residence not inconsistent with a

clearly established intention to retain a permanent residence in another place."

<sup>1</sup> The court saying that his acts in coming to Alabama with the design of settling and manifesting his intention of making that state his permanent residence by leasing a piece of land, procuring materials for the erection of a foundry, mark unequivocally his intention of changing his residence, but were not sufficient to cause a loss of the domicile he previously had. If, say the court, on his return to Georgia, he had, before being able to carry his purpose into effect, died, it can admit of no doubt the courts of Georgia, and not of this state, would have been entitled to distribute his estate. The same rule must have prevailed if he had died upon the journey here, for until he had actually reached here there would have been no change in fact of the domicile.

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§ 3847. **Animus Revertendi.** — One's domicile is not lost or changed by a temporary absence, no matter how long continued, when there exists an *animus revertendi*.<sup>1</sup> "If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished, in general such a person continues to be an inhabitant of such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties."<sup>2</sup> One does not acquire a domicile in a state by entering it with the intention of residing therein only if he shall there find employment.<sup>3</sup> A person domiciled in one state may spend the greater part of the year, or series of years, at another place, without thereby forfeiting his domicile. He does not forfeit his domicile without an intention, definitely formed, to abandon his original domicile and take up another; and until this intention appears, either directly or by some act inconsistent with the retention of the old domicile, the presumption of the continuance of it is not overcome.<sup>4</sup> But a domicile may be changed, although the person on departure cherishes a secret purpose of returning at some indefinite time in the future.<sup>5</sup> A floating intention to return at some future period will not defeat the acquisition of a new domicile.<sup>6</sup> In Massachusetts it is said: "An intention to return, however, at a remote or indefinite

<sup>1</sup> State v. Judge, 13 Ala. 805; Boyd v. Beck, 29 Ala. 703; Griffin v. Wall, 32 Ala. 149; Dow v. Gould etc. M. Co., 31 Cal. 629; Risewick v. Davis, 19 Md. 82; Crawford v. Wilson, 4 Barb. 505, 523; Case v. Clarke, 5 Mason, 70; State v. Daniels, 44 N. H. 383; Chariton County v. Moberly, 59 Mo. 238; Lowry v. Bradley, 1 Speers Eq. 1; 39 Am. Dec. 142; Gilman v. Gilman, 52 Me. 165; 83 Am. Dec. 502; Easterly v. Goodwin, 35 Conn. 279; 95 Am. Dec. 237; Hayes v. Hayes, 74 Ill. 312.

<sup>2</sup> Sears v. Boston, 1 Met. 250; Grillon v. Richards, 13 La. 293; 33 Am. Dec. 563; Bucknam v. Thompson, 38 Me. 171; 61 Am. Dec. 237; Langdon Dowd, 6 Allen, 423; 83 Am. Dec. 641; Weaver v. Norwood, 59 Miss. 665.

<sup>3</sup> Ross v. Ross, 103 Mass. 575.  
<sup>4</sup> Walker v. Walker, 1 Mo. App. 404.

<sup>5</sup> Johnson v. Smith, 43 Mo. 459.  
<sup>6</sup> Stratton v. Brigham, 2 Sneed, 420.

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period, to the former place of actual residence, will not control, if the other facts which constitute domicile all give the new residence the character of a permanent home and place of abode."<sup>1</sup> So the person's purpose "need not be fixed and unalterable" in order to change his domicile, and "a floating intention to return to his former place of abode at some future period" will not defeat it.<sup>2</sup>

ILLUSTRATIONS. — The wife left her husband and returned with her children and furniture to her father's house in the same town, and the husband, not being suffered to follow her, and having no property, sought employment in a neighboring town, intending to return and dwell with his wife whenever she should be reconciled to him, which was afterwards effected. *Held*, that his domicile remained in the town where his family had continued to reside: *Waterborough v. Newfield*, 8 Me. 203. A native of Philadelphia resides in South America seventeen years, then returns, and resides at Philadelphia. Soon after, he engages to go abroad for a limited time, without any intention of resuming his foreign domicile. *Held*, that his native domicile was revived, and was not affected by his temporary absence: *Miller's Estate*, 3 Rawle, 312; 24 Am. Dec. 345.

§ 3848. **Domicile Continues until New One Acquired.**  
—No one can be without a domicile, and therefore one's domicile of origin continues until a new domicile of choice is acquired,<sup>3</sup> and this, even though the party has finally

<sup>1</sup> *Hallet v. Bassett*, 100 Mass. 167.

<sup>2</sup> *Ringgold v. Bailey*, 5 Md. 186; 59 Am. Dec. 107. In an English case it is said (*Attorney-General v. Pattinger*, 30 L. J. Ex. 234): "I think, however, it appears that he had contemplated the possibility of returning to India. But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum*, in order to establish a domicile? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention, or expression of intention, prevented a man having a fixed domicile, no man would ever have a domicile at all, except his domicile of origin."

<sup>3</sup> *Udny v. Udny*, L. R. 1 Ch. 441; *Gilman v. Gilman*, 52 Me. 165, 176; 83 Am. Dec. 502; *Moore v. Wilkins*, 10 N. H. 452, 456; *Hood's Estate*, 21 Pa. St. 106; *Hindman's Appeal*, 85 Pa. 466, 469; *Kirkland v. Whately*, 4 Allen, 464; *Bangs v. Brewster*, 111 Mass. 385; *Glover v. Glover*, 18 Ala. 637; *Hairston v. Hairston*, 27 Miss. 721; 61 Am. Dec. 530; *Desmare v. United States*, 93 U. S. 610; *Sears v. Boston*, 1 Met. 250; *Phillips v. Kingfield*, 19 Me. 375; 36 Am. Dec. 760; *Abingdon v. North Bridgewater*, 23 Pick. 170. For purposes of taxation, a person must have a residence or domicile somewhere, and cannot abandon a domicile once acquired until he has actually acquired another: *Kellogg v. Supervisors of Winnebago*,



abandoned the place of his domicile with no intention of ever returning to it again.<sup>1</sup> An old domicile cannot be forfeited without conclusive proof that a new one has been acquired.<sup>2</sup> Thus where a person abandons his business and home, not with a view to a permanent abode elsewhere, but only to regain his health or prolong his life by travel, he does not thereby change his domicile.<sup>3</sup> So while in transit the old domicile remains.<sup>4</sup> Where a party abandons the domicile of origin in fact, and with a present intention to acquire a new one, if he dies *in itinere*, and before he has consummated that intention by an actual residence, the domicile of origin immediately reverts and reattaches.<sup>5</sup> But for the purposes of voting, a domicile once gained does not continue until a new one is acquired, nor does a right to vote at a particular poll or district continue until the right to vote elsewhere is shown.<sup>6</sup> Where a person, having acquired a domicile of choice, abandons it with the intention of resuming his domicile of origin, or without that intention, the domicile of origin revives as soon as the former domicile is abandoned, and before he arrives at the domicile of origin, or acquires a new domicile by choice.<sup>7</sup>

42 Wis. 97. But see *Wilbraham v. Ludlow*, 99 Mass. 587. An acquired character, depending on actual residence, and not on the existence of commercial relations, is abandoned for every purpose of legal effect the instant a step is taken to abandon the country: *Miller's Estate*, 3 Rawle, 312; 24 Am. Dec. 345.

<sup>1</sup> *Bell v. Kennedy*, L. R. 1 Ch. 306; *Houré v. Houré*, 9 Ired. 99; *Lowry v. Bradley*, 1 Speers Eq. 1; 39 Am. Dec. 142.

<sup>2</sup> *Shepherd v. Cassidy*, 20 Tex. 24; 71 Am. Dec. 372.

<sup>3</sup> *Still v. Woodville*, 38 Miss. 646.

<sup>4</sup> *Littlefield v. Brooks*, 50 Me. 475; *Jennison v. Hapgood*, 10 Pick. 77; *Isham v. Gibbons*, 1 Bradf. 69; *Clark v. Likens*, 26 N. J. L. 207.

<sup>5</sup> *Smith v. Croom*, 7 Fla. 81.

<sup>6</sup> *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349.

<sup>7</sup> *Allen v. Thomason*, 11 Humph. 536; 54 Am. Dec. 55; *King v. Foxwell*, 24 Week. Rep. 629; *Udny v. Udny*, L. R. 1 Sch. App. 441; Lord Westbury saying: "Expressions are found in some books," he says, "and in one or two cases, that the first or existing domicile remains until another is acquired. This is true if applied to the domicile of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicile of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party until another domicile has, *animus et facto*, been acquired. The cases to which I have referred are, in my opinion, met and controlled by other decisions. A natural-born Englishman may, if he domiciles himself in Holland, acquire and have the *status civis*

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ILLUSTRATIONS. — One domiciled in Boston, Massachusetts, went to Europe in 1876 with his family for an indefinite term of absence, and remained abroad until 1879. On leaving he had determined never to return to reside in Boston, and before May 1, 1877, he had decided to take up his residence on his return in Waterford, Connecticut, and on his return he went there to reside. *Held*, that his domicile, for the purposes of taxation, was in Boston, on the 1st of May, 1877: *Borland v. City of Boston*, 132 Mass. 89; 42 Am. Rep. 424.

§ 3849. **Burden of Proof — Evidence.** — As a domicile once established is presumed to continue,<sup>1</sup> it follows that the burden of proving a change of domicile is upon the party alleging it.<sup>2</sup> Residence is *prima facie* evidence of domicile.<sup>3</sup> The fact of voting in a town is not conclusive evidence of the residence of the voter therein at the time. The act and the circumstances under which the vote is given are proper facts for the consideration of the jury.<sup>4</sup> Official acts of a public officer, recognizing a person as an inhabitant, may be received in proof of inhabitancy.<sup>5</sup>

of a Dutchman, which is, of course, ascribed to him in respect of his settled abode in the land; but if he breaks up his establishment, sells his house and furniture, discharges his servants, and quits Holland, declaring that he will never return to it again, and taking with him his wife and children for the purpose of traveling in France or Italy in search of another place of residence, is it meant to be said that he carries his Dutch domicile, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity, and, on the contrary, much reason, in holding that an acquired domicile may be effectually abandoned by unequivocal intention and act; and that when it is so determined, the domicile of origin revives until a new domicile of choice be acquired. According to the *dicta* in the books and cases referred to, if the Englishman whose case we have been supposing lived for twenty years after he had finally quitted Holland without acquiring a new domicile, and afterwards died intestate, his personal

estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition, supposed to be authorized by one or more decisions, involves absurd results, there is great reason for believing that no such rule was intended to be laid down." And see *First Nat. Bank v. Balcon*, 35 Conn. 351.

<sup>1</sup> *Glover v. Glover*, 18 Ala. 367; *Burnham v. Rangeley*, 1 Wood. & M. 7; *Barrett v. Black*, 25 Ga. 151; *Cadwalader v. Howell*, 18 N. J. L. 138; *Wilson v. Terry*, 11 Allen, 206; *Nixon v. Palmer*, 10 Barb. 175; *Hood's Estate*, 21 Pa. St. 106; *Layne v. Pardee*, 2 Swan, 232. This presumption will not prevail where its effect would be to impose on the party the character of an enemy to his government: *Stoughton v. Hill*, 3 Woods, 404.

<sup>2</sup> *Desmare v. United States*, 93 U. S. 605.

<sup>3</sup> *Johnson v. Merchandise*, 2 Paine, 601.

<sup>4</sup> *East Livermore v. Farmington*, 74 Me. 154; *Smith v. Croom*, 7 Fla. 81.

<sup>5</sup> *West Boylston v. Sterling*, 17 Pick. 126.

Ownership of property in another state raises no presumption of non-residence.<sup>1</sup> The declarations of the party made previous to the event which gave rise to the suit are admissible.<sup>2</sup> A voting-list of a town, without evidence that a person's name was placed thereon at his request, and a tax-list with a memorandum "paid" against his name, are inadmissible in his favor to show that his domicile was in that town.<sup>3</sup> It is competent for the party to testify to his purpose and intention as connected with his acts, when they are brought in question.<sup>4</sup> When the evidence leaves the question of the domicile of a testator in doubt, his declaration in his will, written by himself, on the subject, is of great weight.<sup>5</sup> Likewise deeds to him as grantee, in which he was described as of another town; and evidence that he and his son were accustomed to talk over and discuss the affairs of such other town are inadmissible in his favor; but deeds to him as grantee, describing him as resident in the city, are admissible against him.<sup>6</sup> The question of domicile depends on the facts of the case, and is usually a question for the jury.<sup>7</sup>

<sup>1</sup> Gould v. Smith, 48 Mo. 43.

<sup>2</sup> Ennis v. Smith, 14 How. 400; Watson v. Simpson, 13 La. Ann. 337; Tobin v. Walkinshaw, 1 McAll. 186; Thorndyke v. Boston, 1 Met. 247; Wallace v. Lodge, 5 Ill. App. 507; Dupey v. Seymour, 64 Barb. 156; Doyle v. Clark, 1 Flip. 536; the court saying: "The general rule is well understood, that declarations which are part of the *res gestæ* are admissible in evidence to show intention, and the instances are numerous where the declarations of a person made in changing a residence have been received as evidence of an intention to make the change permanent, and to rebut any presumption that it was made for temporary purposes. At the same time, the admissibility of such declarations is somewhat in the discretion of the court, and is subject to another

general rule, that a person will not be allowed by his declarations to make a case for himself. In matters of general and public interest, in which evidence of reputation or common fame is admitted, the declarations of persons supposed to be dead are held admissible only if made before any controversy arose touching the matter to which they relate, or, as it is usually expressed, *ante litem motam*: 1 Greenl. Ev., secs. 130, 131."

<sup>3</sup> Sewall v. Sewall, 122 Mass. 156; 23 Am. Rep. 299.

<sup>4</sup> Kemna v. Brockhaus, 10 Biss. 128.

<sup>5</sup> In re Stover, 4 Redf. 82; Wright v. Boston, 126 Mass. 161.

<sup>6</sup> Weld v. Boston, 126 Mass. 166; Wright v. Boston, 126 Mass. 161.

<sup>7</sup> Lyman v. Fiske, 17 Pick. 231; 23 Am. Dec. 293; Moor v. Harvey, 123 Mass. 219.

## PART VI.—CONTRACTS AND PROPERTY.

## CHAPTER CC.

## CONTRACTS AND PROPERTY.

- § 3850. Retrospective laws — In general.
- § 3851. Impairing obligation of contracts — In general.
- § 3852. What contracts are included.
- § 3853. What contracts are not included.
- § 3854. Exemption laws.
- § 3855. Interest and usury.
- § 3856. Stay laws.
- § 3857. Statutes — Licenses — Penalties.
- § 3858. Governmental rights.
- § 3859. Municipal corporations.
- § 3860. Public officers.
- § 3861. Police power.
- § 3862. Taxation.
- § 3863. Charters.
- § 3864. Rights of action.
- § 3865. Remedies.
- § 3866. Rules of evidence.
- § 3867. Rights in expectancy.
- § 3868. Curative laws — Conveyances and contracts.
- § 3869. Defects in judicial proceedings.
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- § 3873. Statutes held valid.
- § 3874. Duty of tonnage.
- § 3875. Patents and copyrights.
- § 3876. Bankruptcy laws.
- § 3877. Ex post facto laws.
- § 3878. Bills of credit.
- § 3879. Taxes — What are.
- § 3880. Power to tax.
- § 3881. Must be for public purpose.
- § 3882. Taxation of governmental agencies.
- § 3883. Taxation of exports and imports.

§ 3850. Retrospective Laws — In General. — There is no constitutional provision against retrospective legislation

in the United States or in most of the states of the Union.<sup>1</sup> Therefore the state is not prohibited from passing laws of a retrospective nature relating to civil matters, and which merely take away a right of action or only divest rights vested by law in an individual, if it does not divest vested rights in property nor impair the obligation of a contract.<sup>2</sup> But it is different where legislation of this character is opposed to certain fundamental constitutional principles, as violating contracts, or as divesting rights already accrued.<sup>3</sup> In some constitutions there are provisions against retroactive laws, and in these cases statutes having retrospective operation are strictly construed.<sup>4</sup> Where a statute operating on facts existing at the time of its passage attempts to impose upon one person a debt or duty to another, when no right and no obligation existed before its enactment, it is a retrospective law for the decision of a civil cause, and void.<sup>5</sup> Any act of the legislature may be unconstitutional so far as it has a retrospective application to past contracts, and constitutional as applied to future contracts.<sup>6</sup> The legislature cannot, in general, establish a rule to operate retrospectively; but when the rule is unsettled, it belongs to the legislature to settle it, and such a rule necessarily operates both prospectively and retrospectively.<sup>7</sup>

**§ 3851. Impairing Obligation of Contracts—In General.**—By the federal constitution,<sup>8</sup> the states are forbidden to pass any *ex post facto* laws, or laws impairing the

<sup>1</sup> Retrospective laws as distinguished from *ex post facto* laws are not in conflict with the United States constitution, or with the state constitution: *State v. Squires*, 26 Iowa, 340; *Johnson v. United States*, 17 Ct. of Cl. 157.

<sup>2</sup> *Drehman v. Stifel*, 41 Mo 184; 97 Am. Dec. 268; *Rawls v. Kennedy*, 23 Ala. 240; 58 Am. Dec. 289; *Henderson v. Dickerson*, 17 B. Mon. 173; 66 Am. Dec. 149; *Aldrige v. R. R. Co.*, 2 Stew. & P. 199; 23 Am. Dec. 307.

<sup>3</sup> *State v. Squires*, 26 Iowa, 340; *Shonk v. Brown*, 61 Pa. St. 320; *Lane v. Nelson*, 79 Pa. St. 407.

<sup>4</sup> *Cooley on Constitutional Limitations*, 370.

<sup>5</sup> *Towle v. R. R. Co.*, 18 N. H. 547; 47 Am. Dec. 153.

<sup>6</sup> *Barry v. Iselman*, 14 Rich. 129; 91 Am. Dec. 262.

<sup>7</sup> *Peyton v. Smith*, 4 McCord, 476; 17 Am. Dec. 759.

<sup>8</sup> Art. 1, sec. 10.

obligation of contracts, and similar provisions are contained in the state constitutions also.<sup>1</sup> The obligation of a contract, as that expression is used in the constitutions, means the right to performance which the law confers on one party and the corresponding duty of performance to which it binds the other.<sup>2</sup> A law impairs the obligation of a contract if it enlarges, abridges, or in any manner changes the intentions of the parties resulting from the stipulations in the contract.<sup>3</sup> The laws existing at the time and place of making the contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms, embracing not only those laws which affect its validity, construction, and discharge, but also those in relation to its enforcement.<sup>4</sup> The prohibition is confined to laws passed after the contract was made,<sup>5</sup> but it is immaterial whether they originate from a legislature, a state convention, a state constitution, or from any other source.<sup>6</sup>

§ 3852. **What Contracts are Included.**—Executed and executory contracts, and implied, are included.<sup>7</sup> So are the contracts of the state itself.<sup>8</sup> And so are contracts of suretyship or of secondary liability.<sup>9</sup> The obligation of a contract which, when made, was unenforceable by reason of some irregularity, but which has been validated by

<sup>1</sup> *Trustees v. Bailey*, 10 Fla. 112; 81 Am. Dec. 194; *Hope Mut. Ins. Co. v. Flynn*, 38 Mo. 483; 90 Am. Dec. 438.

<sup>2</sup> *Larrabee v. Talbott*, 5 Gill, 426; 46 Am. Dec. 637.

<sup>3</sup> *State v. Carew*, 13 Rich. 498; 91 Am. Dec. 245.

<sup>4</sup> *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266.

<sup>5</sup> *Lehigh Water Co. v. Easton*, 121 U. S. 388; *Ogden v. Saunders*, 12 Wheat. 213.

<sup>6</sup> *Williams v. Bruffy*, 96 U. S. 176.

<sup>7</sup> *Fletcher v. Peck*, 6 Cranch, 87; *Fisk v. Jefferson Police Jury*, 116 U. S. 131; *Lewis v. Brackenridge*, 1 Blackf. 220; 12 Am. Dec. 228.

<sup>8</sup> *Fletcher v. Peck*, 6 Cranch, 87; *Huidekoper v. Douglass*, 3 Cranch, 1; *Van Horne v. Dorrance*, 2 Dall. 304; *New Jersey v. Wilson*, 7 Cranch, 164; *Murray v. Charleston*, 96 U. S. 432; *Woodruff v. Trapnall*, 10 How. 190; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379. A state may not pass a law impairing the obligation of its own contract. Having, by lease, given to A a vested right in the labor of its convicts, it may not take that right from A and give it to B: *Georgia Penitentiary Co. v. Nelms*, 71 Ga. 301.

<sup>9</sup> *Ochiltree v. R. R. Co.*, 21 Wall. 249.

reason of a subsequent law, is protected by the constitution to the same extent as if the contract had been strictly legal at first. The obligation of such a contract includes the remedies which would have been available for its enforcement if it had been valid when made, or such other remedies as may have been lawfully substituted therefor.<sup>1</sup> The legislature cannot create a liability for acts as to which there was no liability when they were committed; but where a remedy exists, the legislature may change it, as well as to acts theretofore as those thereafter done.<sup>2</sup> The legislature cannot, even against a municipal corporation, create a claim without the assent of those who are to contribute to its payment.<sup>3</sup> The guardian of a minor's estate has an authority coupled with an interest, and an act of the legislature empowering another to dispose of the estate is unconstitutional.<sup>4</sup> The rights of a purchaser of land offered at a public sale are vested, and cannot be affected by subsequent legislation revising the provisions of a former act conferring rights on particular persons as preferred purchasers, and extending the time within which such rights may be exercised.<sup>5</sup> An act abolishing the distinction between possession under a recorded deed and possession without such title on record is unconstitutional and void so far as it affects past transactions and vested rights.<sup>6</sup>

ILLUSTRATIONS.—Under an act of the legislature, bonds of the state were issued to raise money to be used in the purchase of lands to be sold to settlers thereon, and the interest on the purchase-money of the lands, when sold, to be applied by the state treasurer to the payment of the interest on the bonds issued under the act. *Held*, that the act constituted part of the contract with the holders of the bonds, and that the state had no right to divert the fund arising from the interest on the purchase-money of the land from the payment of the interest on

<sup>1</sup> *Rader v. Town of Union*, 44 N. J. L. 259.

<sup>2</sup> *Lawrence R. R. Co. v. Mahoning Co.*, 35 Ohio St. 1.

<sup>3</sup> *Hoagland v. Sacramento*, 52 Cal. 142.

<sup>4</sup> *Lincoln v. Alexander*, 52 Cal. 482; 28 Am. Rep. 639.

<sup>5</sup> *Thompson v. Schlater*, 13 La. 115; 33 Am. Dec. 556.

<sup>6</sup> *Kennebec Purchase v. Laboree*, 2 Greenl. 275; 11 Am. Dec. 79.

the bonds: *State v. Cardoza*, 8 S. C. 71; 28 Am. Rep. 275. A statute enacted that in all civil actions "for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on trial, by affidavit or otherwise, what was the consideration of the contract, and that the jury, in making up their verdict, shall take the same into consideration, and determine the value of said contract in present currency, in the particular locality in which it is to be performed, and render their verdict accordingly." *Held*, unconstitutional in so far as the same authorizes the jury in such actions, upon the evidence thus before them, to place their own estimate upon the value of the contracts, instead of taking the value stipulated by the parties: *Wilmington etc. R. R. Co. v. King*, 91 U. S. 3. The state of Tennessee, having organized in 1838 the Bank of Tennessee, agreed by a clause in the charter to receive all its issues of circulating notes in payment of taxes, but by a constitutional amendment of 1865, it declared the issues of the bank during the insurrectionary period void, and forbade their receipt for taxes. *Held*, that this was forbidden by the constitutional provision against impairing the obligation of contracts: *Keith v. Clark*, 97 U. S. 454.

§ 3853. **What Contracts not Included.**—A statute prohibiting the making of certain contracts is not a law impairing the obligation of contracts;<sup>1</sup> nor is a statute which removes an impedient, and allows a contract to be enforced;<sup>2</sup> nor is a law which merely varies its consequences, without changing the essence and character of the contract or altering the nature of the obligation created by it.<sup>3</sup> The contract of marriage is not within the prohibition.<sup>4</sup> A judgment is not a "con-

<sup>1</sup> As, for example, a statute providing that "any and all agreements to pay attorney fees depending upon any condition therein set forth, and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void," etc.: *Churchman v. Martin*, 54 Ind. 380.

<sup>2</sup> *Bleakney v. Bank*, 17 Serg. & R. 64; 17 Am. Dec. 635; *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 236. But as to statutes of limitation, see *post*, § 3870.

<sup>3</sup> *Gray v. Nav. Co.*, 2 Watts & S. 156; 37 Am. Dec. 500.

<sup>4</sup> *Clark v. Clark*, 10 N. H. 380; 34 Am. Dec. 165; *Tolen v. Tolen*, 2 Blackf. 407; 21 Am. Dec. 742. An act rendering valid to all intents and purposes all marriages previously celebrated in the state by an ordained minister qualified and empowered to celebrate them according to the forms and usages of any religious society is not void: *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121. A statute declaring adultery to be a cause of divorce, and



tract";<sup>1</sup> nor are registry laws within the provision;<sup>2</sup> nor previous judicial decisions;<sup>3</sup> and the federal government is not within the constitutional provision.<sup>4</sup>

§ 3854. **Exemption Laws.**—An act increasing the amount of the exemption after the debt under which the sale was made was incurred is a law impairing the obligation of a contract.<sup>5</sup> But Congress may pass exemption laws impairing the obligation of contracts.<sup>6</sup> And the legislature has power to change exemption laws, according to its own views of policy and humanity, so as to affect the remedy upon existing contracts, but not to the extent to render it nugatory or impracticable.<sup>7</sup>

§ 3855. **Interest and Usury.**—Statutes providing that "debts due on open accounts and other demands not heretofore bearing interest by law shall bear interest" are void as to debts contracted before their passage.<sup>8</sup> So are

giving power to the courts to grant divorces for adultery committed before as well as after its passage, is valid: *Jones v. Jones*, 2 Over. 2; 5 Am. Dec. 645. The disability of the wife to dispose of her property may be removed by the legislature without thereby impairing the obligation of any marital contract: *Pritchard v. Citizens' Bank*, 8 La. 130; 28 Am. Dec. 133.

<sup>1</sup> *Sprott v. Reid*, 3 G. Greene, 459; 56 Am. Dec. 549.

<sup>2</sup> *Tucker v. Harris*, 13 Ga. 1; 58 Am. Dec. 488.

<sup>3</sup> It is not an unconstitutional impairment of the obligation of a contract for the supreme court to disregard an erroneous decision as to the proper construction of a statute prescribing the order in which a decedent's debts shall be paid: *McLure v. Melton*, 24 S. C. 559; 58 Am. Rep. 272. A claim for reimbursement of money paid in error, even when reduced to judgment, does not arise from a contract, but from the law, and is not protected by the constitutional prohibition of laws impairing the obligation of contracts:

*State v. New Orleans*, 38 La. Ann. 119; 58 Am. Rep. 168.

<sup>4</sup> See *Gunn v. Barry*, 15 Wall. 610.

<sup>5</sup> *Lessley v. Phipps*, 49 Miss. 790; *Homestead Case*, 22 Gratt. 266; 12 Am. Rep. 507; *Wilson v. Brown*, 58 Ala. 62; 29 Am. Rep. 727. But *aliter* as to a law restricting a former exemption: *Garrett v. Cheshire*, 69 N. C. 376; 12 Am. Rep. 647. The legislature cannot create new subjects of exemption from execution, in addition to those enumerated in the constitution: *Duncan v. Barnett*, 11 S. C. 333; 32 Am. Rep. 476. As to existing debts, the legislature cannot increase the exemption from execution, even as to property acquired by the debtor after the act was passed: *Johnson v. Fletcher*, 54 Miss. 628; 28 Am. Rep. 388.

<sup>6</sup> In *re Owens*, 12 Nat. Bank. Reg. 518; *Russell v. Lowth*, 21 Minn. 167; 18 Am. Rep. 389.

<sup>7</sup> *Stephenson v. Osborne*, 41 Miss. 119; 90 Am. Dec. 359.

<sup>8</sup> *Goggans v. Turnipseed*, 1 S. C. 80; 7 Am. Rep. 23.

statutes changing the rate of interest as to existing contracts.<sup>1</sup> Where interest is only recoverable by virtue of statutes which make the allowance of it discretionary with the court and jury, a statute allowing an abatement of interest that accrued during the war, between citizens of the same state, is constitutional.<sup>2</sup> But a statute is valid which provides that "no corporation shall hereafter interpose the defense of usury in any action, nor shall any bond, etc., of such corporation be set aside, impaired, or adjudged invalid by reason of anything contained in the laws prohibiting usury."<sup>3</sup> Regulating the rates of interest chargeable by pawn-brokers is not within a constitutional prohibition against passing special laws regulating the rate of interest on money.

§ 3856. **Stay Laws.**—The right of a citizen to prosecute and defend actions and other judicial proceedings cannot be abrogated or even suspended.<sup>4</sup> A law is constitutional which gives a stay for a time that is definite and reasonable; but *aliter* where it is indefinite and unreasonable.<sup>5</sup> Where there is some public necessity, as in case of war or invasion, an act suspending legal proceedings for a limited period is not unconstitutional; for a statute of this kind rather conduces to the due administration of justice, and is beneficial to parties litigant.<sup>7</sup> A statute is not invalid which provides that an action shall be stayed for a certain term during and after the service of a person in the army of the state or the United States.<sup>8</sup> Statutes staying judgments and decrees or executions

<sup>1</sup> Hubbard v. Callahan, 42 Conn. 524; 19 Am. Rep. 564.

<sup>2</sup> Harmanson v. Wilson, 14 Am. Law Reg. 627.

<sup>3</sup> Danville v. Pace, 25 Gratt. 1; 18 Am. Rep. 663.

<sup>4</sup> Ex parte Lichtenstein, 67 Cal. 359; 56 Am. Rep. 713.

<sup>5</sup> Davis v. Pierce, 7 Minn. 13; 82 Am. Dec. 65.

<sup>6</sup> William's Appeal, 72 Pa. St. 220; Sayres v. Com., 88 Pa. St. 308.

<sup>7</sup> Johnson v. Duncan, 3 Mart. 530; 6 Am. Dec. 675.

<sup>8</sup> McCormick v. Rusch, 15 Iowa, 127; 83 Am. Dec. 401; Breitenbach v. Bush, 44 Pa. St. 315; 84 Am. Dec. 442; Coffman v. Bank, 49 Miss. 29; 90 Am. Dec. 311; State v. McGinty, 41 Mass. 435; 93 Am. Dec. 264; Luter v. Hunter, 30 Tex. 689; 98 Am. Dec. 494.

rendered in the courts of the state for a certain period impair the obligation of a contract, and are void as to previously existing contracts.<sup>1</sup> An act of the legislature directing sales under decrees in chancery on longer credit than was allowed at the date of the contract is unconstitutional.<sup>2</sup>

§ 3857. **Statutes — Licenses — Penalties.** — A public or private statute is not a contract, unless it is in such form as to create a contract.<sup>3</sup> The grant of a privilege to a corporation is not exclusive unless so expressed, and the legislature may grant a like privilege to another.<sup>4</sup> The grant of a statutory privilege is not a contract; it is a mere license, and revocable at the will of the state.<sup>5</sup> An act exempting the employees of certain railroads from the duty of working on public roads is not an irrevocable contract with the roads or the laborers, but may be repealed.<sup>6</sup> Penalties imposed by statute may be released by a subsequent statute at any time before they are recovered.<sup>7</sup>

§ 3858. **Governmental Rights.** — The contracts which the constitution protects are those that relate to property rights, not governmental.<sup>8</sup> The constitutional provision

<sup>1</sup> Webster v. Rose, 6 Heisk. 93; 19 Am. Rep. 583; Jones v. Crittenden, 1 Car. Law Rep. 385; 6 Am. Dec. 531; Baily v. Gentry, 1 Mo. 164; 13 Am. Dec. 484; Blair v. Williams, 4 Litt. 35; State v. Fry, 4 Mo. 50; Townsend v. Townsend, Peck, 1; 14 Am. Dec. 722.

<sup>2</sup> January v. January, 7 T. B. Mon. 542; 18 Am. Dec. 211.

<sup>3</sup> Welch v. Cook, 97 U. S. 541. A state constitution is a "law" within the meaning of that clause of the United States constitution which ordains that "no state shall pass any law impairing the obligation of contracts": Lehigh Valley R. R. Co. v. McFarlan, 31 N. J. Eq. 706.

<sup>4</sup> Tuckahoe Canal Co. v. R. R. Co., 11 Leigh, 42; 36 Am. Dec. 374; Lafayette Road Co. v. R. R. Co., 13 Ind. 90; 74 Am. Dec. 246; Stafford Co. v. Luck, 80 Va. 223. A grant of a ferry franchise to meet public convenience

is not an exclusive grant that will, on account of the prohibition against impairing the obligation of contracts, preclude the legislature from granting a bridge franchise detracting from its value: Dyer v. Bridge Co., 2 Port. 296; 27 Am. Dec. 655. A reasonable regulation of the use of a privilege conferred by the legislature is not a denial of the right of its use: Frankford etc. R. R. Co. v. Philadelphia, 58 Pa. St. 119; 98 Am. Dec. 243.

<sup>5</sup> Calder v. Kurby, 5 Gray, 597.

<sup>6</sup> In re Thompson, 20 Fla. 887.

<sup>7</sup> Confiscation Cases, 7 Wall. 454; United States v. Tynen, 11 Wall. 88; Codes v. County of Madison, 1 Ill. 154; 12 Am. Dec. 161.

<sup>8</sup> A license or a charter to maintain a lottery is of the latter class, and the legislature may repeal such a charter at any time under its police power: Stone v. State, 101 U. S. 814.

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does not apply to contracts relating to public property.<sup>1</sup> A state cannot, by contract, bargain away any of the essential powers of sovereignty so as to deprive itself of the ability to employ them again and again, as the public exigencies shall seem to require.<sup>2</sup>

ILLUSTRATIONS.---A statute provided that a bequest by a testator leaving issue living to any religious or charitable purpose shall be void if made within twelve months of testator's death. *Held*, constitutional, the right to dispose of property by will being a legislative, and not a natural, right: *Patton v. Patton*, 39 Ohio St. 590.

§ 3859. **Municipal Corporations.**—Grants of privileges to municipal corporations are not contracts.<sup>3</sup> The legislature has the right, whenever it sees fit, to divest cities and villages of the police powers it may have conferred, and resume the exercise of the same itself.<sup>4</sup> A party dealing with a municipal corporation has no such vested right growing out of his contract with the same as is protected by the federal constitution. It is a public institution, and the state may destroy its corporate powers, leaving the party to seek relief by an appeal to the legislature.<sup>5</sup> But a property contract or grant to a municipal corporation is no different from a similar one made to an individual.<sup>6</sup> Where a statute grants to a city all escheated property within certain limits, the rights of the city cannot be divested by a change in the state constitution.<sup>7</sup>

§ 3860. **Public Offices.**—A public office is not a contract, and neither the office nor its emoluments can be claimed as matter of right, as against subsequent legislation abolishing the one or reducing the other.<sup>8</sup> The

<sup>1</sup> *State v. R. R. Co.*, 12 Gill & J. 399; 38 Am. Dec. 318.

<sup>2</sup> *Thorpe v. R. R. Co.*, 27 Vt. 140; *Brick Presbyterian Church v. New York*, 5 Cow. 538.

<sup>3</sup> *East Hartford v. Bridge Co.*, 10 How. 511; *Barnes v. District of Columbia*, 91 U. S. 540; *Yarmouth v. North Yarmouth*, 34 Me. 141; 56 Am. Dec. 666.

<sup>4</sup> *City of Chicago v. Phoenix Ins. Co.*, 126 Ill. 276.

<sup>5</sup> *Wallace v. Sharon Trustees*, 84 N. C. 164.

<sup>6</sup> *Dillon on Municipal Corporations*, sec. 39.

<sup>7</sup> *In re Malone*, 21 S. C. 435.

<sup>8</sup> *Butler v. Pennsylvania*, 10 How. 402; *State v. Douglass*, 26 Wis. 428; 7 Am. Rep. 87; *Perkins v. Corbin*, 45

compensation of officers of the government may during their term of office be changed, modified, and reduced by the legislature, except where expressly prohibited by the constitution.<sup>1</sup> But where a state makes a contract with a public officer, such a contract is within the constitutional prohibition, and cannot be impaired.<sup>2</sup> After a public officer has performed the duties of his office, there is an implied contract that he shall be paid, which may not be impaired by subsequent legislation.<sup>3</sup> So when the term of the office is fixed by the constitution.<sup>4</sup> The legislature may relieve a public officer from liability for public moneys that have been stolen from him without his fault.<sup>5</sup>

ILLUSTRATIONS. — The constitution provided that certain officers should be elected at such times and in such manner as the legislature should direct. The legislature directed the times and manner of the election, and the defendant was elected thereunder. Subsequent to such election, an act was passed extending the term of the incumbent three years. *Held*, unconstitutional: *People v. Bull*, 46 N. Y. 57; 7 Am. Rep. 302. By the constitution it was provided that "the term of office of all county, township, and precinct officers shall expire within thirty days after this constitution shall have been ratified, and the governor shall, by and with the advice and consent of the senate, thereafter appoint such officers, whose term of office shall continue until the legislature shall provide by law for an election of said officers." *Held*, that an act providing that in all cases in which the governor "shall have the power under this act, by the terms of the constitution, to appoint to office, he shall also have the power of removal from office," was not unconstitutional: *Newsom v. Cocke*, 44 Miss. 352; 7 Am. Rep. 686.

Ala. 103; 6 Am. Rep. 698. Where the constitution does not interfere, the legislature may regulate appointments to office, the filling of vacancies, and the duration of terms of office: *People v. Osborne*, 7 Col. 605.

<sup>1</sup> *Haynes v. State*, 3 Humph. 480; 39 Am. Dec. 187; *Com. v. Bailey*, 81 Ky. 395.

<sup>2</sup> *Hall v. State*, 103 U. S. 5.

<sup>3</sup> *Fisk v. Jefferson Police Jury*, 116 U. S. 131.

<sup>4</sup> *Com. v. Gamble*, 62 Pa. St. 343; 1

Am. Rep. 422; *State v. Brunst*, 26 Wis. 412; 7 Am. Rep. 84. The legislature may diminish the aggregate amount of duties of a judge, by the division of his district, or otherwise, but must leave the authority and jurisdiction pertaining to the office intact: *State v. Brunst*, 26 Wis. 412; 7 Am. Rep. 84; *King v. Hunter*, 65 N. C. 603; 6 Am. Rep. 754.

<sup>5</sup> *Board of Education v. McLandborough*, 36 Ohio St. 227; 38 Am. Rep. 582; *Mount v. State*, 90 Ind. 29; 46 Am. Rep. 192.

§ 3861. **Police Power.**—But all property and all contracts are within the police power of the state.<sup>1</sup> No legislation can barter away the police power or governmental rights. The contracts protected are those that relate to property rights not governmental. If public safety or morals require the discontinuance of any manufacture or traffic, the legislature may discontinue it, regardless of any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. Police power extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals.<sup>2</sup>

§ 3862. **Taxation.**—A state cannot, by contract, deprive itself of the right to raise its necessary revenue by the exercise of its power of taxation.<sup>3</sup> But the state may, for a consideration, impose upon itself the obligation not to tax certain subjects, otherwise taxable, for some definite period, or even indefinitely.<sup>4</sup> An exemption from taxation cannot be granted as against a provision in the state constitution which requires all property to be uniformly taxed.<sup>5</sup>

ILLUSTRATIONS.—The state makes a grant of lands, agreeing not to tax them in the hands of the grantees. *Held*, an irrevocable exemption: *New Jersey v. Wilson*, 7 Cranch, 164.

§ 3863. **Charters.**—A charter from the state, or rights vested in a private corporation by statute, are contracts which cannot be repealed or altered.<sup>6</sup> It is not necessary

<sup>1</sup> *United States v. De Witt*, 9 Wall. 41; *United States v. Reese*, 92 U. S. 214.

<sup>2</sup> See *post*, Title Police Power.

<sup>3</sup> *R. R. Co. v. Gaines*, 97 U. S. 697; *Christ Church v. Philadelphia*, 24 How. 300; *East Saginaw Salt Co. v. East Saginaw*, 13 Wall. 373; *Welch v. Cook*, 97 U. S. 541. And a tax is not a debt which the legislature cannot impair: *City of Augusta v. North*,

57 Me. 392; 2 Am. Rep. 55. See *post*, § 3380.

<sup>4</sup> *New Jersey v. Wilson*, 7 Cranch, 164; *Pacific R. R. Co. v. Maguire*, 20 Wall. 36; *University v. People*, 99 U. S. 309; *Stein v. Mayor*, 49 Ala. 362; 20 Am. Rep. 283.

<sup>5</sup> *R. R. Co. v. Gaines*, 97 U. S. 697.

<sup>6</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518; *Gordon v. Appeal Tax Court*, 3 How. 133; *Stone v. Missis-*

that there be a special act, but a contract will arise as well when the corporation is organized under a general act.<sup>1</sup> So a law may make a direct contract when accepted by the other parties,<sup>2</sup> or may provide for the execution of a contract.<sup>3</sup> But to make a contract there must be some consideration; but this may be the fact of the acceptance of the grant and action under it,<sup>4</sup> or the duties and disabilities which the incorporators assume by accepting the charter.<sup>5</sup> Thus a law reciting that lands to be purchased thereafter for certain Indians should not be taxed became a contract when acted on;<sup>6</sup> but an exemption of the property then owned by a corporation from taxation, with no remuneration, and without the imposition of any duty or service, may be revoked.<sup>7</sup> Where, by the constitution of the state, or by its general laws in force when the charter was granted, it is provided that all charters shall be subject to legislative control and alteration, this provision becomes a part of the charter and a part of the contract.<sup>8</sup> And where, by the charter, the legislature reserves the right to alter, amend, or repeal it, in this case an alteration, amendment, or repeal is in accordance with the contract, and not hostile to it.<sup>9</sup> The provision in a general law,

Mississippi, 101 U. S. 814; *Tomlinson v. Jessup*, 15 Wall. 454; *Miller v. State*, 15 Wall. 478; *Wales v. Stetson*, 2 Mass. 143; 3 Am. Dec. 39; *Trustees v. Foy*, 1 Murph. 58; 3 Am. Dec. 672; *Pingry v. Washburn*, 1 Aiken, 15; 15 Am. Dec. 676; *Trustees v. Bradbury*, 11 Me. 118; 26 Am. Dec. 515; *Derby Turnpike Co. v. Parks*, 10 Conn. 522; 27 Am. Dec. 700; *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *Montpelier Academy v. George*, 14 La. 395; 33 Am. Dec. 585; *Backus v. Lebanon*, 11 N. H. 19; 35 Am. Dec. 466; *Michigan Bank v. Hastings*, 1 Doug. (Mich.) 225; 41 Am. Dec. 549; *Bailey v. R. R. Co.*, 4 Harr. (Mich.) 389; 44 Am. Dec. 593; *Brown v. Hummel*, 6 Pa. St. 87; 47 Am. Dec. 431; *Commonwealth v. Claghorn*, 13 Pa. St. 133; 53 Am. Dec. 450; *Yarmouth v. North Yarmouth*, 34 Me. 411; 56 Am. Dec. 666; *Thorpe v. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625; *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559.

<sup>1</sup> *Miller v. State*, 15 Wall. 478.

<sup>2</sup> *New Jersey v. Wilson*, 7 Cranch, 164.

<sup>3</sup> *Hall v. Wisconsin*, 103 U. S. 5.

<sup>4</sup> *Richmond R. R. Co. v. R. R. Co.*, 13 How. 71.

<sup>5</sup> *Tomlinson v. Jessup*, 15 Wall. 454.

<sup>6</sup> *New Jersey v. Wilson*, 7 Cranch, 164.

<sup>7</sup> *Christ Church v. Philadelphia*, 24 How. 300.

<sup>8</sup> See *Stimson's American Statute Law*, sec. 442; *Murray v. Charleston*, 96 U. S. 432, 448; *Railroad Co. v. Georgia*, 98 U. S. 359; *Railroad Companies v. Gaines*, 97 U. S. 697.

<sup>9</sup> *Sinking Fund Cases*, 99 U. S. 709; *Crease v. Babcock*, 23 Pick. 334; 34 Am. Dec. 61; *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379; 47 Am. Dec. 474; *Storey v. Plank Road Co.*, 10 N. J. Eq. 13; 84 Am. Dec. 134.

providing for repeal of the charter of a corporation, that "no amendment or repeal shall impair other rights previously vested," was intended to secure the rights of beneficiaries and others vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise.<sup>1</sup> An act of the legislature granting a charter to a railroad company, and providing therein that the company shall be taxed only in a certain sum and manner, and reserving a right to alter or repeal this charter, does not amount to a contract with the company. It lacks the essential elements of a contract, as there is no obligation on the state to continue the tax in the form prescribed. The distinguishing difference between an ordinary legislative act and an act amounting to a contract is the implied agreement arising from some provision in the act not to alter or recall the privilege granted.<sup>2</sup> The reserved power of the legislature to repeal or suspend, alter or modify, a charter is confined to an alteration of something contained in the franchises granted; the legislature has no power to make any substantial additions to the work. It cannot impose a new charter and oblige the stockholders to accept it, nor can it substitute a thing entirely different from that granted.<sup>3</sup> Where the charter provides that the right is reserved to alter or amend it whenever the public good may require, the legislature is the judge when that time comes, as that body is the proper tribunal to determine what the public good requires in all matters of legislation.<sup>4</sup> But such reservations of the right to repeal found in statutes, unlike similar provisions in the constitution of a state, are only binding on succeeding legislatures so far as they choose to adopt them, and a legislative contract may be made which is not repealable if the legislature so intend.<sup>5</sup>

<sup>1</sup> *Griffin v. Kentucky Ins. Co.*, 3 Bush, 592; 96 Am. Dec. 259.

<sup>2</sup> *State v. Mayor etc. of Jersey City*, 31 N. J. L. 575; 86 Am. Dec. 240.

<sup>3</sup> *Zabriskie v. R. R. Co.*, 18 N. J. Eq. 178; 90 Am. Dec. 617.

<sup>4</sup> *State v. Miller*, 30 N. J. L. 368; 86 Am. Dec. 188.

<sup>5</sup> *New Jersey v. Yard*, 95 U. S. 104.

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§ 3864. **Rights of Action.**—The legislature cannot bring into existence and establish against a party a demand which previously he was neither legally nor equitably bound to recognize and satisfy.<sup>1</sup> The legislature cannot deprive a party of a right of action accruing to him under the rules of the common law, or in accordance with its principles. Thus the right to redress for illegal arrests cannot be taken away;<sup>2</sup> neither can the right to recover back taxes illegally exacted,<sup>3</sup> nor the right to have a void tax sale set aside;<sup>4</sup> nor can conditions to the exercise of the right be imposed which render it practically of no value.<sup>5</sup>

§ 3865. **Remedies.**—There is no vested right in a particular remedy, and therefore the state may take away at its discretion those it provides, and substitute others which shall apply to wrongs already committed, or suits then pending, as well as to those which may be committed thereafter.<sup>6</sup> So it may give a new or an additional remedy.<sup>7</sup> The retrospective operation of a law providing

<sup>1</sup> *Medford v. Learned*, 16 Mass. 215; *Albertson v. Landon*, 42 Conn. 209; *People v. Supervisors*, 43 N. Y. 130; *Ohio etc. R. R. Co. v. Lackey*, 78 Ill. 55; 20 Am. Rep. 259.

<sup>2</sup> *Johnson v. Jones*, 44 Ill. 142; 92 Am. Dec. 159; *Griffin v. Wilcox*, 21 Ind. 370.

<sup>3</sup> *Hubbard v. Brainerd*, 35 Conn. 563.

<sup>4</sup> *Wilson v. McKenna*, 52 Ill. 43.

<sup>5</sup> *McFarland v. Butler*, 8 Minn. 116; *Wilson v. McKenna*, 52 Ill. 43.

<sup>6</sup> *Railroad Co. v. Hecht*, 95 U. S. 168; *Tennessee v. Sneed*, 96 U. S. 69; *Sommers v. Johnson*, 4 Vt. 278; 24 Am. Dec. 604; *Bruce v. Schuyler*, 4 Gilm. 221; 46 Am. Dec. 447; *Baughner v. Nelson*, 9 Gill, 299; 52 Am. Dec. 694; *Coriell v. Ham*, 4 G. Greene, 455; 61 Am. Dec. 134; *Lord v. Chadbourne*, 42 Me. 429; 66 Am. Dec. 290; *Moore v. Luce*, 29 Pa. St. 260; 72 Am. Dec. 629; *Van Rensselaer v. Hays*, 19 N. Y. 68; 75 Am. Dec. 278; *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521; *Reapers' Bank v. Willard*, 24 Ill.

433; 76 Am. Dec. 755; *Schenley v. Commonwealth*, 36 Pa. St. 29; 78 Am. Dec. 359; *Flournoy v. Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468; *Holloway v. Sherman*, 12 Iowa, 282; 79 Am. Dec. 337; *Cook v. Gray*, 2 Houst. 455; 81 Am. Dec. 185; *Richardson v. Cook*, 37 Vt. 599; 88 Am. Dec. 622; *Coffman v. Bank*, 40 Miss. 29; 90 Am. Dec. 311; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46; 93 Am. Dec. 778; *Read v. Frankfort Bank*, 23 Me. 318; *United States Bank v. Longworth*, 1 McLean, 35; *Woods v. Buie*, 6 Miss. 285; *Evans v. Montgomery*, 4 Watts & S. 218; *Oriental Bank v. Freeze*, 18 Me. 109; 36 Am. Dec. 701.

<sup>7</sup> *Hope v. Johnson*, 2 Yerg. 123; *Danville v. Pace*, 25 Gratt. 1; 18 Am. Rep. 663; *Bartlett v. Lang*, 2 Ala. 401; *Hepburn v. Curtis*, 7 Watts, 300; 32 Am. Dec. 760; *Auditor v. Woodruff*, 2 Ark. 73; 33 Am. Dec. 368; *Lycoming v. Union*, 15 Pa. St. 166; 53 Am. Dec. 575; *Whipple v. Farrar*, 3 Mich. 430; 64 Am. Dec. 99.

new remedy is no objection to it.<sup>1</sup> If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, though less convenient than the former one, the obligation of the contract is not impaired.<sup>2</sup> In modes of proceeding and forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right.<sup>3</sup> A law which retroacts upon a past transaction, but affects the remedy only, without doing so oppressively or unjustly, is not invalid.<sup>4</sup> Thus a law abolishing imprisonment for debt acts only upon the remedy, and is valid;<sup>5</sup> so is a statute which operates retrospectively so as to give a mechanic a lien for work already done;<sup>6</sup> so is a statute denying to final judgments thereafter rendered the incident of a lien upon real property;<sup>7</sup> so is a statute changing the mode of acquiring a lien under an existing judgment upon the property of the debtor, e. g., substituting the lien of a docketed judgment for the lien of a *fieri facias*;<sup>8</sup> so is a statute requiring that makers and indorsers of negotiable paper shall be sued in a joint action.<sup>9</sup> A special remedy given to a railroad corporation for the condemnation of land may be taken away by a general act applicable to all rail-

<sup>1</sup> United States v. Sampers, 1 Hemp. 118; Rathbone v. Bradford, 1 Ala. 312; Coosa River Steamboat Co. v. Barclay, 30 Ala. 120; Cutts v. Hardec, 38 Ga. 350; Hope v. Johnson, 2 Verg. 123; Sutherland v. De Leon, 1 Tex. 250; 46 Am. Dec. 100.

<sup>2</sup> Bronson v. Kinzie, 1 How. 311; Evans v. Montgomery, 4 Watts & S. 218; Read v. Frankfort Bank, 23 Me. 318; Tennessee v. Sneed, 96 U. S. 69.

<sup>3</sup> Bronson v. Kinzie, 1 How. 311; Simpson v. City Savings Bank, 56 N. H. 466; 22 Am. Rep. 491; Townsend v. Townsend, Peck, 1; 14 Am. Dec. 722; Western S. F. Soc. v. Philadel-

phia, 31 Pa. St. 175; 72 Am. Dec. 730; Von Baumbach v. Bade, 9 Wis. 559; 76 Am. Dec. 283; Scobey v. Gibson, 17 Ind. 572; 79 Am. Dec. 490.

<sup>4</sup> Simpson v. City Savings Bank, 56 N. H. 466; 22 Am. Rep. 491.

<sup>5</sup> Brown v. Dillahunty, 4 Smedes & M. 713; 43 Am. Dec. 499; In re Peniman, 103 U. S. 741.

<sup>6</sup> Bolton v. Johns, 5 Pa. St. 145; 47 Am. Dec. 404.

<sup>7</sup> Moore v. Holland, 16 S. C. 15.

<sup>8</sup> Whitehead v. Latham, 83 N. C. 232.

<sup>9</sup> McMillan v. Sprague, 4 How. (Miss.) 647; 35 Am. Dec. 412.

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roads.<sup>1</sup> But the remedy given must be one which recognizes and gives effect to the obligation of the contract when the wrong grows out of non-performance of contract, and it must be a remedy calculated to give redress, and not merely colorable.<sup>2</sup> A statute which gives a remedy, but at the same time makes the application of it so difficult and expensive as to render it valueless and inoperative, is unconstitutional.<sup>3</sup> Withdrawing a remedy which goes to the obligation of the contract is an impairment of the contract;<sup>4</sup> as, for example, a stay law;<sup>5</sup> or a law which gives a preference in payment of one creditor over another, which the law, when their contracts were made, did not give, even though the preferred creditor is the state itself;<sup>6</sup> or a law which takes away from the creditor any substantial right which the contract assured to him, as the right to the possession of mortgaged lands until the mortgage debt is paid;<sup>7</sup> or a law which so far increases the exemptions from executions issued on judgments as seriously to impair the value of the remedy, and reduce the probabilities of collection.<sup>8</sup>

ILLUSTRATIONS.—A state statute provided that whenever any savings bank should be found to be insolvent, the account of each depositor should be reduced so as to divide the losses equitably amongst the depositors. *Held*, constitutional: *Simpson v. City Savings Bank*, 56 N. H. 466; 22 Am. Rep. 491. A statute provided that "whenever final judgment shall be rendered in any court of record in this state, said judgment shall become a lien on all the real estate of the judgment debtor." *Held*, constitutional: *Moore v. Letchford*, 35 Tex. 185; 14 Am. Rep. 363. A statute providing for ascertaining whether coupons tendered in payment of state taxes are genuine before *mandamus* can issue to compel their acceptance provided a remedy substantially equivalent to the original remedy by *mandamus*.

<sup>1</sup> *Chattaroi R. R. Co. v. Kinner*, 81 Ky. 221.

<sup>2</sup> *State v. Carew*, 13 Rich. 498; 91 Am. Dec. 245; *Oriental Bank v. Freeze*, 18 Me. 109; 36 Am. Dec. 701.

<sup>3</sup> *Riggs v. Martin*, 5 Ark. 506; 41 Am. Dec. 103.

<sup>4</sup> *Williams v. Johnson*, 30 Md. 500; 96 Am. Dec. 613.

<sup>5</sup> *Cooley on Constitutional Limitations*, 459. See *ante*, § 3856, Stay Laws.

<sup>6</sup> *Barings v. Hayward*, 2 How. 608.

<sup>7</sup> *Mundy v. Mouroe*, 1 Mich. 68.

<sup>8</sup> *Edwards v. Kearzey*, 96 U. S. 595.

*Held*, not to impair the obligation of the state's contract to receive coupons: *Moore v. Greenhow*, 114 U. S. 338. An irrevocable railroad charter gave the power to condemn lands, and provided for an appeal by the land-owner to a certain court. *Held*, that a general statute substituting another court to which such appeal was to be made was constitutional: *United Cos. v. Weldon*, 47 N. J. L. 59; 54 Am. Rep. 114. A statute provides that where no payment, claim, or demand shall have been made for twenty-one years for a ground-rent, annuity, or other charge upon real estate, and where no declaration or acknowledgment shall have been made, a release or extinguishment shall be presumed, and the charge shall be irrevocable. *Held*, to affect the remedy merely, and not unconstitutional: *Biddle v. Hooven*, 120 Pa. St. 221. A statute provided that "no person who receives any money or valuable thing as the consideration for a contract . . . made or entered into on Sunday shall be permitted to defend, . . . on the ground that it was so made, . . . until he shall restore such consideration." *Held*, applicable to contracts existing at its passage, but not to be unconstitutional, relating only to the remedy: *Berry v. Clary*, 77 Me. 482.

§ 3866. **Rules of Evidence.**—So the legislature may alter the rules of evidence,<sup>1</sup> or change the burden of proof.<sup>2</sup> Therefore the following statutes have been held valid: A statute which requires that in any suit involving the genuineness of coupons purporting to have been cut from state bonds, the bond shall be produced, with proof that the coupon was actually cut therefrom;<sup>3</sup> a statute which provides that expert evidence shall not be received to prove the genuineness of any paper or instrument made by machinery, etc.;<sup>4</sup> a law requiring the acknowledgment of deeds and mortgages;<sup>5</sup> a statute prescribing the formalities to be observed in the execution of a will;<sup>6</sup> a statute making defective records of conveyances evidence notwithstanding their defects.<sup>7</sup>

<sup>1</sup> *Ogden v. Saunders*, 12 Wheat. 213, 249; *Webb v. Den*, 17 How. 577; *Rich v. Flanders*, 39 N. H. 304; *Gibbs v. Gale*, 7 M. l. 76; *Cornwall v. Commonwealth*, 82 Va. 644; 3 Am. St. Rep. 121.  
<sup>2</sup> *Sprague v. Pitt*, McCahon, 212; *Callanan v. Hurley*, 93 U. S. 387; *Hand v. Ballou*, 12 N. Y. 541.

<sup>3</sup> *Cornwall v. Commonwealth*, 82 Va. 644; 3 Am. St. Rep. 121.

<sup>4</sup> *Cornwall v. Commonwealth*, 82 Va. 644; 3 Am. St. Rep. 121.

<sup>5</sup> *Parrott v. Kumpf*, 102 Ill. 423.

<sup>6</sup> *In re Cabe*, 68 Cal. 519.

<sup>7</sup> *Webb v. Denn*, 17 How. 577.

§ 3867. **Rights in Expectancy.**—Rights in expectancy as distinguished from vested rights are not within the constitutional provision. Thus the general laws of the country may be changed.<sup>1</sup> All statutory privileges depend upon this principle, and they may be taken away by changes in the general laws at any time. The privilege of exemption from arrest, exemption from taxation, exemption of property from forced sale on execution, and exemption from jury duty are all within the principle.<sup>2</sup> So is an exemption from military duty.<sup>3</sup> So the rules of descent may be changed.<sup>4</sup> Incipient rights not perfected, given by statute, may be taken away by statute.<sup>5</sup> Qualities annexed to estates, and to affect their enjoyment in the future, may be changed when the interests of the owners are not rendered less beneficial. Estates-tail may be changed into estates in fee-simple estates; in joint tenancy into estates in common.<sup>6</sup> The expectant right of the husband to an estate by the curtesy in his wife's lands may be taken away by general legislation at any time before it has become initiate by the birth of living issue of the marriage; so may the expectant right of the wife to dower in her husband's lands at any time before it has passed from the condition of expectancy and become perfected by the husband's death.<sup>7</sup>

<sup>1</sup> "A person has no property, no vested interest, in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself as a rule of conduct may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations": *Munn v. Illinois*, 94 U. S. 113, 134.

<sup>2</sup> *Cooley on Constitutional Law*, 320. See *ante*, § 3854.

<sup>3</sup> *Com. v. Bird*, 12 Mass. 443; *Swindle v. Brooks*, 34 Ga. 67; *State v. Wright*, 53 Me. 328.

<sup>4</sup> *Burghardt v. Turner*, 12 Pick. 534. But the rights of a legatee cannot be

impaired by a law passed after the legacy has vested by the testator's death: *Westervelt v. Gregg*, 12 N. Y. 202; 62 Am. Dec. 160.

<sup>5</sup> *Bangor v. Goding*, 35 Me. 73; 56 Am. Dec. 688.

<sup>6</sup> *Holbrook v. Finney*, 4 Mass. 465; 3 Am. Dec. 243; *Burghardt v. Turner*, 12 Pick. 534.

<sup>7</sup> *Lucas v. Sawyer*, 17 Iowa, 517; *Noel v. Ewing*, 9 Ind. 37; *Pratt v. Tefft*, 14 Mich. 191; *Westervelt v. Gregg*, 12 N. Y. 202; *Hamilton v. Hirsch*, 2 Wash. Ter. 223; *Williams v. Cutney*, 77 Mo. 587; *Henson v. Moore*, 104 Ill. 403; *Morrison v. Rice*, 35 Minn. 436.

### § 3868. Curative Laws—Conveyances and Contracts.

—By a retrospective law defects and errors in conveyances may be corrected.<sup>1</sup> Where no constitutional provision interferes, a retrospective law curing an irregularity which might have been made immaterial before it was done is valid.<sup>2</sup> A marriage defective in formalities of execution may be validated retrospectively;<sup>3</sup> so may notes and bills issued by a corporation on which the power has not been conferred by its charter;<sup>4</sup> so may negotiable paper which is wholly or in part void for usury;<sup>5</sup> so may the imperfect contracts of municipal corporations;<sup>6</sup> so may formal defects in the execution and acknowledgment of deeds;<sup>7</sup> so may defects in releases of dower.<sup>8</sup> But an invalid conveyance cannot be corrected as against the vested rights of *bona fide* purchasers.<sup>9</sup> A legislature has power, by a remedial statute, to legalize defective proceedings under a former statute only in cases where it has present authority to authorize like proceedings.<sup>10</sup> So though it may, by a subsequent statute, cure a mere irregularity in a proceeding, if it could have dispensed with it by a prior statute, it has no power, by a subsequent curative statute, to remedy a jurisdictional defect, or one which goes to the substance of a vested right.<sup>11</sup> A fatal defect in matter of substance cannot be cured by a

<sup>1</sup> *Single v. Supervisors*, 38 Wis. 363; *Satterlee v. Matthewson*, 16 Serg. & R. 169; 2 Pet. 380.

<sup>2</sup> *Green v. Abraham*, 43 Ark. 420.

<sup>3</sup> *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121.

<sup>4</sup> *Lewis v. McElvain*, 16 Ohio, 347; *Trustees v. McGaughey*, 2 Ohio, N. S., 152.

<sup>5</sup> *Savings Bank v. Allen*, 28 Conn. 97; *Thompson v. Morgan*, 6 Minn. 292; *Parnelee v. Lawrence*, 48 Ill. 331; *Woodruff v. Scruggs*, 27 Ark. 26; 11 Am. Rep. 777.

<sup>6</sup> *Booth v. Woodbury*, 32 Conn. 118; *Crowell v. Hopkinton*, 45 N. H. 9; *Ahl v. Gleim*, 52 Pa. St. 432; *State v. Demorest*, 32 N. J. L. 528; *Coffman v. Keightley*, 24 Ind. 509; *Mills v. Charle-*

*ton*, 29 Wis. 400; 9 Am. Rep. 578; *Mattingly v. District of Columbia*, 97 U. S. 687; *Dows v. Elmwood*, 34 Fed. Rep. 114.

<sup>7</sup> *Grim v. School District*, 57 Pa. St. 433; 98 Am. Dec. 237; *Chesnut v. Shane's Lessee*, 16 Ohio, 599; 47 Am. Dec. 387.

<sup>8</sup> *Johnson v. Richardson*, 44 Ark. 365.

<sup>9</sup> *Brinton v. Severs*, 12 Iowa, 389; *Les Bois v. Bramell*, 4 How. 449; *Hilliard v. Miller*, 10 Pa. St. 326; *Alter's Appeal*, 67 Pa. St. 341; 5 Am. Rep. 433.

<sup>10</sup> *Kimball v. Town of Rosendale*, 42 Wis. 407; 24 Am. Rep. 421.

<sup>11</sup> *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182.

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, 223; Williams v.

Henson v. Moore,

ison v. Rice, 35

a retrospective law,—the omission of a name, for instance.<sup>1</sup>

§ 3869. **Defects in Judicial Proceedings.**—The legislature has no power, by a retrospective law, to cure a defect of jurisdiction in the proceedings of courts.<sup>2</sup> Mere irregularities in judicial proceedings may be cured retrospectively;<sup>3</sup> as defects in execution sales,<sup>4</sup> or sales by executors or guardians.<sup>5</sup> Irregular proceedings in taxation may be made good retrospectively;<sup>6</sup> but there must originally have been in the officers jurisdiction to impose the levy; and they must have made it in accordance with the general principles which underlie the power to tax.<sup>7</sup> The legislature may validate the proceedings at a term of court held without legal authority;<sup>8</sup> or by a validating act may cure a defect or irregularity in tax assessments by local boards;<sup>9</sup> or cure a technical defect in the alteration of a way by confirming a town vote;<sup>10</sup> or legalize a tax-list, invalid because the listers had not subscribed, but only taken, the preliminary oath prescribed by statute.<sup>11</sup>

§ 3870. **Statutes of Limitation.**—A statute limiting the time within which legal proceedings shall be commenced takes away no rights of property, and is constitutional.<sup>12</sup> Limitation laws when reasonable may be applied to existing contracts.<sup>13</sup> But the time must not be unreasonably

<sup>1</sup> *Bartlett v. Wilson*, 59 Vt. 23.

<sup>2</sup> *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587; *Denny v. Mattoon*, 2 Allen, 361; 79 Am. Dec. 784; *State v. Doherty*, 60 Me. 504.

<sup>3</sup> *Kearney v. Taylor*, 15 How. 494.

<sup>4</sup> *Beach v. Walker*, 6 Conn. 190.

<sup>5</sup> *Davis v. State Bank*, 7 Ind. 316; *Lucas v. Turner*, 17 Ind. 41.

<sup>6</sup> *Butler v. Toledo*, 5 Ohio St. 225; *Astor v. New York*, 62 N. Y. 580.

<sup>7</sup> *People v. Lynch*, 51 Cal. 15; 21 Am. Rep. 677.

<sup>8</sup> *Walpole v. Elliott*, 18 Ind. 258; 81 Am. Dec. 358.

<sup>9</sup> *Williams v. Albany Supervisors*, 122 U. S. 154.

<sup>10</sup> *Spaulding v. Nourse*, 143 Mass. 490.

<sup>11</sup> *Smith v. Hard*, 59 Vt. 13.

<sup>12</sup> *Bell v. Morrison*, 1 Pet. 351. A statute repealing an exception in the statute of limitations in favor of persons beyond seas is not unconstitutional as applied to causes of action accrued on the day the repealing act was passed; *Frey v. Kirk*, 4 Gill & J. 509; 23 Am. Dec. 582.

<sup>13</sup> *Bell v. Morrison*, 1 Pet. 351; *Terry v. Anderson*, 95 U. S. 628; *Pearce v.*

shortened.<sup>1</sup> But when a right is barred by statute, it cannot be revived by retrospective legislation.<sup>2</sup> The defense of the statute of limitations is a vested right which cannot be impaired.<sup>3</sup>

Patton, 7 B. Mon. 162; 45 Am. Dec. 61; Griffin v. McKenzie, 7 Ga. 163; 50 Am. Dec. 389, and note 391-394; Briscoe v. Anketell, 28 Miss. 361; 61 Am. Dec. 553; Richardson v. Cook, 37 Vt. 509; 88 Am. Dec. 622; Wardlaw v. Buzard, 15 Rich. 158; 94 Am. Dec. 148.

<sup>1</sup> Perles v. Watertown, 6 Biss. 79; Berry v. Ramsdell, 4 Met. (Ky.) 202; Ludwig v. Steward, 32 Mich. 27; Hart v. Bostwick, 14 Fla. 162; Robinson v. Magee, 9 Cal. 81; 70 Am. Dec. 638. A statute of limitations does not apply to the state or government itself, unless expressly named: United States v. Hear, 2 Mason, 311; Gibson v. Chateau, 13 Wall. 92. In Louisiana, New Jersey, Pennsylvania, and Rhode Island, the maxim, *Nullum tempus occurrit regi*, is not restricted to sovereignty, but applies to municipal corporations also: Cross v. Mayor etc., 18 N. J. Eq. 311; Jersey City v. State, 30 N. J. L. 521; Simmons v. Connell, 1 R. I. 519; City of Philadelphia v. R. R. Co., 58 Pa. St. 263; Com. v. McDonald, 16 Serg. & R. 401; Rung v. Shoneberger, 2 Watt. 23; 26 Am. Dec. 95; Mayor v. Magnon, 4 Mart. (La.) 1; Barter v. Com., 3 Penn. & W. 253; Com. v. Alburger, 1 Whart. 469; Jersey City v. Morris Canal and Banking Co., 12 N. J. Eq. 61. But see Evans v. Erie Co., 66 Pa. St. 222. But in Maryland, Vermont, Virginia, New York, Massachusetts, Connecticut, North Carolina, South Carolina, Mississippi, Missouri, Texas, Kentucky, Ohio, Illinois, Iowa, and West Virginia, the application of this maxim is restricted to sovereignty alone, and municipal corporations, like natural persons, are subject to the statute of limitations: Kelley v. Greenfield, 2 Har. & McH. 138; Knight v. Heaton, 22 Vt. 481; Varick v. Corporation, 4 Johns. Ch. 53; Armstrong v. Dalton, 4 Dev. 368; Bowen v. Team, 6 Rich. 298; 60 Am. Dec. 127; State v. Pettis, 7 Rich. 390; Litchfield v. Wilnot, 2 Root, 288; Galveston v. Menard, 23 Tex. 349; Dudley v. Frankfort, 12 B. Mon. 610; Rowan v. Portland, 8 B. Mon. 232; Alves v. Town of Henderson, 16 B. Mon. 131; Clements

v. Anderson, 46 Miss. 581; County of St. Charles v. Powell, 22 Mo. 525; 66 Am. Dec. 637; School Directors v. Georges, 50 Mo. 194; Cincinnati v. The Church, 8 Ohio, 298; Lowe v. Kennedy, 13 Ohio St. 42; Cincinnati v. Evans, 5 Ohio St. 594; Peoria v. Johnson, 56 Ill. 45; Chicago etc. R. R. Co. v. City of Joliet, 79 Ill. 40; City of Pella v. Scholte, 24 Iowa, 283; 95 Am. Dec. 729; Onstott v. Murray, 22 Iowa, 457; Manchester Mills v. Manchester, 25 Gratt. 825; Richmond v. Poe, 24 Gratt. 149; Levasser v. Washburn, 11 Gratt. 572; Wheeling v. Campbell, 12 W. Va. 45.

<sup>2</sup> Brent v. Chapman, 5 Cranch, 358; Lockhart v. Horn, 1 Woods, 628; Rockport v. Wahlen, 54 N. H. 167; 20 Am. Rep. 131; Yancy v. Yancy, 5 Heisk. 353; 13 Am. Rep. 5; Reformed Church v. Schoolcraft, 65 N. Y. 134; Girdner v. Stephens, 1 Heisk. 280; 2 Am. Rep. 700; Woart v. Winnick, 3 N. H. 473; 14 Am. Dec. 384; Bradford v. Brooks, 2 Aiken, 284; 16 Am. Dec. 715; Davis v. Minor, 1 How. (Miss.) 183; 28 Am. Dec. 325; Boisdere v. Bank, 9 La. 506; 29 Am. Dec. 453. See Searle v. Adams, 3 Kan. 515; 89 Am. Dec. 598.

<sup>3</sup> Ryder v. Wilson, 41 N. J. L. 9. Hence it is held in this case that a right of action which has become barred under the statute of limitations is not revived by the repeal of the statute; the court saying: "The proposition is, that if a statute of limitation be repealed, all rights of action which were destroyed by it are revived, and can be enforced by a judicial proceeding. But I can find nothing in the nature of the transaction, nor in legal principles, that will lend the least support whatever to such a contention. . . . The decisions of the courts, so far as my research has extended, are wholly in accord on this subject, and with one voice they declare that when a right of action has become barred under existing laws the right to rely upon the statutory defense is a vested right that cannot be rescinded or disturbed by subsequent legislation."



ILLUSTRATIONS.—A statute declared that the period from April 17, 1861, to February 27, 1866, should not be counted in computing time under any statute of limitation. *Held*, constitutional: *Caperton v. Martin*, 4 W. Va. 138; 6 Am. Rep. 270.

§ 3871. **Regulation of Commerce—In General.**—The United States constitution provides that Congress shall have power “to regulate commerce with foreign nations and among the several states.”<sup>1</sup> “Commerce,” as this word is used in the constitution, is not limited to traffic,—to buying and selling and the exchange of commodities,—but it comprehends navigation and transportation, either by sea or land, and all that is included in commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.<sup>2</sup> It comprehends intercourse between the citizens of the several states;<sup>3</sup> it extends to the transportation of goods or passengers;<sup>4</sup> it embraces the vehicles of commerce as well as the articles of commerce;<sup>5</sup> it includes the contract with the seaman,<sup>6</sup> as

<sup>1</sup> U. S. Const., art. 1, sec. 8, cl. 3.

<sup>2</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *Henderson v. New York*, 92 U. S. 259; *Passenger Cases*, 7 How. 283; *Pensacola Tel. Co. v. Tel. Co.*, 96 U. S. 1.

<sup>3</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>4</sup> *Passenger Cases*, 7 How. 283; *Welton v. State*, 91 U. S. 275; *State v. Freight Tax*, 15 Wall. 232; *Chy Lung v. Freeman*, 92 U. S. 275.

<sup>5</sup> *White's Bank v. Smith*, 7 Wall. 646; *Mitchell v. Steelman*, 8 Cal. 363; *Brig Wilson v. United States*, 1 Brock. 423. Therefore it includes the bill of lading: *Woodruff v. Panham*, 8 Wall. 123; *Almy v. State*, 24 How. 169; the court saying: “But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it, and it is

hardly less necessary to the existence of such commerce than casks to cover tobacco or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a shipmaster without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is in substance and effect a duty on the article exported”; *Brumagim v. Tillinghast*, 18 Cal. 235; 79 Am. Dec. 176.

<sup>6</sup> *Cooley v. Board of Wardens*, 12 How. 299, 316; *The Chusan*, 2 Story, 455, 465; *Ex parte Pool*, 2 Va. Cas. 276.

well as the navigation of the vessel;<sup>1</sup> in fine, it reaches everything that is essential to commercial intercourse between the citizens of the several states. But the federal jurisdiction cannot extend to transactions wholly internal, or to the state's rights over its own productions, even though they may afterwards become the subject of interstate commerce.<sup>2</sup> Contracts for ship-building are not maritime contracts, and the states, therefore, may regulate their enforcement.<sup>3</sup> But whenever the taxation of a commodity would amount to a regulation of commerce, so will the taxation of an inseparable incident or a necessary concomitant of such commodity. With regard to commerce between the several states, the transportation is as much a part of such commerce as the goods themselves.<sup>4</sup> The power of the states to regulate railroad rates by direct action is limited to domestic transportation, which means that carried on exclusively within the boundaries of a state, and transportation can be domestic only when it begins and ends within those boundaries; and this definition cannot, for the purpose of enlarging state authority, be held to include so much of a transportation on a continuous shipment between two or more states as will cover the distance traveled within the limit of any one of those states. It can only include the transportation

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *Murphy v. Northern Trans. Co.*, 15 Ohio St. 553.

<sup>2</sup> In *Veazie v. Moor*, 14 How. 568, it is said: "A pretension as far-reaching as this would extend to contracts between citizen and citizen of the same state, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries, the mines and furnaces of the country; for there is not one of these avocations the results of which may not become the subjects of foreign commerce, and be borne, either by turnpikes, canals, or railroads, from point to point within the several states, towards an ultimate destination. Such a pretension would

effectually prevent or paralyze every effort at internal improvement by the several states; for it cannot be supposed that the states would exhaust their capital and their credit in the construction of turnpikes, canals, and railroads, the remuneration derivable from which and all control over which might be immediately wrested from them, because such public works would be facilities for commerce which, whilst availing itself of those facilities, was unquestionably internal, although intermediately or ultimately it might become foreign."

<sup>3</sup> *Davis v. Mason*, 44 Ark. 553.

<sup>4</sup> *Erie R. R. Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226.

carried on upon roads lying wholly within the state, or else, it may be, to shipments beginning and ending in the state, without reference to the character of the road in that regard. This is the utmost reach of state power.<sup>1</sup> The right of the states to regulate commerce is concurrent with that of Congress, provided always that all state regulations inconsistent with those of the federal government on this subject must give way.<sup>2</sup>

§ 3872. **Statutes Held Void.** — Therefore the following state laws have been held void: A statute giving to certain persons the exclusive right to navigate the waters of a state — highways of commerce — for a series of years;<sup>3</sup> a statute requiring importers of goods to take out a license and pay a license fee therefor;<sup>4</sup> a statute imposing a tax to be paid by railroads upon freights taken up within the state and carried out of it, and taken up without the state and brought within it;<sup>5</sup> a statute requiring every master of a vessel bringing passengers from other countries, and landing them within its limits, to pay to the state a certain sum per head for every such passenger;<sup>6</sup> a statute requiring the owners of steamboats navigating the waters of the state, before the boat should leave a certain port, to file a statement with the probate judge, setting forth the names, residence, and interests of the owners;<sup>7</sup> a statute compelling all carriers of passengers to provide equal accommodation to those applying for carriage, irrespective of their race, color, or previous condition;<sup>8</sup> a statute imposing a tax on every alien passenger who shall come by vessel from a foreign country to the port of New York, and holding the vessel liable therefor;<sup>9</sup> a statute imposing

<sup>1</sup> *Louisville etc. R. R. Co. v. R. R. Comm'rs*, 19 Fed. Rep. 679.

<sup>2</sup> *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 582.

<sup>3</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>4</sup> *Brown v. Maryland*, 12 Wheat. 419.

<sup>5</sup> *State Freight Tax*, 15 Wall. 232.

<sup>6</sup> *Passenger Cases*, 7 How. 283; *Henderson v. New York*, 92 U. S. 259.

<sup>7</sup> *Sinnot v. Davenport*, 22 How. 227.

<sup>8</sup> *Hall v. De Cuir*, 95 U. S. 485.

<sup>9</sup> *People v. Compagnie Générale Transatlantique*, 107 U. S. 59; 20 Blatchf. 296.

a license tax on those within the state dealing in goods or merchandise not the growth, produce, or manufacture of the state;<sup>1</sup> a state tax on a bill of lading of goods transported on the high seas;<sup>2</sup> a statute which undertakes to prohibit the driving or conveying of Texas, Indian, or Mexican cattle into the state during certain seasons of the year is void, though conflicting with no act of Congress;<sup>3</sup> a statute requiring railroads connecting with railroads outside the state to transfer freight and passengers at a point within the state;<sup>4</sup> a statute prohibiting carriers from bringing intoxicating liquors into the state without the certificate of the county auditor that the consignee is authorized to sell;<sup>5</sup> a statute imposing a privilege tax of a certain sum per annum on sleeping-cars used in interstate business;<sup>6</sup> a statute authorizing a tax on the gross receipts of railroads for the carriage of freight and passengers into, out of, or through the state;<sup>7</sup> a statute fixing the rates of freight shipped "over any kind of railroad within this state," as to contracts for transportation from the state to points in other states;<sup>8</sup> a statute providing for a state tax on the gross receipts of Pennsylvania steamship companies derived from the transportation of persons and property by sea, between different states, and to and from foreign countries;<sup>9</sup> a statute authorizing an injunction against the prosecution of business by a foreign corporation refusing to pay its taxes, in its application to a telegraph company authorized by the federal statute to operate its lines over the post-roads of the United States;<sup>10</sup> a statute providing for the imposition of a penalty on a telegraph

<sup>1</sup> *Welton v. Missouri*, 91 U. S. 275.

<sup>2</sup> *Almy v. California*, 24 How. 169.

<sup>3</sup> *R. R. Co. v. Husen*, 95 U. S. 465.

<sup>4</sup> *Council Bluffs v. R. R. Co.*, 45 Iowa, 338; 24 Am. Rep. 777.

<sup>5</sup> *Bowman v. R. R. Co.*, 125 U. S. 465.

<sup>6</sup> *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51.

<sup>7</sup> *Fargo v. Michigan*, 121 U. S. 230; *Commonwealth v. R. R. Co.*, 143 Mass. 264.

<sup>8</sup> *Carton v. R. R. Co.*, 59 Iowa, 148; 44 Am. Rep. 672; *Wabash etc. R. R. Co. v. Illinois*, 118 U. S. 557.

<sup>9</sup> *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326.

<sup>10</sup> *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530.

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company which fails to deliver a message to the person to whom it is sent, if he resides within a mile of the telegraph station or in the city or town wherein the station is;<sup>1</sup> a statute preventing persons from conveying natural gas from one state into another state, with the imposition of penalties for so doing;<sup>2</sup> a law which requires every vessel arriving at a port to pay to the port-wardens the sum of five dollars, whether called on to perform any service or not, is a regulation of commerce;<sup>3</sup> a law imposing a tax of seven dollars upon every person leaving the state by any railroad, stage-coach, or other vehicle engaged in the transportation of passengers for hire;<sup>4</sup> a statute which provides for the appointment of a state commissioner, who is to satisfy himself whether or not any passenger (not a citizen) "who shall arrive in the state from any foreign port or place is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman," and who shall prevent any such person from landing, unless the master or owner or consignee of the vessel shall give a bond in each case to save harmless every county, city, or town of the state against any expense incurred for the relief, support, or care of such person for two years thereafter;<sup>5</sup> a statute requiring the payment of seventy cents for each passenger inspected to ascertain if he has leprosy, upon his coming into California from abroad, and imposing a fine for non-payment upon the owners or consignees of vessels bringing such passengers;<sup>6</sup> a statute providing that all drummers and

<sup>1</sup> *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347.

<sup>2</sup> *State v. Indiana Gas Co.*, 120 Ind. 575.

<sup>3</sup> *Steamboat Co. v. Port-wardens*, 6 Wall. 31.

<sup>4</sup> *Crandall v. Nevada*, 6 Wall. 37.

<sup>5</sup> *Chy Lung v. Freeman*, 92 U. S. 275; *State v. The Constitution*, 42 Cal. 378; 10 Am. Rep. 303.

<sup>6</sup> *People v. Pacific Mail S. S. Co.*, 8 Saw. 640; 16 Fed. Rep. 344.

persons not having a regular licensed house of business in the taxing district of Shelby County (Memphis), and selling goods by sample, shall pay a privilege tax, in so far as it applies to non-residents of the state;<sup>1</sup> a statute requiring merchants residing out of the state, who sell by sample, to pay a license fee based on the value of their stock in the place where they reside and have their principal place of business;<sup>2</sup> a statute requiring a license tax from those vending products and manufactures of other states only;<sup>3</sup> a statute requiring that an agent for the sale of articles manufactured in other states must first obtain a license, for which he is required to pay a specific tax for each county in which he sells, or offers to sell, them, while the agent for the sale of articles manufactured in that state, if acting for the manufacturer, is not required to obtain a license or pay any license tax;<sup>4</sup> a liquor law which discriminates between wines made within the state and those made out of it;<sup>5</sup> and in a very recent case the supreme court of the United States decided an Iowa statute unconstitutional in so far as it prohibits the sale of liquors by a foreign or non-resident importer in the packages in which they are brought from another state;<sup>6</sup> and the same was held as to a Michigan statute imposing an annual tax of three hundred dollars on the business of selling only brewed or malt liquors at wholesale or retail, and a tax of sixty-five dollars on the business of manufacturing such liquors, and providing that a manufacturer may sell without paying anything but the manufacturers' license, in so far as it prevents a non-resident manufacturer from sending such liquor into the state, and there disposing of it, in the original packages, through a clerk located there.<sup>7</sup>

<sup>1</sup> *Robbins v. Shelby County Taxing District*, 120 U. S. 489.

<sup>2</sup> *Corson v. Maryland*, 120 U. S. 502.

<sup>3</sup> *Ex parte Thomas*, 71 Cal. 204.

<sup>4</sup> *Webber v. Virginia*, 103 U. S. 344.

<sup>5</sup> *Weil v. Calhoun*, 25 Fed. Rep. 865.

<sup>6</sup> *Leisy v. Hardin*, 135 U. S. 100 (original-package case).

<sup>7</sup> *Lyng v. State*, 135 U. S. 161.

§ 3873. **Statutes Held Valid.**—But harbor regulations are within the power of the state.<sup>1</sup> So are quarantine regulations.<sup>2</sup> A law imposing pilot fees on vessels is not a regulation of commerce;<sup>3</sup> nor is a license tax on foreign insurance companies doing business in the state;<sup>4</sup> nor a statute imposing a penalty on any person who should have in his possession any dead game at a certain season, although the game was received from another state;<sup>5</sup> nor a state law providing for the scaling of logs, to see whether they are fit for commerce, and to prevent fraud;<sup>6</sup> nor a law authorizing an inspector to measure coal sold within the city, and allowing him a fee therefor, even as applied to imported coal;<sup>7</sup> nor statutes providing for the examination of the form, size, and weight of packages containing tobacco;<sup>8</sup> nor a state's imposition of a license fee, either directly or through one of its municipal corporations, upon ferry-boats plying across a navigable river between two states;<sup>9</sup> nor a statute declaring void contracts whereby common carriers seek to limit their liability;<sup>10</sup> nor a statute requiring locomotive-engineers to undergo examination and obtain licenses, and making it a misdemeanor to violate the law, even as applied to an engineer who runs his engine over a line of road partly in another state;<sup>11</sup> nor a state statute requiring railroads to draw the cars of other corporations as well as their own, at reasonable times, and for a reasonable compensation, to be agreed on

<sup>1</sup> *Cooley v. Wardens*, 12 How. 299; *Steamship Co. v. Joliffe*, 2 Wall. 450; *The James Gray v. The John Fraser*, 21 How. 450.

<sup>2</sup> *License Cases*, 5 How. 504; *R. R. Co. v. Husen*, 95 U. S. 465.

<sup>3</sup> *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ex parte McNeil*, 13 Wall. 236; *Cooley v. Board of Wardens*, 12 How. 297; *Thompson v. Sprague*, 69 Ga. 409; 47 Am. Rep. 760. But a state pilot act, which discriminates in favor of vessels of that and the two adjoining states, and which, moreover, conflicts with the federal statute, is void:

*Sprague v. Thompson*, 118 U. S. 90.

<sup>4</sup> *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410.

<sup>5</sup> *Phelps v. Racey*, 60 N. Y. 10; 19 Am. Rep. 140.

<sup>6</sup> *Hospes v. O'Brien*, 24 Fed. Rep. 145.

<sup>7</sup> *City Council v. Rogers*, 2 McCord, 495; 13 Am. Dec. 751.

<sup>8</sup> *Turner v. Maryland*, 107 U. S. 33.

<sup>9</sup> *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

<sup>10</sup> *Hart v. R. R. Co.*, 69 Iowa, 485.

<sup>11</sup> *Smith v. Alabama*, 124 U. S. 465.

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by the parties or fixed by the railroad commissioner;<sup>1</sup> nor a regulation by a state railroad commission as to when the ticket-office of a railroad engaged in interstate commerce shall be opened;<sup>2</sup> nor a statute requiring all regular passenger trains to stop at county-seat stations long enough for passengers to get on and off.<sup>3</sup> Articles imported may be taxed after they have passed from the hands of the importers, even though they remain in the original package.<sup>4</sup>

§ 3874. **Duty of Tonnage.**—The states are forbidden, without the consent of Congress, to lay any duty of tonnage. They cannot, therefore, levy dues upon vessels measured by their capacity,<sup>5</sup> nor, indeed, any dues at all which are imposed upon the vessels as instruments of commerce, or are levied for the mere privilege of trading to a port.<sup>6</sup> A statute requiring licenses at the rate of three dollars per ton from vessels engaged in the oyster trade is unconstitutional as imposing a tonnage duty.<sup>7</sup> But owners of vessels may be taxed by the state for their interests in them as property by the same standards employed in other cases.<sup>8</sup> Wharfage dues are not taxes, and they may, therefore, be laid in proportion to tonnage.<sup>9</sup> So the fee required by the ordinance of a city to be paid to the harbor-master for assigning a vessel its place at its wharf or in the harbor is not a duty of tonnage.<sup>10</sup> Wharfage is the compensation which the owner of a wharf demands

<sup>1</sup> *Rae v. R. R. Co.*, 14 Fed. Rep. 401.

<sup>2</sup> *Hall v. R. R. Co.*, 25 S. C. 564.

<sup>3</sup> *Chicago and Alton R. R. Co. v. People*, 105 Ill. 657.

<sup>4</sup> *Waring v. The Mayor*, 8 Wall. 110.

See *Welton v. Missouri*, 61 U. S. 275.

<sup>5</sup> *Cannon v. New Orleans*, 20 Wall.

577; *State Tonnage Tax Case*, 12 Wall.

204; *Inman Steamship Co. v. Tinker*,

94 U. S. 238.

<sup>6</sup> *Steamship Co. v. Port Wardens*, 6

Wall. 31; *Peete v. Morgan*, 19 Wall.

581; *Wheeling etc. Transp. Co. v.*

*Wheeling*, 8 U. S. Sup. Ct. Rep. 417.

<sup>7</sup> *Booth v. Lloyd*, 33 Fed. Rep.

593; *Ex parte Insley*, 33 Fed. Rep.

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<sup>8</sup> *Peete v. Morgan*, 19 Wall. 581.

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home situs: *St. Louis v. Ferry Co.*, 11

Wall. 423.

<sup>9</sup> *Packet Co. v. Keokuk*, 95 U. S.

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*New Orleans*, 9 Rob. 324; 41 Am. Dec.

333; *Sweeney v. Otis*, 37 La. Ann. 520.

<sup>10</sup> *State v. Charleston*, 4 Rich. 286.



for the use thereof, and tonnage a charge for the privilege of entering or loading at or lying in a port or harbor. The question as to which of these classes a particular charge belongs is of mixed law and fact,—of fact, as to whether the charge was imposed for the use of the wharf or for entering; of law, whether on the facts shown it was wharfage or tonnage.<sup>1</sup> Charges imposed by city ordinance on vessels “that may discharge or receive freight, or land on or anchor at or in front of any public landing or wharf belonging to the city for the purpose of discharging or receiving freight,” are wharfage, and not tonnage, charges.<sup>2</sup> And state statutes as to pilots and pilot fees are not within the prohibition.<sup>3</sup>

**§ 3875. Patents and Copyrights.**—Under the constitutional power<sup>4</sup> to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries, exclusive copyrights are granted for a term of years to the authors, inventors, designers, or proprietors of books, maps, charts, pictures, prints, statues, models, etc., and exclusive rights to make, use, and vend new inventions.<sup>5</sup> The power to legislate on the subject of patents is plenary, and may be exercised in the passage of either general or special laws.<sup>6</sup> But such laws have no extraterritorial effect.<sup>7</sup> But trademarks are not within the power.<sup>8</sup> The power includes the copyright of photographs.<sup>9</sup> State statutes regulating

<sup>1</sup> *Transportation Co. v. Parkersburg*, 107 U. S. 691.

<sup>2</sup> *Transportation Co. v. Parkersburg*, 107 U. S. 691.

<sup>3</sup> *Steamship v. Joliffe*, 2 Wall. 450; *Ex parte McNeil*, 13 Wall. 236. In Georgia a state law requiring masters of vessels bound to ports in the state to accept the services of the first licensed pilot offering was declared not to be unconstitutional: *Thompson v. Sprague*, 69 Ga. 409; 47 Am. Rep. 760. But this was reversed in 118 U. S. 90.

<sup>4</sup> U. S. Const., art. 1, sec. 8, cl. 8.

<sup>5</sup> See *ante*, Title Patents.

<sup>6</sup> *Evans v. Eaton*, Pet. C. C. 322; *Bloomer v. Stolley*, 5 McLean, 153; *Blanchard v. Sprague*, 2 Story, 164; *Blanchard's Factory v. Warner*, 1 Blatchf. 258.

<sup>7</sup> *Brown v. Duchesne*, 19 How. 183.

<sup>8</sup> *United States v. Steffens*, U. S., 1877.

<sup>9</sup> *Burrow Giles Co. v. Sarony*, 111 U. S. 53.

or limiting the sale of patent rights are void;<sup>1</sup> as a statute that no one shall sell any patent right in the state until he has first submitted his letters patent to a county judge and obtained his approval.<sup>2</sup> But it is a valid exercise of the police power for a state legislature to enact that persons selling patent rights shall record their title with the county clerk.<sup>3</sup> And a statute requiring vendors of patent rights to file copies with the county clerk, and to make affidavit of their genuineness and of the authority to sell, and to insert the words "given for a patent right," in notes taken, is a valid police regulation, and constitutional.<sup>4</sup>

§ 3876. **Bankruptcy Laws.**—Congress may, by the constitution, establish "uniform laws on the subject of bankruptcy throughout the United States." This is a power which Congress may or may not exercise, but if it does so, state laws on the subject must yield.<sup>5</sup> A state bankrupt or insolvent law (in the absence of a national one) operating prospectively on contracts made after its enactment does not impair the obligation of the contract, and is valid.<sup>6</sup> But it is void as to debts previously contracted.<sup>7</sup> But a state law cannot bind citizens of other states.<sup>8</sup>

<sup>1</sup> *Helm v. First Nat. Bank*, 43 Ind. 167; 13 Am. Rep. 395; *Grover and Baker Sewing Machine Co. v. Butler*, 53 Ind. 454; 21 Am. Rep. 200; *Hollida v. Hunt*, 70 Ill. 109; 22 Am. Rep. 63; *Crittenden v. White*, 23 Minn. 24; 23 Am. Rep. 676; *Wood Machine Co. v. Caldwell*, 54 Ind. 270; 23 Am. Rep. 641. *Contra*, *Patterson v. Com.*, 11 Bush, 311; 21 Am. Rep. 220.

<sup>2</sup> *Wilch v. Phelps*, 14 Neb. 134.

<sup>3</sup> *Brechbill v. Randall*, 102 Ind. 528; 52 Am. Rep. 695.

<sup>4</sup> *New v. Walker*, 108 Ind. 365; 58 Am. Rep. 40.

<sup>5</sup> *Sturges v. Crowninshield*, 4 Wheat. 122; *Rowe v. Page*, 54 N. H. 190.

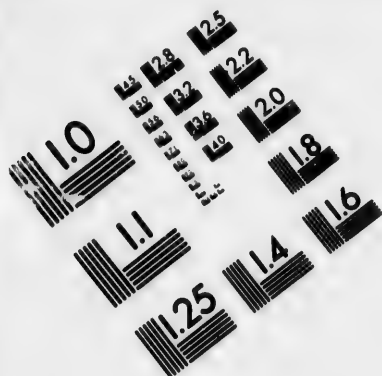
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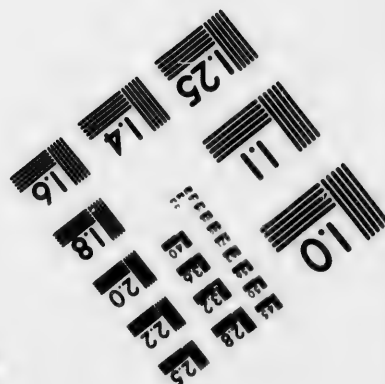
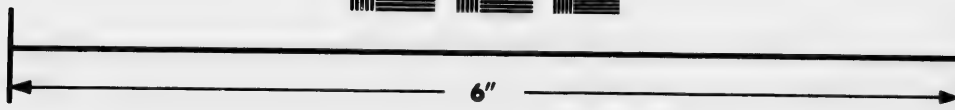
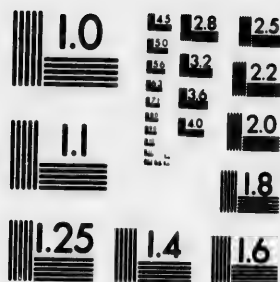
<sup>7</sup> *Smith v. Mead*, 3 Conn. 253; 8 Am. Dec. 183.

**Receivers—In General.**—The object sought by the appointment of a receiver is to provide for the safety of property, pending the litigation which is to decide the right of litigant parties. The duty of the court, upon a motion for a receiver, is merely to protect the property in the mean time for the benefit of those persons to whom the court, at the hearing of the cause, when it will have before it all evidence and materials for a determination, shall think it properly belongs: *Kerr*

<sup>8</sup> *Frey v. Kirk*, 4 Gill & J. 509; 23 Am. Dec. 581.



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§ 3877. "Ex Post Facto" Laws. — The United States and the states are forbidden to pass *ex post facto* laws.

on Receivers, 6; *Blakeney v. Dufaur*, 15 Beav. 42; *Gardner v. R. R. Co.*, L. R. 2 Ch. 201.

**Receivers of Railroads.** — A court of equity will not appoint a receiver of a railroad merely upon a showing that there has been a default in the payment of interest, secured by a mortgage of the properties and income of the company, that upon such default the trustees under the mortgage were entitled to immediate possession, that they have demanded possession, and that the same has been refused. It is necessary, in addition to this, to show that ultimate loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale, if such decree and sale be made: *Union Trust Co. v. R. R. Co.*, 4 Dill. 114. A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment: *Cowdrey v. R. R. Co.*, 93 U. S. 352. Where a railroad and its appurtenances are in the hands of receivers, to be preserved and operated, the court having charge thereof possesses the power, after notice to and hearing of the parties interested, to allow the issuing of negotiable certificates of indebtedness, creating a first lien, when this is necessary to raise money for the management and preservation of the property until it shall have been disposed of: *Meyer v. Johnston*, 53 Ala. 237.

**Rights in Foreign Jurisdiction.** — Where duly appointed and authorized, a receiver may, ordinarily, sue in another state. This power, however, arises from comity, in the absence of special statute regulation, and it is, in general, subordinate to the right of local creditors as respects property within the jurisdiction where such a suit is brought: *Chandler v. Siddle*, 3 Dill. 477; *Runk v. St. John*, 29 Barb. 587; *Willets v. Waite*, 25 N. Y. 584; *Taylor v. Ins. Co.*, 14 Allen, 353; *Hunt v. Ins. Co.*, 55 Me. 298; *Hoyt v.*

*Thompson*, 5 N. Y. 320; *Graydon v. Church*, 7 Mich. 36; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Humphreys v. Hopkins*, 81 Cal. 551; *Holmes v. Remsen*, 20 Johns. 229. This question can hardly, however, in the light of the conflicting authorities, be considered as a settled one. In the federal supreme court and in Missouri it is held that a receiver cannot sue in a foreign jurisdiction for the property of the debtor: *Booth v. Clark*, 17 How. 322; *Ins. Co. v. Needles*, 52 Mo. 17. On the other hand, the courts of Louisiana recognize to the fullest extent right of foreign receivers to bring suits in that state, in *Planters' Bank v. Bass*, 2 La. Ann. 436; *Paradise v. F. & M. Bank of Memphis*, 5 La. Ann. 710; *McAlpin v. Jones*, 10 La. Ann. 552. And see *Warren v. Nat. Bank*, 7 Phila. 156; *Hope Mut. Ins. Co. v. Taylor*, 2 Robt. 278. In *Cagill v. Wooldridge*, 8 Baxt. 580, the court say: "It is true, that if a receiver appointed by the courts of another state should, by virtue of such appointment, seek to recover in our courts property to which others had acquired rights here, the claim would not be enforced; that is, our courts would not, in such a case, lend their aid to enforce and carry out the order of the foreign court as to the property within our jurisdiction. The right of the receiver, as such, could not be recognized in our courts. But where the court of a sister state, having jurisdiction of the parties and subject-matter, and having the property within its actual control, appoints a receiver to take possession of and sell the property, and this order is executed by the property being actually taken into possession by the receiver, we think, beyond doubt, this would give to the receiver, against the parties to the litigation and those claiming through them, a special property and right of possession, that would enable him to maintain an action of replevin, and that this right would not be lost by sending the property to this state for sale; that to this extent we would respect the orders and judgments of the courts of sister states."

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In its ordinary sense this term embraces all retrospective laws; but in the constitution it is limited exclusively to laws of a criminal nature,—crimes and penalties.<sup>1</sup>

**Liability of Receivers.**—A receiver of an insolvent railroad is not an agent or servant of the company, and the company is not liable for damages occasioned by his negligence while operating the road: Metz v. R. R. Co., 58 N. Y. 61; Ohio R. R. Co. v. Davis, 23 Ind. 553; Hopkins v. Connel, 2 Tenn. Ch. 323; Bell v. R. R. Co., 53 Ind. 57; Erwin v. Davenport, 9 Heisk. 44; State v. R. R. Co., 67 Me. 479. *Contra*, Lamphear v. Buckingham, 33 Conn. 237; Klein v. Jewett, 26 N. J. Eq. 474; 27 N. J. Eq. 550; White v. R. R. Co., 52 Iowa, 97; Meara v. Holbrook, 20 Ohio St. 137; Kinney v. Crocker, 18 Wis. 74; Davenport v. R. R. Co., 2 Woods, 519; Safford v. People, 85 Ill. 558; Allen v. R. R. Co., 42 Iowa, 683; Daniels v. Hart, 118 Mass. 543. Nor is the receiver personally liable: Cardot v. Barney, 63 N. Y. 281; Camp v. Barney, 4 Hun, 373; Kain v. Smith, 11 Hun, 552; Henderson v. Walker, 55 Ga. 481. Although such company is liable for loss as a carrier: Blumenthal v. Brainerd, 38 Vt. 402; Morse v. Brainerd, 41 Vt. 550; Paige v. Smith, 99 Mass. 395; Newell v. Smith, 49 Vt. 255; Cowdrey v. R. R. Co., 93 U. S. 352; Nichols v. Smith, 115 Mass. 332; Barter v. Wheeler, 49 N. H. 9; Pearson v. Wheeler, 55 N. H. 41.

**Suits against Receivers.**—A person who brings an action in one court against a receiver appointed by another court, without the consent of the court whose officer such receiver is, is guilty of a contempt of the latter court; and this is so, although such action may not result in disturbing the possession of the receiver: Thompson v. Scott, 4 Dill. 508; Wiswall v. Sampson, 14 How. 65. The proper practice is for the person having a demand against the fund in the hands of the receiver to bring his demand into the court appointing the receiver, and the court will direct him to be examined, *pro interesse suo*, before the master, and if, upon auditing his

claim, the court finds it to be a just one, it will direct the receiver to pay it without litigation; but if the court finds the claim to be a doubtful one, it will give the claimant leave to prosecute it against the receiver before some competent court: Thompson v. Scott, 4 Dill. 508. But in some states it is held that while a court of equity will, on a proper application, protect its own receiver, where the possession which he holds under the authority of the court is sought to be disturbed, and while a plaintiff desiring to prosecute a legal claim for damages against a receiver might, in order to relieve himself from the liability to have his proceedings arrested by an exercise of this equitable jurisdiction, very properly obtain leave to prosecute, yet his failure to do so is no bar to the jurisdiction of a court of law, and is no defense to an otherwise legal action, especially when there is no attempt to interfere with the possession of the receiver, but only to obtain a judgment at law on a claim for damages: Allen v. R. R. Co., 42 Iowa, 683; Kinney v. Crocker, 18 Wis. 75. A state statute providing that all receivers appointed by any court may be sued without leave of the court appointing or controlling them can have no application to receivers appointed by courts of the United States: Hale v. Duncan, 7 Cent. L. J. 147. A state court, on plaintiff's petitioning to have the cause against a receiver removed to the United States circuit court, may of its own motion revoke the order granting permission to sue the receiver and dismiss the action: Meredith etc. Savings Bank v. Simpson, 22 Kan. 414.

<sup>1</sup> Calder v. Bull, 2 Dall. 386; Dash v. Van Kleeck, 7 Johns. 477; 5 Am. Dec. 291; Jones v. Jones, 2 Over. 2; 5 Am. Dec. 645; Dickenson v. Dickenson, 3 Murph. 327; 9 Am. Dec. 608; Boston v. Cummins, 16 Ga. 102; 60 Am. Dec. 717; Henderson etc. R. R. Co. v. Dickerson, 17 B. Mon. 173; 66 Am. Dec. 148.

§ 3878. "Bills of Credit."—The states are prohibited from "emitting bills of credit." A bill of credit is a bill issued by the state involving the faith of the state, and designed to circulate as money on the credit of the state, in the ordinary uses of business.<sup>1</sup> The bills of a bank chartered by the state are not bills of credit, even though the state is sole stockholder in the bank,<sup>2</sup> or though the state has pledged its credit for their payment in case the bank shall fail to do so.<sup>3</sup>

ILLUSTRATIONS.—Certain treasury warrants issued between November 18, 1861, and December 1, 1862, are in the following form:—

"Arkansas Treasury Warrant, No. 1126, on Auditor's Warrant No. 2182.

"The state of Arkansas promises to pay F. Bates, or bearer, ten dollars, with interest at eight per centum per annum, to be paid in the order of their number. November 18, 1861.

"\$10.

O. BASHAM, Treasurer."

*Held*, that such warrants are void, as being "bills of credit," as they were issued on the faith and credit of the state, are direct promises of the state to pay money, and were designed to be a substitute for money: *Bragg v. Tufts*, 49 Neb. 554.

§ 3879. **Taxes**—**What are.**—The word "taxes" embraces all impositions made by the government upon the person, property, principles, enjoyments, and occupations of the people for the purpose of a public revenue.<sup>4</sup>

§ 3880. **Power to Tax.**—The power to tax is an incident of sovereignty, and is co-extensive with the subjects to which the sovereignty extends. It is unlimited in its range, and security against its abuse is found only in the

<sup>1</sup> *Craig v. Missouri*, 4 Pet. 410; *Woodruff v. Trapnall*, 10 How. 109.

<sup>2</sup> *Briscoe v. Bank*, 11 Pet. 257; *McFarland v. State Bank*, 4 Ark. 44; 37 Am. Dec. 761.

<sup>3</sup> *Darrington v. State Bank*, 13 How. 12.

<sup>4</sup> Cooley on Constitutional Law, 53. Duties, imposts, and excises are

"taxes." But the two former terms are usually applied to the levies made by government on the importation or exportation of commodities, while the term "excises" is applied to the taxes laid upon the manufacture, sale, or consumption of commodities within the country, and upon licenses to pursue certain occupations: Cooley on Taxation, 3.

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responsibility of the legislature, which imposes the tax, to the constituency, who are to pay it.<sup>1</sup> A people, however, in establishing their constitution, and delegating to their representatives this power, may impose at discretion limits to its exercise; and such limitations have been imposed in the constitutions of many states. Where a state by its system of taxation does not intrench upon the legitimate authority of the general government, or violate any right recognized or secured to the citizens by the constitution of the United States, the supreme federal court, as between the citizen and his state, can afford no relief against state taxation, however unjust, oppressive, or onerous it may be.<sup>2</sup>

§ 3881. **Must be for Public Purpose.**— But a tax must be for a public purpose. Therefore a tax for a mere private purpose is illegal and void; as, for example, a tax to aid private parties or corporations to establish themselves in business as manufacturers;<sup>3</sup> a tax the proceeds of which are to be loaned out to individuals who have suffered from a great fire,<sup>4</sup> a tax to supply with provisions and seed such farmers as have lost their crops;<sup>5</sup> a tax to build a dam which at discretion is to be devoted to private purposes;<sup>6</sup> a tax to refund moneys to individuals which they have paid to relieve themselves from an impending military draft.<sup>7</sup>

§ 3882. **Taxation of Governmental Agencies.**— Neither the federal nor the state governments can legally tax the

<sup>1</sup> *Veazie Bank v. Fenno*, 8 Wall. 533, 548; *McCulloch v. Maryland*, 4 Wheat. 316, 428; *Howell v. State*, 3 Gill, 14; *People v. Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; *Pullen v. Commissioners*, 66 N. C. 361; *Taylor v. Palmer*, 31 Cal. 240; *State v. Newark*, 26 N. J. L. 519; *Williams v. Cammack*, 27 Miss. 209, 219; 61 Am. Dec. 508; *Parham v. Justices*, 9 Ga. 341, 352.  
<sup>2</sup> *Kirtland v. Hotchkiss*, 100 U. S. 491.

<sup>3</sup> *Loan Ass'n v. Topeka*, 20 Wall.

655; *Allen v. Jay*, 60 Me. 124; 11 Am. Rep. 185.

<sup>4</sup> *Lowell v. Boston*, 111 Mass. 454; 15 Am. Rep. 39.

<sup>5</sup> *State v. Osawkee*, 14 Kan. 418; 19 Am. Rep. 99.

<sup>6</sup> *Attorney-General v. Eau Claire*, 37 Wis. 400.

<sup>7</sup> *Tyson v. School Directors*, 51 Pa. St. 9; *Crowell v. Hopkinton*, 45 N. H. 9; *Usher v. Colchester*, 33 Conn. 567; *Freeland v. Hastings*, 10 Allen, 570; *Miller v. Grandy*, 13 Mich. 540.



means or agencies of the other.<sup>1</sup> The United States cannot tax a state municipal corporation or its resources,<sup>2</sup> or the salary of a state officer,<sup>3</sup> or the process of state courts,<sup>4</sup> or a railroad owned by a state.<sup>5</sup> A state cannot tax the salary or emoluments of federal officers,<sup>6</sup> or the bonds or other securities issued under the power to borrow money on the credit of the United States,<sup>7</sup> or the revenue stamps or treasury notes issued by the United States,<sup>8</sup> or a bank created by the United States as its fiscal agent.<sup>9</sup> But a state tax on the property of a railroad authorized by the federal government to construct its works, upon condition that it should at all times transmit dispatches over its telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon the railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, is not a tax on a government agency which the state is prohibited from levying.<sup>10</sup>

<sup>1</sup> *McCulloch v. Maryland*, 4 Wheat. 316; *Ward v. Maryland*, 12 Wall. 418; *Sayler v. Davis*, 22 Wis. 225; *State v. Gustin*, 32 Ind. 1.

<sup>2</sup> *United States v. R. R. Co.*, 17 Wall. 322.

<sup>3</sup> *The Collector v. Day*, 11 Wall. 113.

<sup>4</sup> *Warren v. Paul*, 22 Ind. 276; *Moore v. Quirk*, 105 Mass. 49; 7 Am. Rep. 499; *Union Bank v. Hill*, 3 Cold. 325.

<sup>5</sup> *Georgia v. Atkins*, 1 Abb. 22.

<sup>6</sup> *Dobbins v. Comm'rs*, 16 Pet. 435.

<sup>7</sup> *Weston v. Charleston*, 2 Pet. 449; *Bank Tax Case*, 2 Wall. 200.

<sup>8</sup> *Palfrey v. Boston*, 101 Mass. 329; 3 Am. Rep. 364; *Montgomery v. Elston*, 32 Ind. 27; *Bank v. Supervisors*, 7 Wall. 26.

<sup>9</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 368; *Osborn v. Bank of United States*, 9 Wheat. 738. See *United States v. R. R. Co.*, 17 Wall. 322.

<sup>10</sup> *Union Pacific R. R. Co. v. Peniston*, 1 Dill. 314; the court saying: "It is often a difficult question whether a tax imposed by a state does in fact invade the domain of the general government,

or interfere with its operations to such an extent or in such a manner as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is, for that reason alone, inhibited by the constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The states are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise. . . . It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they

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§ 3883. **Taxation of Imports and Exports.**—By the constitution, "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." By this is meant "a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them." But this duty or tax is not merely a tax on the act of importation; it is a tax on the thing imported, and extends to the article after it has entered the country.<sup>1</sup> The imported article continues to be a part of the foreign commerce of the country while it remains in the hands of the importer for sale in the original package. The authority to import carries with it the authority to sell the imported article in the condition in which it is imported. This privilege, obtained by paying the import duty to the government of the United States, cannot be abridged by the states, either by a direct tax on the article imported or by requiring a license from the importer before exercising his right to sell. When the original package is broken by the importer, either for use or for retail, or passes into the hands of a purchaser, it ceases to be an import, becomes mixed with the general mass of property in the state, and subject to taxation by the state.<sup>2</sup> But the exemption does not extend to a purchaser from the importer, even in the original package; by sale and delivery the merchandise loses its characteristic as an import.<sup>3</sup> The term "impost" only applies to a tax on articles imported from foreign countries; it does not apply to articles brought from one state to another.<sup>4</sup>

are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax

upon their operations is a direct obstruction to the exercise of federal powers."

<sup>1</sup> *Brown v. Maryland*, 12 Wheat. 419.

<sup>2</sup> *License Cases*, 5 How. 575; *Low v. Austin*, 13 Wall. 29.

<sup>3</sup> *Waring v. Mayor*, 8 Wall. 110.

<sup>4</sup> *Woodruff v. Parham*, 8 Wall. 136; *Brown v. Houston*, 114 U. S. 622.

## PART VII.—EMINENT DOMAIN.

## CHAPTER CCL.

## EMINENT DOMAIN.

- § 3884. Eminent domain — In general.
- § 3885. Must be for public use.
- § 3886. The necessity.
- § 3887. What property may be taken.
- § 3888. Damages — In general.
- § 3889. Damages — In taking by railroads.
- § 3890. Damages — Incidental injuries.
- § 3891. The interest appropriated.
- § 3892. New use.
- § 3893. What not included in assessment of damages.
- § 3894. Who entitled to compensation — "Owner."
- § 3895. Mode of assessment.
- § 3896. Measure of damages.
- § 3897. Improvements on land by party before or pending proceedings.
- § 3898. Benefits.
- § 3899. Payment.
- § 3900. Validity of proceedings cannot be attacked collaterally.
- § 3901. Estoppel by assessment of damages.
- § 3902. Remedies.
- § 3903. Measure of damages for wrongful entry.
- § 3904. Appeals.
- § 3905. Abandonment — Discontinuance of proceedings.
- § 3906. Laches — Acquiescence — Limitations.

§ 3884. **Eminent Domain — In General.** — By eminent domain is meant the authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.<sup>1</sup> A state legislature may

<sup>1</sup> *Cooper v. Williams*, 4 Ohio, 253; (Del.) 514; 33 Am. Dec. 411; *Enfield* 22 Am. Dec. 745; *Scudder v. Trenton* Co. v. R. R. Co., 17 Conn. 40; 42 Am. etc. Co., 1 N. J. Eq. 694; 23 Am. Dec. Dec. 716; *Alexander v. Mayor*, 5 Gill, 756; *Whiteman v. R. R. Co.*, 2 Harr. 383; 46 Am. Dec. 630; *Ex parte Mar-*

take private property for any public use upon compensating the owner, and may change the use of property already taken by the state, or the legislature in so doing may act by itself or by an agent to whom it delegates its power.<sup>1</sup> So, also, the national government may take private property whenever to do so is an appropriate means to carry into execution the powers conferred upon it by the federal constitution, and a state cannot enlarge or diminish this right, nor prescribe the manner of its exercise.<sup>2</sup> The right may be exercised either directly through the agents of the government, or through corporate bodies, or through individuals.<sup>3</sup> When the United States decides to appropriate private property by virtue of the right of eminent domain, it may transfer to a state board or state court the function of ascertaining the value of the property taken and the amount of compensation to be made.<sup>4</sup> But when the right is delegated by the legislature to a corporation, the power must be strictly pursued.<sup>5</sup> It is not necessary

tin, 13 Ark. 198; 58 Am. Dec. 321; *Moale v. Mayor*, 5 Md. 314; 61 Am. Dec. 276; *Commissioners v. Withers*, 23 Miss. 21; 64 Am. Dec. 127; *Little Rock etc. R. R. Co. v. Woodruff*, 49 Ark. 381; 4 Am. St. Rep. 51; *Jones v. Walker*, 2 Paine, 688. Nations cannot exist without the exercise of police power in taking private property without compensation in times of war when an emergency renders it necessary. It must be exercised by the military agents of the government, who must, in order to discharge their duties, exercise a discretion; and that discretion, unless shown to have been wantonly or in bad faith abused, cannot be revised by the civil courts: *Taylor v. R. R. Co.*, 6 Cold. 646; 98 Am. Dec. 474.

<sup>1</sup> *Secome v. R. R. Co.*, 23 Wall. 108; *West River Bridge Co. v. Dix*, 6 How. 507; *Richmond R. R. Co. v. R. R. Co.*, 13 How. 71; *United States v. Chicago*, 7 How. 185; *Greenwood v. Freight Co.*, 105 U. S. 13.

<sup>2</sup> *Kohl v. United States*, 91 U. S. 367; *United States v. Jones*, 107 U. S.

367. The United States may exercise the right of eminent domain within a state; but a state cannot exercise it in behalf of the United States: *Darlington v. United States*, 82 Pa. St. 382; 22 Am. Rep. 766; *People v. Humphrey*, 23 Mich. 471; 9 Am. Rep. 94. But in Massachusetts it is held that a state legislature may delegate the right of eminent domain to an agent of the United States for the purpose of obtaining land in such state as a site for a post-office: *Burt v. Merchants' Ins. Co.*, 106 Mass. 356; 8 Am. Rep. 339.

<sup>3</sup> *Whiteman v. R. R. Co.*, 2 Harr. (Del.) 514; 33 Am. Dec. 411; *Backus v. Lebanon*, 11 N. H. 19; 35 Am. Dec. 467. It may be exercised in favor of a foreign corporation: *In re Townsend*, 39 N. Y. 171.

<sup>4</sup> *United States v. Jones*, 109 U. S. 513.

<sup>5</sup> *State v. Jersey City*, 25 N. J. L. 309; *Moorhead v. R. R. Co.*, 17 Ohio, 340; *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722; *Comm'rs v. Humphrey*, 47 Ga. 565.

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that there should be a special act of the legislature in each particular case. It may be exercised through the action of general laws and of judicial tribunals.<sup>1</sup> Corporate existence, and right to exercise the power of eminent domain, can only be derived from legislative enactment; and before a company can demand a judgment of condemnation, it must show that both have been conferred upon it by a valid law, and that it has substantially complied with the conditions which the law has annexed to the exercise of the power.<sup>2</sup> A railroad company after the time prescribed in its charter for the completion of its road has expired has no right to take lands without the consent of the owner.<sup>3</sup> The public cannot appropriate property to public use except in the mode pointed out by statute; and if the authorities undertake to appropriate property in any other way, equity will restrain the act.<sup>4</sup> A statute prescribing the mode by which a party may be divested of his property without his consent must be strictly construed; and a party claiming to have acquired a right and title to property by virtue of its provisions, as against the original owner, must affirmatively allege and prove that the mode prescribed has, in every particular, been strictly followed.<sup>5</sup> The "taking" land by a railroad corporation consists of a series of acts commencing with the entry for the purpose of location, and terminating in the act of payment; and the land is not considered "taken," so as to divest the owner of the title, until this last act is performed.<sup>6</sup>

In cases of inevitable necessity,—such as the necessity of destroying buildings to arrest the progress of conflagrations,—but only in cases where the necessity is so urgent as to admit of no delay, private property may be

<sup>1</sup> *Backus v. Lebanon*, 11 N. H. 19; 35 Am. Dec. 466.

<sup>2</sup> *Atkinson v. R. R. Co.*, 15 Ohio St. 21.

<sup>3</sup> *Peavey v. R. R. Co.*, 30 Me. 498.

<sup>4</sup> *Comm'rs v. Humphrey*, 47 Ga. 565;

<sup>5</sup> *Trumpler v. Bemerly*, 39 Cal. 490.

<sup>6</sup> *Fox v. R. R. Co.*, 31 Cal. 538.

taken without first providing for compensation.<sup>1</sup> But where the law gives a public officer power to destroy private property to prevent the spread of a conflagration, and provides that he shall exercise his discretion in so doing, and further provides that compensation shall be made to the owner for the property destroyed, the grant of such power is a grant of power to exercise the right of eminent domain.<sup>2</sup> The diversion of a private watercourse by a municipal corporation for the purpose of general drainage, at the instance and with the acquiescence of the owners, is not an exercise of the right of eminent domain, nor a taking of private property for public use without compensation.<sup>3</sup> And the following are held not an exercise of the right of eminent domain, or the taking of private property for public use without compensation, within the constitutional provision: An act providing that the expense of grading a street shall be assessed on property fronting on such street;<sup>4</sup> an act authorizing trustees of a town to pave and grade streets, and to require owners of lots to execute the work opposite thereto, and, on failure, to impose fines;<sup>5</sup> imposing the cost of public improvements of land, under legislative action, upon the parties who, by owning lands in the vicinity of such improvement, receive a peculiar advantage;<sup>6</sup> where the lands of individual proprietors are washed away by reason of the acts of a corporation empowered to improve the navigation of a river;<sup>7</sup> where

<sup>1</sup> *Bishop v. Mayor*, 7 Ga. 200; 50 Am. Dec. 400; *Surocco v. Geary*, 3 Cal. 69; 58 Am. Dec. 385; *Taylor v. Plymouth*, 8 Met. 462; *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381; *McDonald v. Redwing*, 13 Minn. 38; *Peurice v. Wallis*, 37 Miss. 172; *Amer. Print Works v. Lawrence*, 23 N. J. L. 590; 57 Am. Dec. 420; *Miller v. Craig*, 11 N. J. Eq. 175; *Russell v. Mayor etc. of New York*, 2 Denio, 461; *Pentz v. Etna Ins. Co.*, 3 Edw. Ch. 341; *Coe v. Shultz*, 47 Barb. 64; *Respublica v. Sparhawk*, 1 Dall. 357; *Farham v. Decatur*, 9 Ga. 341; *Denver v. Alcalde*,

1 Cal. 355; *Field v. Des Moines*, 39 Iowa, 575; 18 Am. Rep. 47.

<sup>2</sup> *Hale v. Lawrence*, 21 N. J. L. 714. 47 Am. Dec. 191.

<sup>3</sup> *Murphey v. Mayor of Wilmington*, 11 Cent. L. J. 427.

<sup>4</sup> *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Walsh v. Mathews*, 29 Cal. 123.

<sup>5</sup> *Trustees of Paris v. Berry*, 2 J. J. Marsh. 483.

<sup>6</sup> *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; 90 Am. Dec. 634.

<sup>7</sup> *Hollister v. Union Co.*, 9 Conn. 436; 25 Am. Dec. 37.

the legislature authorizes a city to subscribe to railroad stock.<sup>1</sup> Nor do the provisions of the various state constitutions, that private property shall not be taken for public use except upon just compensation, apply to or restrict the power of taxation;<sup>2</sup> nor to regulations to govern the use of property by its owners consistently with the public welfare and rights of others.<sup>3</sup>

§ 3885. **Must be for Public Use.**—Property can, under the power of eminent domain, be taken only for the public use. Even though compensation be made to the owner, the property of one man cannot be given to another man.<sup>4</sup> The term “public use” means a use concerning the whole community as distinguished from particular individuals, though each and every member of society need not be equally interested in such use, or be personally and directly affected by it; if the object be to satisfy a great public want or exigency, it is sufficient.<sup>5</sup> It is enough if the taking tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor. Such results indirectly contribute to the general welfare and prosperity of the whole community.<sup>6</sup> The term is synonymous with public benefit or advantage, and is equivalent to the statutory phrase “of common conve-

<sup>1</sup> *Sharpless v. Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759.

<sup>2</sup> *Martin v. Dix*, 52 Miss. 53; 24 Am. Rep. 661.

<sup>3</sup> *Railroad Company v. Richmond*, 96 U. S. 521.

<sup>4</sup> *Scudder v. Trenton etc. Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756; *Harding v. Goodlett*, 3 Yerg. 40; 24 Am. Dec. 546; *Varick v. Smith*, 5 Paige, 137; 28 Am. Dec. 417; *Ten Eyck v. Delaware Canal Co.*, 18 N. J. L. 200; 37 Am. Dec. 233; *Taylor v. Porter*, 4 Hill, 140; 40 Am. Dec. 275; *Pearce*

*v. Patton*, 7 B. Mon. 102; 45 Am. Dec. 61; *Embury v. Conner*, 3 N. Y. 511; 53 Am. Dec. 325; *Ryan v. Brown*, 18 Mich. 196; 100 Am. Dec. 154; *Osborn v. Hart*, 24 Wis. 89; 1 Am. Rep. 161. The legislature cannot confer authority by special act to sell private property without the owner's consent, unless a case of necessity is shown, arising from insanity, etc.: *Powers v. Bergen*, 6 N. Y. 358.

<sup>5</sup> *Gilmer v. Lime Point*, 18 Cal. 229.

<sup>6</sup> *Talbot v. Hudson*, 16 Gray, 417.

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nience and necessity," used with reference to highways.<sup>1</sup> But land cannot be taken by right of eminent domain because the public will be incidentally benefited by the use to which private parties will put the land, so long as the public has no right of control.<sup>2</sup> No precise line can be drawn between public and private uses. In those difficult intermediate cases where public and private interests are blended together, each must depend on its own peculiar circumstances.<sup>3</sup> A work may be a public use, though conducted and owned by a private corporation.<sup>4</sup> The right may be granted to a railroad.<sup>5</sup> A use of land for a public park or square is a "public use."<sup>6</sup> So is the construction of a water-power;<sup>7</sup> or supplying a municipality with water;<sup>8</sup> or a public canal, though constructed by a private corporation;<sup>9</sup> or a grist-mill;<sup>10</sup> or the building of a fort;<sup>11</sup> or the establishment of public ways to stone and mineral lands;<sup>12</sup> or the drainage of lands;<sup>13</sup> or the building of an aqueduct;<sup>14</sup> or the erection of booms;<sup>15</sup> or the establishment of a public market.<sup>16</sup>

<sup>1</sup> *Olmstead v. Camp*, 33 Conn. 532; 89 Am. Dec. 221.

<sup>2</sup> *In re Eureka Basin Warehouse etc.* Co., 96 N. Y. 42.

<sup>3</sup> *Olmstead v. Camp*, 33 Conn. 532; 89 Am. Dec. 221. A railroad corporation sought to condemn land for a road to be used for the purpose of conveying visitors during the summer months to see the Niagara River and the Whirlpool. There could be no habitations on the route, and no other traffic or business. Held, that the land could not be taken *in invitum*, the use not being a public use: *In re Niagara Falls etc.* R. R. Co., 108 N. Y. 375.

<sup>4</sup> *Willyard v. Hamilton*, 7 Ohio (part 2), 111; 30 Am. Dec. 195.

<sup>5</sup> *Commonwealth v. R. R. Co.*, 62 Pa. St. 286; 1 Am. Rep. 399; *Stewart v. Supervisors*, 30 Iowa, 9; 1 Am. Rep. 238; *Bloodgood v. R. R. Co.*, 18 Wend. 9; 31 Am. Dec. 313; *Whiteman v. R. R. Co.*, 2 Harr. (Del.) 514; 33 Am. Dec. 411. A railroad corporation, is not necessarily a public corporation

such as may use a city's street, because it is connected with a grain elevator, which is public in so far as that its charges may be regulated by law: *Mikesell v. Durkee*, 36 Kan. 97.

<sup>6</sup> *County Court v. Griawold*, 58 Mo. 175; *Comm'rs v. Henry*, 38 Minn. 266; *In re Commissioners of Central Park*, 63 Barb. 282.

<sup>7</sup> *Scuddler v. Trenton etc. Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756.

<sup>8</sup> *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; *Olmsted v. Morris Aqueduct*, 46 N. J. L. 495; *Riche v. Bar Harbor Works*, 75 Me. 91.

<sup>9</sup> *Willyard v. Hamilton*, 7 Ohio (part 2), 111; 30 Am. Dec. 195.

<sup>10</sup> *Olmstead v. Camp*, 33 Conn. 532; 89 Am. Dec. 221.

<sup>11</sup> *Gilmer v. Lime Point*, 18 Cal. 229.

<sup>12</sup> *Phillips v. Watson*, 63 Iowa, 28.

<sup>13</sup> *In re Drainage*, 30 N. J. L. 433; *Brown v. Keener*, 74 N. C. 714.

<sup>14</sup> *Thorn v. Sweeney*, 12 Nev. 251.

<sup>15</sup> *Cotton v. Mississippi etc. Boom Co.*, 22 Minn. 372.

<sup>16</sup> *In re Cooper*, 28 Hun, 515.



A use of land for a cemetery is not a public use;<sup>1</sup> nor the flowage of lands by mill-owners on account of the erection of dams;<sup>2</sup> nor the taking of property for a private road;<sup>3</sup> nor the taking of a strip of land by a coal company for a tramway from its works to a railroad;<sup>4</sup> nor to enable a person to build a flume on the land of another, to carry off the tailings from his mine, or to enable him to deposit the tailings on such land;<sup>5</sup> nor a merchant mill, although intended to be used by the public;<sup>6</sup> nor taking private property merely to speculate upon, or to increase the store of wealth and capital of the state.<sup>7</sup> Property condemned for one purpose cannot be used for another and different purpose, nor can property condemned for public use be appropriated to private use.<sup>8</sup> Passenger-depots; convenient and proper places for storing and keeping cars and locomotives; proper, secure, and convenient places for the receipt and delivery of freight, and for the safe and secure keeping of property, between the time of its receipt and dispatch, or after its arrival and discharge, and before delivery,—are among the acknowledged necessities

<sup>1</sup> *In re Deansville Cemetery Ass'n*, 66 N. Y. 539; 23 Am. Rep. 86.

<sup>2</sup> *Tyler v. Beacher*, 44 Vt. 648; 8 Am. Rep. 398; *Ryerson v. Brown*, 35 Mich. 333; 24 Am. Rep. 564.

<sup>3</sup> *Osborn v. Hart*, 24 Wis. 89; 1 Am. Rep. 161; *Wild v. Deig*, 43 Ind. 455; 13 Am. Rep. 399; *Taylor v. Porter*, 4 Hill, 140; 40 Am. Dec. 274; *Nesbitt v. Trumbo*, 39 Ill. 110; 89 Am. Dec. 290; *Crear v. Crossly*, 40 Ill. 175; *Dickey v. Tennison*, 27 Mo. 373; *Bankhead v. Brown*, 25 Iowa, 540. *Contra*, *Harvey v. Thomas*, 10 Watts, 65. By the constitutions of several states, private roads are expressly brought with the power of eminent domain. And a private road open to the public is held to be for a "public use": *Ferris v. Bamble*, 5 Ohio St. 109; *Proctor v. Andover*, 42 N. H. 348; *Bell v. Prouty*, 43 Vt. 299; *Sherman v. Buick*, 32 Cal. 241; 91 Am. Dec. 577.

<sup>4</sup> *Sholl v. German Coal Co.*, 118 Ill. 428; 59 Am. Rep. 379. See *Harvey v. Thomas*, 10 Watts, 63; 36 Am. Dec. 141.

<sup>5</sup> *Consolidated Channel Co. v. R. R. Co.*, 51 Cal. 269.

<sup>6</sup> *Loughbridge v. Harris*, 42 Ga. 500.

<sup>7</sup> *Taylor v. R. R. Co.*, 6 Cold. 646; 99 Am. Dec. 474.

<sup>8</sup> *Belcher v. R. R. Co.*, 82 Mo. 121; *Mayor v. Wright*, 6 Yerg. 497; 27 Am. Dec. 489; *Cape Girardeau Road Co. v. Renfrae*, 58 Mo. 265; *Imlay v. R. R. Co.*, 26 Conn. 249; 68 Am. Dec. 392; *Williams v. Natural Bridge Plank Road Co.*, 21 Mo. 582; *Rutherford v. Taylor*, 38 Mo. 315; *Price v. Thompson*, 48 Mo. 363; *Canal Co. v. St. Louis*, 20 Dill. 82; *Pres. Society v. R. R. Co.*, 3 Hill, 567; *Trenor v. Jackson*, 46 How. Pr. 397; *Louisville v. Louisville Rolling Mill*, 3 Bush, 416; 96 Am. Dec. 243; *Barclay v. Honell's Lessee*, 6 Pet. 31; *State v. Laverock*, 34 N. J. L. 202; *Warren v. Lyons City*, 22 Iowa, 357; *Board of Education v. Edson*, 15 Ohio St. 225; 98 Am. Dec. 114; *Barney v. Keokuk*, 94 U. S. 324.

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for the running and operating a railroad; and the right to take lands for those purposes is included in a grant of power to a railroad corporation to acquire real estate for the purposes of its incorporation, or for the purpose of running or operating its road.<sup>1</sup> So depots and cattle-yards sufficient to accommodate the freight and live-stock transported over it are essential, and lands sufficient for such structures are necessary for its operation.<sup>2</sup> A railroad company authorized to maintain a road, etc., "with such appendages as may be deemed necessary for the convenient use of the same," may have lands condemned on which to erect shops for the repair of cars and locomotives.<sup>3</sup> But the manufacture of railroad cars is not so necessarily connected with the management of a railroad that the company would be authorized by its charter to take lands compulsorily for the purpose of erecting such a manufactory thereon.<sup>4</sup> So as to the erection of dwelling-houses to rent to the employees of the company. But it is otherwise as to land taken for piling the wood or lumber used on the road, and brought to it to be transported.<sup>5</sup>

What is a public use is a question for the courts.<sup>6</sup> The decision of the legislature that the use for which private property is taken under the right of eminent domain is a public use is not conclusive, inasmuch as that body has no power finally to determine upon the extent of its authority over private rights. It is, however, the sole judge whether an exigency exists which calls for the exercise of this power.<sup>7</sup> Whether the use for which private property is sought to be taken by eminent domain is a public use

<sup>1</sup> New York etc. R. R. Co. v. Kip, 46 N. Y. 546; 7 Am. Rep. 385. See 77 N. Y. 248.

<sup>2</sup> New York etc. Co. v. Manhattan Gas etc. Co., 63 N. Y. 326.

<sup>3</sup> Chicago etc. R. R. Co. v. Wilson, 17 Ill. 123.

<sup>4</sup> Eldridge v. Smith, 34 Vt. 484.

<sup>5</sup> Eldridge v. Smith, 34 Vt. 484.

<sup>6</sup> Scudder v. Trenton etc. Co., 1 N. J. Eq. 694; 23 Am. Dec. 756; Denver etc. Land Co. v. R. R. Co., 34 Fed. Rep. 386.

<sup>7</sup> Talbot v. Hudson, 82 Mass. 417. See next section.

is a question for the courts, and a grant by the legislature of the right to take such land is not conclusive evidence that the use is public.<sup>1</sup>

§ 3886. **The Necessity.**—The state has the right not only to determine upon the necessity of some appropriation for its needs, but it may also decide for itself whether it is needful to take any particular estate or parcel of property for the purpose.<sup>2</sup> The statute need not recite the necessity; the fact of its passage is sufficient evidence of the legislative opinion that the taking is necessary.<sup>3</sup> It is not essential that the legislature shall determine that any given enterprise is necessary or proper before putting in operation the power of eminent domain.<sup>4</sup> When a corporation is permitted to make an appropriation, it may be empowered to judge of the necessity, where other provision is not made by the constitution.<sup>5</sup> Necessity and a public

<sup>1</sup> *Matter of Deansville Cemetery Association*, 66 N. Y. 569; 23 Am. Rep. 86; *Ryerson v. Brown*, 35 Mich. 333; 24 Am. Rep. 564.

<sup>2</sup> *Cooley on Constitutional Law*, 336; *County Court v. Griswold*, 58 Mo. 175; *Beekman v. R. R. Co.*, 3 Paige, 45; 22 Am. Dec. 679; *Varick v. Smith*, 5 Paige, 137; 28 Am. Dec. 417; *Hinchman v. R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; 90 Am. Dec. 634; *Tait v. Central Lunatic Asylum*, 84 Va. 271; *Sweaton v. Martin*, 57 Wis. 364. In *Milwaukee etc. R. R. Co. v. City of Faribault*, 23 Minn. 167, a railroad company sought to enjoin the city from opening a street through its depot-grounds. The city acted under a general power to open streets. On the question as to what body or tribunal should decide upon the necessity of the proposed taking by the city, the supreme court of Minnesota said: "It is claimed by defendant that the city council in this case was the sole and exclusive judge as to the public necessity and propriety of laying out the proposed street, on the ground that the necessity and expediency of laying out highways is

exclusively a legislative and not a judicial question. This is undoubtedly a correct rule as applied to the legislature itself, and also to a municipal body, when acting within the conceded limits of its delegated powers. But when, as in this case, the jurisdiction of the inferior tribunal over the particular subject-matter depends, not upon an express grant of power, but upon the existence of an alleged necessity from which the disputed power is to be implied, the decision of such tribunal upon the existence of the necessity is neither final nor conclusive on the courts."

<sup>3</sup> *In re Wellington*, 16 Pick. 87; 26 Am. Dec. 631.

<sup>4</sup> *National Docks R. R. Co. v. R. R. Co.*, 32 N. J. Eq. 735.

<sup>5</sup> *Cooley on Constitutional Law*, 336; *In re New York etc. R. R. Co.*, 46 N. Y. 546; 7 Am. Rep. 335; *Cotton v. Miss. Boom Co.*, 22 Minn. 372. In *Smith v. R. R. Co.*, 105 Ill. 511, the court say: "Every company seeking to condemn land for a public improvement must, in a modified degree, be permitted to judge for itself as to what amount is necessary for such purpose. This right, of course, is

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use must in all cases exist as a condition precedent to the legal right of a railroad company to enforce a charter right to condemn property.<sup>1</sup> While a corporation having a franchise to furnish a city with water may condemn private property, there must exist a real necessity for the condemnation. It is not enough that the acquisition of certain land would be a convenience, and would enhance the value of the property of the corporation, and secure a better supply of water.<sup>2</sup> Whether land sought to be condemned for car workshops is necessary therefor is a question of fact on which issue may be joined at the trial.<sup>3</sup> A land-owner may oppose condemnation proceedings under the general statute, as respects his own land, upon the ground that the proposed taking is not necessary.<sup>4</sup> But it is not necessarily a defense to condemnation proceedings that the land to be taken is not to be immediately used, if it is probable that it will be used within a reasonable time, and if the benefit to the public is apparent.<sup>5</sup> The state can take only such an interest as is necessary to be acquired to accomplish the public purpose in view. Thus a street should not be wholly condemned to the use of a street-railroad company; other persons, artificial or natural, may use its tracks on making compensation.<sup>6</sup> The fee cannot be taken if a less estate will meet the public wants.<sup>7</sup> Whether the necessities of the railroad

subordinate to all statutory and constitutional restrictions on the subject, and also to the further limitation that the courts of the state which are authorized to entertain applications of this character are clothed with ample power to prevent any abuses of this power by such companies. For instance, if in an obscure village a railroad company, in the exercise of this limited right to judge for itself as to the amount of land necessary for its purposes, should attempt to condemn forty or twenty acres of land for depot purposes, this would clearly be an attempted abuse of the right, and the court to whom the petition was re-

ferred would be fully warranted in denying the application." And see *Ford v. R. R. Co.*, 14 Wis. 609; 80 Am. Dec. 791.

<sup>1</sup> *Tracy v. R. R. Co.*, 80 Ky. 259.

<sup>2</sup> *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123.

<sup>3</sup> *Southern Pacific R. R. Co. v. Raymond*, 53 Cal. 223.

<sup>4</sup> *In re Minneapolis R. R. Co.*, 38 Minn. 157.

<sup>5</sup> *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251.

<sup>6</sup> *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y. 330.

<sup>7</sup> *New Orleans Pacific R. R. Co. v. Gay*, 32 La. Ann. 471.

company require occupancy of the condemned land, exclusive of all uses by the owner of the fee, is a question of fact, and not of law.<sup>1</sup>

§ 3887. **What Property may be Taken.** — The property which the constitution protects is anything of value which the law recognizes as such, and in respect to which the owner is entitled to a remedy against any one who may disturb him in its enjoyment. It is immaterial whether the property be tangible or intangible, — whether the interest in it be permanent or merely temporary.<sup>2</sup> An injury to land which deprives the owner of the ordinary use of it is a "taking" of the land.<sup>3</sup> So a partial destruction, or diminution of value, is a taking of property.<sup>4</sup> Property already devoted to public use may be taken, except where it is necessary for the exercise of the first use.<sup>5</sup> Property dedicated to public use as a levee or public landing may be devoted by the legislature to the use of a railroad company, subject to the restriction that no wharfage shall be exacted.<sup>6</sup> The lands of private corpo-

<sup>1</sup> *Kansas Central R. R. Co. v. Allen*, 22 Kan. 285.

<sup>2</sup> Cooley on Constitutional Law, 337.

<sup>3</sup> *Hooker v. Canal Co.*, 14 Conn. 146.

<sup>4</sup> *Glover v. Powell*, 10 N. J. Eq. 211.

<sup>5</sup> *Baltimore etc. R. R. Co. v. R. R. Co.*, 17 W. Va. 812; *Chicago etc. R. R. Co. v. R. R. Co.*, 112 Ill. 589; *Central Horse Co. v. R. R. Co.*, 81 Ill. 523; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323; *New York etc. R. R. Co. v. R. R. Co.*, 36 Conn. 196; *Sioux City etc. R. R. Co. v. R. R. Co.*, 25 Am. & Eng. R. R. Cas. 150; *Oregon Cascade R. R. Co. v. Bailey*, 3 Or. 164; *Illinois etc. Canal Co. v. R. R. Co.*, 14 Ill. 314; *St. Louis etc. R. R. Co. v. Institution*, 43 Ill. 314; *In re New York Cent. R. R. Co.*, 63 N. Y. 326; *Boston Water Power v. R. R. Co.*, 23 Pick. 360; *Backus v. Lebanon*, 11 N. H. 19; 35 Am. Dec. 466; *Tuckahoe Canal Co. v. R. R. Co.*, 11 Leigh, 42; 36 Am. Dec. 374; *Enfield Toll Bridge v. R. R. Co.*, 17 Conn. 40; 42 Am. Dec. 716; *Fulton v. Short Route*, 85 Ky. 640; 7 Am. St. Rep. 619; *Toledo etc. R. R.*

*Co. v. R. R. Co.*, 62 Mich. 564; 4 Am. St. Rep. 875. In *Springfield v. R. R. Co.*, 4 Cush. 63, the court say: "When it is the intention of the legislature to grant a power to take land already appropriated to another public use, such intention must be shown by express words or by necessary implication. There may be such a necessary implication. Every grant of power is intended to be efficacious and beneficial, and to accomplish its declared object, and carries with it such incidental powers as are requisite to its exercise." A municipal corporation cannot, without special authority given by statute, or by necessary and reasonable implication, take for a highway the lands of a cemetery; and this rule applies to the ornamental parts of a cemetery the same as to the parts used for interments: *Evergreen Cemetery Association v. City of New Haven*, 43 Conn. 234; 21 Am. Rep. 643.

<sup>6</sup> *Portland and Willamette Valley R. R. Co. v. Portland*, 14 Or. 188; 53 Am. Rep. 299.

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rations are subject to the exercise of the right of eminent domain, the same as those of individuals.<sup>1</sup> Thus, subject to this exception, even under a general power to take land, the property or franchises of one railroad or other corporation may be taken by another.<sup>2</sup> But to justify the taking by one railroad company, for the same use, of land acquired by another company, which is necessary for the latter to economically and expeditiously carry on its present and prospective business, there must be a necessity so absolute that without it the grant itself would be defeated, and not a necessity created by the company itself for its own convenience, or for the sake of economy.<sup>3</sup> And the right of way of a railroad cannot be taken longitudinally, except under an express legislative power.<sup>4</sup> A railroad company may condemn land owned and used by a navigation company as a wharf or dock for the landing of freight, no public trust being impressed on the land, and the charter of the navigation company not making it a common carrier.<sup>5</sup> But a rail-

<sup>1</sup> Matter of New York Central etc. R. R. Co., 63 N. Y. 326.

<sup>2</sup> Chicago etc. R. R. Co. v. R. R. Co., 112 Ill. 589; Northern R. R. Co. v. R. R. Co., 27 N. H. 183; Met. etc. R. R. Co. v. R. R. Co., 87 Ill. 317; Peoria etc. R. R. Co. v. R. R. Co., 66 Ill. 174; the court saying: "The land of railroad corporations not actually in use by such company, or absolutely necessary for the enjoyment of their franchise, must be upon the same footing as the land of an individual, though that may be taken even from the actual and profitable use of the owner. We perceive no reason why, in this respect, railroad companies should claim, and be allowed, immunities not accorded to individual proprietors"; Peoria etc. R. R. Co. v. R. R. Co., 105 Ill. 110; Grand Rapids etc. R. R. Co. v. R. R. Co., 35 Mich. 263; 24 Am. Rep. 545; East. etc. R. R. Co. v. R. R. Co., 111 Mass. 125; 15 Am. Rep. 13; Richmond etc. R. R. Co. v. R. R. Co., 13 How. 71; Enfield Toll Bridge v. R. R. Co., 17 Conn. 454; 44 Am. Dec. 556; Lafayette Road

v. R. R. Co., 13 Ind. 90; 74 Am. Dec. 246; Philadelphia etc. R. R. Co.'s Appeal, 102 Pa. St. 123. By the constitutions of several states, this is expressly provided for, — Alabama, Arkansas, California, Colorado, Louisiana, Missouri, Pennsylvania, Texas: Stimson's American Statute Law, sec. 466.

<sup>3</sup> In re Sharon R. R. Co., 122 Pa. St. 533; 9 Am. St. Rep. 133; In re Pittsburgh etc. R. R. Co., 122 Pa. St. 511; 9 Am. St. Rep. 128. The taking and condemnation by a railroad company of part of the road-bed of another company is an "interference with the rights and franchises" of such other company: Alexandria and Fredericksburg R. R. Co. v. R. R. Co., 75 Va. 780; 40 Am. Rep. 743.

<sup>4</sup> In re City of Buffalo, 68 N. Y. 167; Atlanta v. R. R. Co., 53 Ga. 120; Northern etc. R. R. Co. v. Baltimore, 46 Md. 425; Danbury etc. R. R. Co. v. Norwalk, 37 Conn. 109; City of Bridgeport v. R. R. Co., 36 Conn. 255; 4 Am. Rep. 63.

<sup>5</sup> In re New York, Lackawanna etc. R. R. Co., 99 N. Y. 12.

road authorized to condemn lands for a right of way cannot condemn a temporary use, nor a use contingent on the happening of a future event.<sup>1</sup> A municipal corporation may take property of a railroad company,<sup>2</sup> or a turnpike road,<sup>3</sup> or a mill privilege.<sup>4</sup> The bridge of a corporation can be taken for public use, and made a free bridge.<sup>5</sup> So a corporation whose property, acquired under the right of eminent domain, is taken by another corporation must be given compensation therefor the same as a private individual.<sup>6</sup>

Dwelling-houses and other buildings may be taken.<sup>7</sup> Thus where a railroad company was authorized to take "land" for the purposes of their road, it was held that it gave them a right to remove a dwelling-house on their route.<sup>8</sup> So a railroad has a right to cut the trees growing on the strip of land which it has taken for its road, whether such trees are for shade, ornament, or fruit, and whether such cutting be at the time of laying out its track, or afterwards.<sup>9</sup>

<sup>1</sup> *Hibernia Underground R. R. Co. v. De Camp*, 47 N. J. L. 518; 54 Am. Rep. 197.

<sup>2</sup> *Baltimore etc. R. R. Co. v. North*, 28 Am. & Eng. R. R. Cas. 36; *New Jersey R. R. Co. v. Long Branch*, 39 N. J. L. 28; *Philadelphia etc. R. R. Co. v. Philadelphia*, 47 Pa. St. 325; *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *Old Colony etc. R. R. Co. v. Plymouth*, 14 Gray, 144; *Chicago etc. R. R. Co. v. Lake*, 71 Ill. 333; *Commonwealth v. Essex Co.*, 13 Gray, 239; *In re City of Buffalo*, 68 N. Y. 167; the court saying: "In determining whether a power generally given is meant to have operation upon lands already devoted, by legislative authority, to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, and the extent to which that use would be impaired or diminished, by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together with some tolerable interference, which may be compensated for

by damages paid, . . . it is not to be implied from a general power, given without having in view a then existing and particular need therefor, that the legislature meant to subject lands, devoted to a public use already in exercise, to one which might thereafter arise."

<sup>3</sup> *Armington v. Barnet*, 15 Vt. 745; 40 Am. Dec. 705.

<sup>4</sup> *Hazen v. Essex Co.*, 12 Cush. 475;

<sup>5</sup> *In re Towanda Bridge Co.*, 91 Pa. St. 216; *Red River Bridge Co. v. Mayor*, 1 Sneed, 176; 60 Am. Dec. 143.

<sup>6</sup> *Southwestern etc. R. R. Co. v. Tel. Co.*, 46 Ga. 4; 12 Am. Dec. 535; *Texas etc. R. R. Co. v. Matthews*, 60 Tex. 215.

<sup>7</sup> *Forney v. R. R. Co.*, 23 Neb. 465; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84; *Wells v. R. R. Co.*, 47 Me. 345; *Brocket v. R. R. Co.*, 14 Pa. St. 241; 53 Am. Dec. 534.

<sup>8</sup> *Brocket v. R. R. Co.*, 14 Pa. St. 241; 53 Am. Dec. 534.

<sup>9</sup> *Brainard v. Clapp*, 10 Cush. 6; 57 Am. Dec. 74.

**ILLUSTRATIONS.**—A statute authorized a railroad company to take for railroad purposes land occupied by another railroad company, and provided that all general laws relating to the taking of lands for railroad purposes should govern the proceedings. *Held*, that the statute was constitutional, although the company whose land was taken was thereby deprived of part of its business: *Eastern R. R. Co. v. R. R. Co.*, 111 Mass. 125; 15 Am. Rep. 13.

**§ 3888. Damages—In General.**—Property within the constitutional provision includes both the land itself and every right which accompanies its ownership and is incident thereto.<sup>1</sup> Damages are recoverable whenever there is a direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives it an additional value, and the plaintiff sustains a special damage in excess of that sustained by the public generally.<sup>2</sup> The constitutional remedy to secure just compensation by corporations for property "injured or destroyed" in the construction or enlargement of corporate works has relation to such injuries to one's property as are the natural and necessary result of the original construction or enlargement of its works by a corporation, and of such certain character that the damages therefor may be estimated at the time, and paid or secured in advance, as provided in the constitution. The word "injury," or "injured," as used in the constitution, is construed to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries, both corporations and individuals stand upon the same plane of responsibility.<sup>3</sup> Where part only of the plaintiff's land has been taken, the injury suffered by the part not taken must also be compensated for.<sup>4</sup> A damage to property from changing

<sup>1</sup> Mills on Eminent Domain, sec. 31; Gulf R. R. Co. v. Fuller, 63 Tex. 467; Eaton v. R. R. Co., 51 N. H. 504; 12 Am. Rep. 147; Branson v. Philadelphia, 47 Pa. St. 329; McLauchlin v. R. R. Co., 5 Rich. 583.

<sup>2</sup> Rigney v. Chicago, 102 Ill. 64.

<sup>3</sup> Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541; 4 Am. St. Rep. 659.

<sup>4</sup> See note to Winona etc. R. R. Co. v. Waldron, 11 Minn. 515, in 88 Am.

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R. Co. v. Speer, 56

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the grade of a city street is a "taking" within the constitutional requirement of compensation.<sup>1</sup> The erection of a bridge within half a mile of a ferry, tending to diminish the profits of the ferry franchise, is within the prohibition of the constitution as to the taking of private property.<sup>2</sup> The recovery may include prospective as well as past damages.<sup>3</sup>

**§ 3889. Damages — In Taking by Railroads.** — The measure of damages of a land-owner for injuries to his land by the construction of a railroad over it includes all damages, direct and consequential, present and prospective, certain and contingent, which may fairly result to the land-owner by the loss of his property and rights, and the injuries thereto.<sup>4</sup> The measure of damages for building a railroad through a man's land is the difference between the value of the land before the road was built and its value after the road is finished.<sup>5</sup> Thus damages are recoverable for the cutting and filling of land, the making of embankments and excavations;<sup>6</sup> injuries to crops;<sup>7</sup>

Dec. 113-121; *Walker v. R. R. Co.*, 103 Mass. 10; 4 Am. Rep. 509; *Johnson v. City of Boston*, 130 Mass. 452; *Edmonds v. City of Boston*, 108 Mass. 535; *Brown v. Beatty*, 34 Miss. 227; 69 Am. Dec. 389; *Dearborn v. R. R. Co.*, 24 N. H. 179; *Virginia etc. R. R. Co. v. Henry*, 8 Nev. 175; *Raleigh etc. R. R. Co. v. Wicker*, 74 N. C. 220; *Snyder v. R. R. Co.*, 25 Wis. 60; *Bigelow v. R. R. Co.*, 27 Wis. 478; *Chapman v. R. R. Co.*, 33 Wis. 629; *Washburn v. R. R. Co.*, 59 Wis. 364; *Springfield etc. R. R. Co. v. Rhea*, 44 Ark. 258; *Tonica etc. R. R. Co. v. Unsicker*, 22 Ill. 221; *St. Louis etc. R. R. Co. v. Capps*, 67 Ill. 607; *Keithsburg etc. R. R. Co. v. Henry*, 79 Ill. 290; *Wilmes v. R. R. Co.*, 29 Minn. 242; *Lake Shore etc. R. R. Co. v. R. R. Co.*, 100 Ill. 21; *Chicago etc. R. R. Co. v. Smith*, 111 Ill. 363; *Richmond etc. Road Co. v. Rogers*, 1 Duvall, 135; *Vicksburg etc. R. R. Co. v. Dillard*, 35 La. Ann. 1045; *Bangor etc. R. R. Co. v. McComb*, 60 Me. 290; *Presbrey v. R. R. Co.*, 103 Mass. 1.

<sup>1</sup> *McElroy v. Kansas City*, 21 Fed.

Rep. 257; *Johnson v. Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779; *Harmon v. Omaha*, 17 Neb. 548; 52 Am. Rep. 420; *Sheehy v. R. R. Co.*, 94 Mo. 574; 4 Am. St. Rep. 396.

<sup>2</sup> *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

<sup>3</sup> *Elizabeth etc. R. R. Co. v. Combs*, 10 Bush, 382; 19 Am. Rep. 67; *Fowle v. R. R. Co.*, 112 Mass. 334; 17 Am. Rep. 106.

<sup>4</sup> *Johnson v. R. R. Co.*, 35 N. H. 569; 69 Am. Dec. 560.

<sup>5</sup> *Hornstein v. R. R. Co.*, 51 Pa. St. 87; *Harvey v. R. R. Co.*, 47 Pa. St. 428.

<sup>6</sup> *Kansas City etc. R. R. Co. v. Story*, 96 Mo. 611; *Cummins v. R. R. Co.*, 63 Iowa, 397; *Little Rock etc. R. R. Co. v. Allen*, 41 Ark. 431; *Missouri Pacific Co. v. Hays*, 15 Neb. 224; *Republican Valley R. R. Co. v. Linn*, 15 Neb. 234; *Wilmington etc. R. R. Co. v. Stauffer*, 60 Pa. St. 374; 100 Am. Dec. 574.

<sup>7</sup> *Lance v. R. R. Co.*, 57 Iowa, 636; *Gilmore v. R. R. Co.*, 104 Pa. St. 275; *Lafferty v. R. R. Co.*, 124 Pa. St. 297; 10 Am. St. Rep. 587.

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the risk from fire;<sup>1</sup> obstruction to ingress and egress by embankments and ditches;<sup>2</sup> or by trains of cars allowed to stand upon the company's track;<sup>3</sup> the necessity for precautions to protect the owner's family and his live-stock from accident;<sup>4</sup> the inconvenience of having lands temporarily thrown open;<sup>5</sup> the smoke, dust, and noise of trains;<sup>6</sup> damages likely to result from necessary and properly executed blasting;<sup>7</sup> the fact that building and operating the railroad will interfere with the business of a mill by making it unsafe to drive horses near it, and

<sup>1</sup> The danger of negligent fire is not to be taken into consideration, because for this an action of tort will lie: *Kansas City R. R. Co. v. Kregelo*, 32 Kan. 608. But the risk of fire which may remain, after presuming that the company will take every needful precaution, constitutes an element of damage, which may be considered in the award: *Kansas City etc. R. R. Co. v. Kregelo*, 32 Kan. 608; *Texas etc. R. R. Co. v. Cella*, 42 Ark. 528; *Little Rock etc. R. R. Co. v. Allen*, 41 Ark. 431; *Keithsburg R. R. Co. v. Henry*, 79 Ill. 290; *Setzler v. R. R. Co.*, 112 Pa. St. 56; *Bangor etc. R. R. Co. v. McComb*, 60 Me. 290; *Chapman v. R. R. Co.*, 33 Wis. 629; *Pierce v. R. R. Co.*, 105 Mass. 199; *Colvill v. R. R. Co.*, 19 Minn. 283; *Curtis v. R. R. Co.*, 20 Minn. 28; *Stillman v. R. R. Co.*, 34 Minn. 420; *Adden v. R. R. Co.*, 55 N. H. 413; 20 Am. Rep. 220; *Somerville etc. R. R. Co. v. Doughty*, 22 N. J. L. 495; *In re Utica R. R. Co.*, 56 Barb. 456; *Oregon R. R. Co. v. Barlow*, 3 Or. 311. But see *contra*, holding that the damage resulting from the fear of fire to buildings and crops is too remote and speculative to be taken into account, *Rodemacher v. R. R. Co.*, 41 Iowa, 297; 20 Am. Rep. 592; *Lance v. R. R. Co.*, 57 Iowa, 639; *Fremont etc. R. R. Co. v. Whalen*, 11 Neb. 585; *Gilmore v. R. R. Co.*, 104 Pa. St. 275; *Sunbury etc. R. R. Co. v. Hummell*, 27 Pa. St. 99; *Lehigh Valley R. R. Co. v. Lazarus*, 28 Pa. St. 203; *Patten v. R. R. Co.*, 33 Pa. St. 426; 75 Am. Dec. 616; *Wooster v. R. R. Co.*, 57 Wis. 311; *Jones v. R. R. Co.*, 68 Ill. 380; *Hatch v. R. R. Co.*, 19 Ohio St. 92. In awarding

damages to the owner of lands taken for a railroad, the exposure of his remaining land and buildings to fire from the railroad engines may be taken into consideration, notwithstanding the company is by statute liable for any fire so caused; but the benefits which the owner, in common with others, derive from the railroad cannot be considered to reduce his damages: *Adden v. R. R. Co.*, 55 N. H. 413; 20 Am. Rep. 220. The owner is not entitled to compensation for the increased rates of insurance which he may have to pay because of the danger to his property from locomotives: *Patten v. R. R. Co.*, 33 Pa. St. 426; 75 Am. Dec. 612.

<sup>2</sup> *Little Rock etc. R. R. Co. v. Allen*, 41 Ark. 431; *Kansas City etc. R. R. Co. v. Story*, 96 Mo. 611; *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429; *Sherwood v. R. R. Co.*, 21 Minn. 127. But see *Cumberland Valley R. R. Co. v. Rhoadarmer*, 107 Pa. St. 214.

<sup>3</sup> *Union R. R. etc. Yard Co. v. Moore*, 80 Ind. 458; 5 Am. & Eng. R. R. Cas. 346; *Mahady v. R. R. Co.*, 91 N. Y. 148; 43 Am. Rep. 661.

<sup>4</sup> *Little Rock etc. R. R. Co. v. Allen*, 41 Ark. 431.

<sup>5</sup> *St. Louis etc. R. R. Co. v. Kirby*, 104 Ill. 345.

<sup>6</sup> *Little Rock etc. R. R. Co. v. Allen*, 41 Ark. 431; *Blue Earth Co. v. R. R. Co.*, 28 Minn. 503; 10 Am. & Eng. R. R. Cas. 209. *Contra*, *Dimmick v. R. R. Co.*, 58 Iowa, 637.

<sup>7</sup> *Dodge v. County Commissioners*, 3 Met. 380; *Brown v. R. R. Co.*, 5 Gray, 35; *Whitehouse v. R. R. Co.*, 52 Me. 208.

dangerous and inconvenient for persons going to and from it;<sup>1</sup> the inconvenience and danger of carrying on a farm divided by the railway;<sup>2</sup> the fact that the land-holder is obliged to build additional fences;<sup>3</sup> the turning of surface water upon the land, by an embankment;<sup>4</sup> the preventing the flow of surface water from one part of the farm to another.<sup>5</sup> The effects of noise, smoke, soot, and the like, are not distinct elements of damage, but in estimating the depreciation in value of the entire tract, these causes may be considered, in so far as the annoyance and inconvenience arising therefrom are increased by reason of and as an incident to the taking of a part of the land.<sup>6</sup> In assessing the damages occasioned to the owner of a message by the taking of his lands for the construction of a railroad, the depreciation of value arising from the proximity of the road and the running of trains should be considered only so far as it is due to proximity secured by means and as a result of such taking.<sup>7</sup>

But the following have been held not to be proper elements of damages, because either too remote or speculative, viz.: The liability of teams of horses to be frightened, and the probable injury to them and to persons resulting therefrom;<sup>8</sup> the increased risk to an orchard, by reason of leaving it more free of access to persons traveling along the railroad, and to tramps and employees of the railroad

<sup>1</sup> *Western Pennsylvania R. R. Co. v. Hill*, 56 Pa. St. 460.

<sup>2</sup> *McReynolds v. R. R. Co.*, 106 Ill. 152; *Peoria etc. R. R. Co. v. Sawyer*, 71 Ill. 361; *Vicksburg etc. R. R. Co. v. Dillard*, 35 La. Ann. 645.

<sup>3</sup> *Evansville R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Evansville R. R. Co. v. Stringer*, 10 Ind. 551; *Evansville R. R. Co. v. Cochran*, 10 Ind. 560; *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 74; *Louisville etc. R. R. Co. v. Glazebrook*, 1 Bush, 325; *Winona etc. R. R. Co. v. Denman*, 10 Minn. 267. But if the company is compelled by statute to construct and maintain fences, such additional cost cannot be

considered as an element of damage: *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100.

<sup>4</sup> *Walker v. R. R. Co.*, 103 Mass. 10; 4 Am. Rep. 509; *Wichita etc. R. R. Co. v. Kuhn*, 38 Kan. 104; *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

<sup>5</sup> *Pflegar v. R. R. Co.*, 28 Minn. 510.

<sup>6</sup> *Walker v. R. R. Co.*, 103 Mass. 10; 4 Am. Rep. 509.

<sup>7</sup> *Walker v. R. R. Co.*, 103 Mass. 10; 4 Am. Rep. 509.

<sup>8</sup> *Guess v. R. R. Co.*, 72 Ga. 320; *Atchison etc. R. R. Co. v. Lyon*, 24 Kan. 745. *Contra*, *Wooster v. R. R. Co.*, 57 Wis. 311.

company;<sup>1</sup> the possibility of future changes in the plans of the company taking the land;<sup>2</sup> an injury to personalty or the cost of removing it from the land taken;<sup>3</sup> inconvenience and delay by having to convey his manufactures across the railroad and by reason of the obstruction of trains passing along it;<sup>4</sup> loss resulting to the owner from the removal of an embankment built by the company;<sup>5</sup> or from the obstruction of a public highway.<sup>6</sup>

§ 3890. **Damages — Incidental Injuries.** — For mere incidental or consequential injuries suffered by a person from the taking of property for public use, no compensation is recoverable.<sup>7</sup> The law makes no provision for compensation for an injury occasioned by the construction of a road to any person from whom no land, estate, or materials are taken.<sup>8</sup> A railroad company which constructs its road in a prudent and reasonable manner is not liable to individuals for consequential damages to their premises caused by the building of an embankment upon an adjoining public highway which such railroad crosses.<sup>9</sup> But in some states it is held that where the construction or operation of a railroad or other public work results in damage, though only consequential, damages are recoverable.<sup>10</sup> Where a railroad company has been

<sup>1</sup> *Kansas City etc. R. R. Co. v. Kregelo*, 32 Kan. 608.

<sup>2</sup> *Russell v. R. R. Co.*, 33 Minn. 210.

<sup>3</sup> *In re New York Central etc. R. R. Co.*, 35 Hun, 306; *In re New York etc. R. R. Co.*, 35 Hun, 633.

<sup>4</sup> *Patten v. R. R. Co.*, 33 Pa. St. 426; 75 Am. Dec. 612.

<sup>5</sup> *Wabash etc. R. R. Co. v. McDougall*, 126 Ill. 111; 9 Am. St. Rep. 539.

<sup>6</sup> *Gear v. R. R. Co.*, 43 Iowa, 83.

<sup>7</sup> *In Cooley on Constitutional Law*, 338, the author says: "Loss to some one is almost a necessary incident of any exercise of governmental authority; a tax law cannot be changed, a street opened or graded, a county seat changed, a new town set off from an old, or anything else of public importance done, without injurious conse-

quences falling upon some one. But the loss is *damnum absque injuria*."

<sup>8</sup> *Whittier v. R. R. Co.*, 38 Me. 26;

*Rochette v. R. R. Co.*, 32 Minn. 201;

*Richardson v. R. R. Co.*, 25 Vt. 465;

60 Am. Dec. 283; *Struthers v. R. R. Co.*, 87 Pa. St. 282; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325;

94 Am. Dec. 84; *Radcliff v. Brooklyn*,

4 N. Y. 195; 53 Am. Dec. 357; *In re Philadelphia R. R. Co.*, 6 Whart. 25;

36 Am. Dec. 202.

<sup>9</sup> *Rogers v. R. R. Co.*, 35 Me. 319.

<sup>10</sup> *Richardson v. R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283.

<sup>11</sup> *Chicago etc. R. R. Co. v. Ayres*,

108 Ill. 511; *Dearborn v. R. R. Co.*,

24 N. H. 179; *Republican Valley R. R. Co. v. Fellows*, 16 Neb. 169; *Brown v. R. R. Co.*, 71 Mass. 35.

authorized by law to lay its tracks in the streets of a city, an abutting owner cannot maintain an action against such company upon an allegation that its track was laid so near his premises as not to leave sufficient space for a vehicle to stand; that he and his family are thereby incommoded in leaving their residence and returning to it; and that the rental value of his property is thereby greatly depreciated.<sup>1</sup> This, of course, does not exclude the right of recovery for damages accruing by reason of the work having been negligently or wantonly done; for "all the authorities concur that an injury to private rights or property, committed through negligence or willful misconduct, even though in pursuit of a lawful purpose, may be redressed by an action."<sup>2</sup> Thus where a corporation, authorized to build a railway upon a line selected by themselves, and to cross public highways, restoring them to their original usefulness, in crossing a highway near the plaintiff's premises, raised an embankment which obstructed free access to and otherwise injured his property, they were held liable for the damages.<sup>3</sup>

ILLUSTRATIONS. — The state constructed a canal near a river. This caused a change in the flow of the waters of the river, so that land on the side opposite to the canal was injured. *Held*, that for such a consequential injury the state was not liable under the constitutional prohibition against the taking of private property for public use without compensation: *Green v. State*, 73 Cal. 29. A party has two or more distinct and separate, but adjoining, farms, through but one of which a railroad passes. *Held*, that he cannot be allowed compensation for damages to the adjoining farm, for injury claimed to have resulted from the construction of the road: *Minnesota Valley R. R. Co. v. Doran*, 15 Minn. 230. A railroad company erected upon property owned by it in fee, and fronting on one side of a street, a viaduct, or elevated roadway, and railroad thereon, and operated it for the transportation of passengers and freight by steam. In consequence of the noise, smoke, and dust arising from the use of the engines and cars, and neces-

<sup>1</sup> *Kellinger v. R. R. Co.*, 50 N. Y. 206; *Tate v. R. R. Co.*, 64 Mo. 206.

<sup>2</sup> *Kellinger v. R. R. Co.*, 50 N. Y. 206. <sup>3</sup> *Fletcher v. R. R. Co.*, 25 Wend. 462.

sarily incident to the use of the property as a steam-railroad, injury was done to the plaintiff's property on the opposite side of the street, no part of which property, or any right of way, or other appurtenance thereunto belonging, had been taken or used in the erection or construction of the road. In an action on the case to recover damages for such injuries, *held*, that the court's instruction to the jury that the plaintiff was entitled to recover, and that the legal measure of damages was the difference between the market value of the property before the railroad was built and its market value after the completion of the structure, was erroneous: *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472; 2 Am. St. Rep. 618.

**§ 3891. The Interest Appropriated.** — When land is taken for a public use the fee is not in general appropriated, but an easement only is taken, and the easement consists in the right to make use of the land for the particular purpose, and for no other. When, under such circumstances, the use ceases, the owner is restored to his former estate.<sup>1</sup> The general rule in this country is, that railroad companies, by virtue of their compulsory powers in taking lands, acquire no absolute fee-simple, but only the right to use the lands for their purposes; and where compensation is to be made for the value of the use appropriated, in estimating such value, what, if anything, would be left to the land-owner of value, consistent with the enjoyment of the easement by the railroad company, should also be considered.<sup>2</sup>

**§ 3892. New Use.** — If, after the land has been taken for a public purpose, it becomes important to make use of it for any other public use than that to which it was devoted by the first appropriation, and this is done, the original owner becomes entitled to a new assessment of compensation.<sup>3</sup> It is a new use where a highway is afterwards taken for a steam-railroad.<sup>4</sup> So is the laying of

<sup>1</sup> Cooley on Constitutional Law, 338; Kansas Cent. R. R. Co. v. Allen, 22 Kan. 285; 31 Am. Rep. 190.

<sup>2</sup> Alabama etc. R. R. Co. v. Burkett, 42 Ala. 83.

<sup>3</sup> Cooley on Constitutional Law, 338.

<sup>4</sup> Imlay v. R. R. Co., 26 Conn. 249; 68 Am. Dec. 392; Wager v. R. R. Co., 25 N. Y. 526; Cooley on Constitu-

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R. Co., 64 Mo.  
Co., 25 Wend. 462.

underground gas-pipes in a country highway.<sup>1</sup> It is not a new use where land taken for a highway is afterwards taken for a plank road or a turnpike road;<sup>2</sup> nor where a city street is afterwards appropriated for a street railroad,<sup>3</sup> or for telegraph poles.<sup>4</sup> Where land is taken for a city street, it is taken for all the purposes to which city streets are usually devoted; for sewers, and the laying of water, gas, and steam pipes, as well as for passage of men and teams, and for all such improved methods of passage and carriage as may come into use, and as may not be inconsistent with the enjoyment of the way for other customary uses.<sup>5</sup>

**§ 3893. What not Included in Assessment of Damages.**

— The damages recoverable in eminent domain proceed-

tional Limitations, 547; Dillon on Municipal Corporations, sec. 704; Davis v. Mayor of New York, 14 N. Y. 507; 67 Am. Dec. 186; Williams v. R. R. Co., 16 N. Y. 97; 69 Am. Dec. 651; Bloomfield Gas Co. v. Calkins, 62 N. Y. 386; Hinchman v. R. R. Co., 17 N. J. Eq. 75; 86 Am. Dec. 252; Starr v. R. R. Co., 24 N. J. L. 599; Eaton v. R. R. Co., 51 N. H. 504; 12 Am. Rep. 147; Elliott v. R. R., 32 Conn. 580; South Carolina R. R. Co. v. Steiner, 44 Ga. 546; Indianapolis etc. R. R. Co. v. Hartley, 67 Ill. 439; Cox v. R. R. Co., 48 Ind. 178; Kucheman v. R. R. Co., 46 Iowa, 366; Southern Pacific R. R. Co. v. Reed, 41 Cal. 256; R. R. Co. v. Scumeirer, 7 Wall. 289; 48 Ind. 178; Stone v. R. R. Co., 68 Ill. 394; 18 Am. Rep. 556; Cook v. R. R. Co., 30 Iowa, 94; 6 Am. Rep. 649; Perry v. R. R. Co., 55 Ala. 413; 28 Am. Rep. 740; Jersey City R. R. Co. v. R. R. Co., 20 N. J. Eq. 61. Or an elevated railroad: Story v. R. R. Co., 90 N. Y. 122; 43 Am. Rep. 146. *Contra*, In re Philadelphia etc. R. R. Co., 6 Whart. 25; 36 Am. Dec. 202. *Aliter* where the owner does not own the fee: Grand Rapids etc. R. R. Co. v. Heisel, 38 Mich. 62; 31 Am. Rep. 306; Stetson v. R. R. Co., 75 Ill. 74.

<sup>1</sup> Sterling's Appeal, 111 Pa. St. 35; 56 Am. Rep. 247.

<sup>2</sup> Murray v. Commissioners, 12 Met. 455.

<sup>3</sup> Elliott v. R. R. Co., 32 Conn. 579; People v. Kerr, 27 N. Y. 186; Milhan v. Sharp, 15 Barb. 201; Cincinnati etc. R. R. Co. v. Cummins, 14 Ohio St. 523; South Carolina R. R. Co. v. Steiner, 44 Ga. 546; Peddicord v. R. R. Co., 44 Md. 463; Barney v. Keokuk, 94 U. S. 324; Attorney-General v. R. R. Co., 125 Mass. 515; 28 Am. Rep. 264; Newell v. R. R. Co., 35 Minn. 112; 59 Am. Rep. 303; Hinchman v. R. R. Co., 17 N. J. Eq. 75; 86 Am. Dec. 252; Jersey City etc. R. R. Co. v. R. R. Co., 20 N. J. Eq. 61; Hiss v. R. R. Co., 52 Md. 242; 36 Am. Rep. 371; West Jersey R. R. Co. v. R. R. Co., 34 N. J. Eq. 164. A horse-railroad may not be laid in a city street solely as a freight-transfer track between two steam-railroads without compensation to the adjoining land-owners; and this is so although the street is on land made by filling below low-water mark in a navigable river or lake: Carli v. R. R. Co., 28 Minn. 373; 41 Am. Rep. 290.

<sup>4</sup> Pierce v. Drew, 136 Mass. 75; 49 Am. Rep. 7. *Contra*, Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; 47 Am. Rep. 453.

<sup>5</sup> Cooley on Constitutional Law, 340.

It is not afterwards or where a street rail-taken for a which city e laying of sage of men s of passage may not be or other cus-

ings to acquire a right of way for a railroad are such as may result from building and operating the road in a reasonably proper and skillful manner, so as to avoid the infliction of all loss and injury not necessarily resulting from thus building and operating the road. Hence, if the road is not so built or operated, the owner of the land at the time of any injury accruing from the want of proper skill and care may recover therefor.<sup>1</sup> The assessment of damages against a railroad for taking land does not include damages occasioned to the owner by the diversion by the railroad of a natural stream.<sup>2</sup>

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ILLUSTRATIONS.—A person released a railroad corporation from all claim of damages on account of the construction of the road over his land. *Held*, not to operate against his claim for damages resulting from the road's being built over the land of another: *Eaton v. R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147.

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#### § 3894. Who Entitled to Compensation—"Owner."—

Every one having an interest in the property taken, which will be impaired by the taking, is included in the term "owner," and is entitled to compensation.<sup>3</sup> Thus the following are included: Homesteaders upon public lands;<sup>4</sup> vendors of lands not yet conveyed;<sup>5</sup> holders of bonds for

Co., 32 Conn. 579; N. Y. 188; Milhan 101; Cincinnati etc. nsville, 14 Ohio St. R. R. Co. v. Steiner, ord v. R. R. Co., 44 Keokuk, 94 U. S. ral v. R. R. Co., 125 Rep. 264; Newell inn. 112; 59 Am. an v. R. R. Co., 17 n. Dec. 252; Jersey v. R. R. Co., 20 N. R. R. Co., 52 Md. 71; West Jersey R. Co., 34 N. J. Eq. 164. may not be laid in a s a freight-transfer wo steam-railroads tion to the adjoin- and this is so et is on land made w-water mark in a lake: Carli v. R. R. 373; 41 Am. Rep.

<sup>1</sup> Ohio etc. R. R. Co. v. Wachter, 123 Ill. 440; 5 Am. St. Rep. 532.

<sup>2</sup> Stodghill v. R. R. Co., 43 Iowa, 26; 22 Am. Rep. 211.

<sup>3</sup> Mills on Eminent Domain, sec. 65; Dietrichs v. R. R. Co., 14 Neb. 355; Tompkins v. R. R. Co., 21 S. C. 420; State v. Runyon, 24 N. J. L. 256; Rentz v. Detroit, 48 Mich. 544; Ex parte Jennings, 6 Cow. 518; 16 Am. Dec. 447; Ashby v. R. R. Co., 5 Met. 368; 38 Am. Dec. 426. Damages assessed for the value of land taken for a railroad, though a trespasser was in possession at the time and claimed the damages, should be paid to the owner: Rooney v. R. R. Co., 6 Cal. 638. Proceedings to condemn lands for use of a corporation, in virtue of the right of eminent domain, do not involve the question of title to the land. The petitioners must ascertain the true

owner of the land they wish to acquire, and make him a party; and the petition assumes his title. He, in turn, is not called upon to prove his title; it stands conceded. The commissioners have no jurisdiction of the question of title,—only of that of damages: Peoria etc. R. R. Co. v. Laurie, 63 Ill. 264.

<sup>4</sup> Burlington etc. R. R. Co. v. Johnson, 38 Kan. 142.

<sup>5</sup> New York etc. R. R. Co. v. Stanley, 34 N. J. L. 55; Ten Brooke v. Jahke, 77 Pa. St. 392; Milwaukee etc. R. R. Co. v. Strange, 63 Wis. 178; Pomeroy v. R. R. Co., 25 Wis. 641; Allyn v. R. R. Co., 4 R. I. 457; McLendon v. R. R. Co., 54 Ga. 293; Verdier v. R. R. Co., 15 S. C. 476; Galveston etc. R. R. Co. v. Pfeuffer, 56 Tex. 66; Indiana etc. R. R. Co. v. Allen, 100 Ind. 409.

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deeds;<sup>1</sup> landlords and tenants; lessors and lessees;<sup>2</sup> the holders of equitable interests;<sup>3</sup> *cestuis que trust*;<sup>4</sup> executors of active trusts;<sup>5</sup> mortgagors and mortgagees;<sup>6</sup> mortgagees of leaseholds;<sup>7</sup> owners of easements;<sup>8</sup> owners of private ways<sup>9</sup> and of rights in public common;<sup>10</sup> married women with separate estates;<sup>11</sup> owners of reversionary interests;<sup>12</sup> tenants for life;<sup>13</sup> remaindermen;<sup>14</sup> residuary legatees;<sup>15</sup> heirs;<sup>16</sup> widows in whom the right of dower has vested;<sup>17</sup> persons having divided interests.<sup>18</sup> But mere inchoate rights are not included; as rights of dower and curtesy, the husband or wife being yet alive;<sup>19</sup> and judgment liens, or liens by attachment upon mesne process;<sup>20</sup> or a licensee under a parol license from the owner;<sup>21</sup> or a person who is in possession of one of several tracts, but who has no title thereto or interest therein (the land belonging to the

<sup>1</sup> St. Louis R. R. Co. v. Wilder, 17 Kan. 239; Bird v. R. R. Co., 34 L. J. Com. P. 366; Tasker v. Small, 7 L. J. Ch. 19; Wiley v. R. R. Co., 18 L. J. Ch. 201.

<sup>2</sup> Commissioners v. Wood, 10 Pa. St. 93; 49 Am. Dec. 582; Baltimore etc. R. R. Co. v. Thompson, 10 Md. 76; Biddle v. Hussman, 23 Mo. 597; Lawrence v. Boston, 119 Mass. 126; Cobb v. Boston, 109 Mass. 438; Parks v. Boston, 15 Pick. 198; Pennsylvania R. R. Co. v. Eby, 107 Pa. St. 166; Getz v. R. R. Co., 105 Pa. St. 547; North Pennsylvania R. R. Co. v. Davis, 26 Pa. St. 238; Frost v. Earnest, 4 Whart. 86; Snell v. R. R. Co., 3 Utah, 192.

<sup>3</sup> Sennott v. R. R. Co., 59 Vt. 226; Martin v. R. R. Co., 35 L. J. Ch. 795; L. R. 1 Eq. 145.

<sup>4</sup> Reed v. R. R. Co., 105 Mass. 303.

<sup>5</sup> People v. Robinson, 29 Barb. 77.

<sup>6</sup> Adams v. R. R. Co., 57 Vt. 240, 660; Platt v. Bright, 29 N. J. Eq. 128; Cool v. Crommet, 13 Me. 250; Breed v. Gray, 5 Gray, 470, note; Sherwood v. Lafayette, 109 Ind. 411; 58 Am. Rep. 414.

<sup>7</sup> Astor v. Hoyt, 5 Wend. 603; Hagar v. Brainard, 44 Vt. 294.

<sup>8</sup> East Pennsylvania R. R. Co. v. Schollenberger, 54 Pa. St. 144; Eaton v. R. R. Co., 51 N. H. 504; 12 Am. Rep. 147; Thompson v. Androscoggin

Co., 54 N. H. 545; In re Boston etc. R. R. Co., 31 Hun, 461.

<sup>9</sup> Philadelphia R. R. Co. v. Williams, 54 Pa. St. 103.

<sup>10</sup> Bell v. R. R. Co., 1 Grant Cas. 105.

<sup>11</sup> Tennessee R. R. Co. v. Love, 3 Head, 63; State v. Hulick, 33 N. J. L. 307.

<sup>12</sup> Hollingsworth v. R. R. Co., 63 Iowa, 443.

<sup>13</sup> Colcough v. R. R. Co., 2 Head, 171; Burbridge v. R. R. Co., 9 Ind. 546; Harrisburg v. Crangle, 3 Watts & S. 460.

<sup>14</sup> Bentonville R. R. Co. v. Baker, 45 Ark. 252.

<sup>15</sup> Shelton v. Derby, 27 Conn. 414.

<sup>16</sup> Boonville v. Ormrod's Admr, 26 Mo. 193.

<sup>17</sup> New Orleans R. R. Co. v. Frederick, 46 Miss. 1; Columbia Bridge Co. v. Geisse, 35 N. J. L. 558.

<sup>18</sup> Galveston etc. R. R. Co. v. Pfeuffer, 56 Tex. 66.

<sup>19</sup> McCracken v. Hayward, 2 How. 608; Towne v. Smith, 1 Wood. & M. 134; Lawrence v. Miller, 2 N. Y. 245; Moore v. New York, 4 Sand. 456; 8 N. Y. 110; 59 Am. Dec. 473; Watson v. R. R. Co., 47 N. Y. 157.

<sup>20</sup> Wood's Railway Law, 866; Watson v. R. R. Co., 47 N. Y. 157; Chicago etc. R. R. Co. v. Chamberlain, 84 Ill. 333.

<sup>21</sup> Clapp v. Boston, 133 Mass. 367.

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United States).<sup>1</sup> Where a statute requires the permission of the "owner" of land before a railroad company may enter thereupon, it is sufficient if the consent of the person having control of the land as an executor be obtained;<sup>2</sup> but a guardian cannot grant a right of way over the land of his ward.<sup>3</sup> Neither can a right of way be conveyed by the equitable owner, nor by a person having only a contingent interest.<sup>4</sup> The right of the remainderman to damages for land appropriated by a railroad company for a right of way cannot be impaired by a tenant for life.<sup>5</sup>

§ 3895. **Mode of Assessment.**—The right of eminent domain is conditioned on making compensation.<sup>6</sup> The legislature cannot take itself, or authorize the taking of, private property for public uses without providing for compensation to the owner.<sup>7</sup> The state has no right to determine for itself the amount of compensation; it must

<sup>1</sup> Rosa v. R. R. Co., 18 Kan. 124.

<sup>2</sup> Tompkins v. R. R. Co., 21 S. C. 420.

<sup>3</sup> Ind. etc. R. R. Co. v. Allen, 100 Ind. 409.

<sup>4</sup> Tapert v. R. R. Co., 50 Mich. 267.

<sup>5</sup> Bentonville etc. R. R. Co. v. Baker, 45 Ark. 252.

<sup>6</sup> Stewart v. Supervisors, 30 Iowa, 9; 1 Am. Rep. 238; Southwestern R. R. Co. v. South. Tel. Co., 46 Ga. 43; 12 Am. Rep. 585; State v. Graves, 19 Md. 351; 81 Am. Dec. 639; Nevins v. Peoria, 41 Ill. 502; 89 Am. Dec. 392. An order putting plaintiff in possession of lands pending proceedings for their condemnation is void: Coburn v. Goodall, 72 Cal. 498; 1 Am. St. Rep. 75.

<sup>7</sup> Gardner v. Newburgh, 2 Johns. Ch. 161; 7 Am. Dec. 527; McCauly v. Weller, 12 Cal. 529; Ex parte Jennings, 6 Cow. 518; 16 Am. Dec. 447; Forsythe v. Ellis, 4 J. J. Marsh. 298; 20 Am. Dec. 219; Baker v. Boston, 12 Pick. 184; 24 Am. Dec. 421; Attorney-General v. Stevens, 1 N. J. Eq. 369; 22 Am. Dec. 527; Beekman v. R. R.

Co., 3 Paige, 45; 22 Am. Dec. 679; Cooper v. Williams, 4 Ohio, 253; 22 Am. Dec. 745; Scudder v. Trenton etc. Falls Co., 1 N. J. Eq. 694; 23 Am. Dec. 756; Hooker v. New Haven Co., 14 Conn. 146; 36 Am. Dec. 477; Ex parte Martin, 13 Ark. 198; 58 Am. Dec. 321; Ward v. Peck, 49 N. J. L. 42; Hall v. Boyd, 14 Ga. 1; Royston v. Royston, 21 Ga. 161; Nesbitt v. Trumbo, 39 Ill. 110; 39 Am. Dec. 290; Bruning v. New Orleans etc. Banking Co., 12 La. Ann. 541; Hoyer v. Swan, 5 Md. 237; Dickey v. Tennison, 27 Mo. 373; Concord R. R. v. Greely, 17 N. H. 47; Dunham v. Williams, 36 Barb. 136; Grim v. Weissenberg S. Dist., 57 Pa. St. 433; 98 Am. Dec. 237. But this is only essential where private property is taken: Penn. R. R. Co. v. R. R. Co., 23 N. J. Eq. 157. A statute which provides that where a highway is laid out across a railroad, the railroad company shall pay for the approaches, is unconstitutional in permitting private property to be taken without just compensation: Chicago and Grand Trunk R. R. Co. v. Hough, 61 Mich. 507.

provide a tribunal for such purpose.<sup>1</sup> But the mode of assessment of damages is within the discretion of the legislature, which may provide for their assessment by commissioners.<sup>2</sup> The commissioners should be fair and impartial men, indifferently chosen between the parties.<sup>3</sup> The commissioners are judges of the law as well as of the facts.<sup>4</sup> It is provided in most of the states that an attempt shall first be made to agree with the owner upon compensation, and when this fails the compensation may be assessed by some statutory tribunal. Under such statutes, where the petition fails to show an inability to agree with the land-owner as to the compensation to be paid, and it does not appear that any effort was made to purchase or agree on the compensation or price to be paid for the land sought to be taken, it will be insufficient to give the court jurisdiction, or to entitle the petitioner to the right of condemnation.<sup>5</sup> The obligation to make such effort is imperative, and a condition precedent to the exercise of the right of eminent domain. Therefore, when property is condemned without any such effort having been made,

<sup>1</sup> *Rich v. Chicago*, 59 Ill. 26; *Power's Appeal*, 29 Mich. 504; *County Court v. Griswold*, 58 Mo. 175; *Penn. R. R. Co. v. R. R. Co.*, 60 Md. 263. A statute authorizing the manager of a railroad owned by the commonwealth to take land for a passenger-station for the use of that and other railroads, and providing no other mode of compensation to the owner of the land so taken than that such land shall be paid for from the earnings of the railroad owned by the commonwealth, is unconstitutional, even if such earnings will probably be sufficient to meet all claims for land damages: *Connecticut River R. R. Co. v. Franklin County Comm'rs*, 127 Mass. 50; 34 Am. Rep. 338. So a statute allowing bond for damages for taking private property for public use is unconstitutional; the bond is not "just compensation": *Vilhac v. R. R. Co.*, 53 Cal. 208.

<sup>2</sup> And such a statute does not impair the right to trial by jury: *Livingston*

*v. Mayor*, 8 Wend. 85; 22 Am. Dec. 622; *Beekman v. R. R. Co.*, 3 Paige, 45; 22 Am. Dec. 679; *Scudder v. Trenton etc. Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756; *Willyard v. Hamilton*, 7 Ohio, 111; 30 Am. Dec. 195; *Hickox v. Cleveland*, 8 Ohio, 543; 32 Am. Dec. 730. A constitution which contains no express provision as to how compensation for private property taken for public use shall be ascertained and paid operates to give the legislature discretionary power to regulate the mode. But this is not an unlimited discretion. The owner of property taken has a right to require that an impartial tribunal shall be created, and an opportunity for hearing his claims afforded: *Langford v. Ramsey County*, 16 Minn. 375.

<sup>3</sup> *Powers v. Bears*, 12 Wis. 213; 78 Am. Dec. 733.

<sup>4</sup> *Port Huron and Southwestern R. Co. v. Voorheis*, 50 Mich. 506.

<sup>5</sup> *Reed v. R. R. Co.*, 126 Ill. 48.

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the proceedings are utterly void.' The constitutional provision that "private property shall not be taken for public uses without just compensation" does not prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual as the incipient proceeding to the acquisition of a title to it, or to an easement in it for a public use, although such occupation may be more or less injurious to the owner. But such occupation becomes unlawful, unless the title or the easement is acquired within a reasonable time; otherwise the occupiers become trespassers *ab initio*.<sup>2</sup>

The procedure in the condemnation of property and the assessment of damages under the eminent-domain laws is regulated by the statute of the different states, whose provisions are varied in their character, and cannot be set out in this place. It is universally held, however, that all the requisites of the statutes to the exercise of the power must be performed, and all the steps required by the statute must be taken.<sup>3</sup> Nevertheless a substantial compliance therewith is sufficient.<sup>4</sup> Where the charter of a railroad corporation contains a provision as to the manner of condemning land for its right of way, the method pointed out by such provision, and not that prescribed by the general law, must be followed.<sup>5</sup> Proceedings for condemnation must be brought in the county in which the land is located.<sup>6</sup> The land-owner is entitled to notice;<sup>7</sup>

<sup>1</sup> Leslie v. St. Louis, 47 Mo. 474; Anderson v. St. Louis, 47 Mo. 479; Beauvais v. St. Louis, 47 Mo. 487; Nicholson v. St. Louis, 47 Mo. 499.

<sup>2</sup> Nichols v. R. R. Co., 43 Me. 356.

<sup>3</sup> Detroit etc. Co. v. Highway Coms., 34 Mich. 37; Adams v. R. R. Co., 10 N. Y. 328; O'Hara v. R. R. Co., 25 Pa. St. 445; Wilson v. Lynn, 119 Mass. 117; Pennsylvania R. R. Co. v. Porter, 29 Pa. St. 165; Blaisdell v. Winthrop, 118 Mass. 138; Whiteman v. R. R. Co., 2 Harr. (Del.) 514; 33 Am. Dec. 411; White v. R. R. Co., 7 Heisk. 518; Lund v. New Bedford, 121 Mass. 286; Wamesit Power Co. v. Allen, 120 Mass. 352; Leung v. R. R. Co., 8 Watts

& S. 458; Sharp v. Johnson, 4 Hill, 92; 40 Am. Dec. 259.

<sup>4</sup> Indianapolis etc. R. R. Co. v. Christian, 93 Ind. 360; Shields v. McMahan, 101 Ind. 591; Heick v. Voight, 110 Ind. 279; McCollister v. Shuey, 24 Iowa, 362; State v. Pitman, 38 Iowa, 252; Stevens v. Board of Supervisors, 41 Iowa, 341; Townsend v. R. R. Co., 91 Ill. 545; Byron v. Blount, 97 Ill. 62; Raymond v. Comm'rs, 63 Me. 112.

<sup>5</sup> Norfolk Southern R. R. Co. v. Ely, 95 N. C. 77.

<sup>6</sup> Missouri Pacific R. R. Co. v. Carter, 85 Mo. 448.

<sup>7</sup> Tracey v. R. R. Co., 80 Ky. 259; Atlantic etc. R. R. Co. v. Cumberland

and condemnation proceedings had without notice may be set aside on *certiorari*.<sup>1</sup> The legislature, however, may provide for constructive notice by publication.<sup>2</sup>

The damages arising from the appropriation of land, whether prospective or otherwise, must all be recovered in one action.<sup>3</sup> The jury should consider, and the land-owners should lay before them, all the consequences of the appropriation of the land in the manner in which the company will use it; and it is the business of the jury to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railroad company. The company cannot be required to resort to a new condemnation whenever some new expenditure is to be made or change effected, unless it is something so plainly repugnant to or varying from the purpose originally contemplated as to amount to a change of user.<sup>4</sup> The damages should be ascertained under the laws in force at the time the proceedings are begun.<sup>5</sup> The proceedings fix the price at which, upon actual payment, the company may take it, and it must be taken and the terms accepted within a reasonable time, for if there is a great enhancement of price between the time of assessment and acceptance, the owner may have the right to demand a reassessment.<sup>6</sup> A vested right to the damages assessed does not exist until the final confirmation of the commissioners' report.<sup>7</sup>

County Comm'rs, 51 Me. 36; Reitenbaugh v. R. R. Co., 21 Pa. St. 100; Baltimore etc. R. R. Co. v. R. R. Co., 17 W. Va. 812; Burns v. R. R. Co., 8 Saw. 543; Union Pacific R. R. Co. v. R. R. Co., 29 Fed. Rep. 728; Powers v. Bears, 12 Wis. 213; 78 Am. Dec. 733.

<sup>1</sup> Case v. Thompson, 6 Wend. 634; People v. Supervisors, 36 How. Pr. 544; State v. Jersey City, 25 N. J. L. 309; Seifert v. Brooks, 34 Wis. 443; Stone v. Boston, 2 Met. 220; Wood v. Comm'rs, 62 Ill. 391; Atlantic R. R. Co. v. Comm'rs, 51 Me. 36; Ware v. Comm'rs, 38 Me. 402; Anderson v. Taberville, 6

Cold. 150; Skinner v. Lake View Ave. Co., 57 Ill. 151; Joliet R. R. Co. v. Barrows, 24 Ill. 562.

<sup>2</sup> St. Paul etc. R. R. Co. v. Minneapolis, 35 Minn. 141; 24 Am. & Eng. R. R. Cas. 309.

<sup>3</sup> Indiana etc. R. R. Co. v. Allen, 113 Ind. 398; 3 Am. St. Rep. 650.

<sup>4</sup> Barnes v. R. R. Co., 65 Mich. 251.

<sup>5</sup> Emerson v. R. R. Co., 75 Ill. 176.

<sup>6</sup> Gear v. R. R. Co., 20 Iowa, 523; 89 Am. Dec. 550.

<sup>7</sup> Matter of Anthony Street, 20 Wend. 618; 32 Am. Dec. 608.

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§ 3896. **Measure of Damages.**—The rule of valuation of property appropriated for public use is not what it is worth for the purpose to which it is devoted, or for any other particular purpose, but what it is worth generally, for any and all of its natural and legitimate uses.<sup>1</sup> For land actually taken under the power of eminent domain, the measure of damages is its cash market value,<sup>2</sup> by this term being meant the price he could obtain after reasonable and ample time taken to effect a sale.<sup>3</sup> The owner

<sup>1</sup> Goodin v. Canal Co., 18 Ohio St. 169; 98 Am. Dec. 95.

<sup>2</sup> Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381; 4 Am. St. Rep. 51; Virginia etc. R. R. v. Henry, 8 Nev. 165; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Low v. R. R. Co., 63 N. H. 557; King v. R. R. Co., 32 Minn. 224.

<sup>3</sup> Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381; 4 Am. St. Rep. 51. And the value is estimated as of the time of the taking: In re Albany Street, 11 Wend. 149; 25 Am. Dec. 618; Stafford v. Providence, 10 R. I. 567; 14 Am. Rep. 710; Parks v. Boston, 15 Pick. 198; 19 Am. Dec. 322; Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381; 4 Am. St. Rep. 51; Morin v. R. R. Co., 30 Minn. 100; Young v. Harrison, 17 Ga. 30; Cook v. Comm'rs, 61 Ill. 115; Dupuis v. Chicago, 115 Ill. 97; Logansport etc. R. R. Co. v. Buchanan, 52 Ind. 163; Calumet etc. R. R. Co. v. Moore, 124 Ill. 329; Vanblaricum v. State, 7 Blatchf. 209; Ind. Cent. R. R. Co. v. Hunter, 8 Ind. 74; Reed v. R. R. Co., 105 Mass. 303; First Baptist Soc. v. Fall River, 119 Mass. 95; Isom v. R. R. Co., 36 Miss. 300; Schuylkill Nav. Co. v. Thoburn, 7 Serg. & R. 410; Texas etc. R. R. Co. v. Matthews, 60 Tex. 215; Sweeney v. United States, 62 Wis. 396. Its prior value is irrelevant: Texas etc. R. R. Co. v. Cella, 42 Ark. 528. The rule generally adopted is that the damages should be assessed as of the date of filing the location: Hampden etc. Co. v. R. R. Co., 124 Mass. 118; Old Colony R. R. Co. v. Miller, 125 Mass. 1; Davidson v. R. R. Co., 3 Cush. 91; Boynton v. R. R. Co., 4 Cush. 467. Or petition for con-

demnation: Logansport etc. R. R. Co. v. Buchanan, 52 Ind. 163; Burt v. Merchants' Ins. Co., 115 Mass. 1. But in some states damages are assessed as of the date of filing the award by the commissioners appointed to assess the damages: Winona etc. R. R. Co. v. Denman, 10 Minn. 267; Blue Earth County v. R. R. Co., 28 Minn. 503; Morin v. R. R. Co., 30 Minn. 100. Metler v. R. R. Co., 37 N. J. L. 222. In some states, where there has been an actual entry on the land before the commencement of any legal proceedings, damages have been assessed as of the date of such entry: Daniels v. R. R. Co., 41 Iowa, 52; Edwards v. Boston, 108 Ill. 535; Sweeney v. United States, 62 Wis. 396. But the better rule seems to be to assess the damages as of the time of legal proceedings: Hampden etc. Co. v. R. R. Co., 124 Mass. 118; Morin v. R. R. Co., 30 Minn. 100. "The fact that a railroad company has, in advance of proper condemnation proceedings, committed a trespass and wrongfully taken possession of the land, gives it no right to insist that such proceedings subsequently instituted shall relate back to the date of the trespass": Blue Earth County v. R. R. Co., 28 Minn. 503. In an Illinois case, under a statute which provided that certain lands should be converted into a public park when they should have been acquired, it was claimed that the passage of the act constituted a taking for the purpose of assessing damages. The court said: "The legislature has not the power, by mere declaration of law, to set apart the land of the citizen for the use of corporations, and divest the owner of the right to sell

cannot be compelled to accept the amount at which it is assessed for taxation,<sup>1</sup> nor the price which it would probably bring at a forced sale,<sup>2</sup> nor is the value to be determined by the price paid therefor by the owner.<sup>3</sup>

The award is not limited to its value for cultivation or habitation.<sup>4</sup> Its adaptability to any peculiar use to which it may have been applied, or its prospective value with reference to any use to which it might otherwise be peculiarly suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future, are proper elements to consider.<sup>5</sup> If lots condemned for public use are available

and improve it. It cannot, by arbitrary enactment, take property for public use, and limit the owner's right to recover compensation to the date of the law, when the property might greatly enhance in value between the passage of the law and the time when proceedings to condemn are commenced": *Cook v. South Park Comm'rs*, 61 Ill. 115. The market value is generally proved by the opinion of witnesses who know the land and its value: *Lawson on Expert and Opinion Evidence*, 436, rule 61; *Little Rock etc. R. R. Co. v. Woodruff*, 49 Ark. 381; 4 Am. St. Rep. 51; *St. Louis etc. R. R. Co. v. Chapman*, 38 Kan. 307; 5 Am. St. Rep. 744. And it is competent for such witness to support their estimates by describing the property, giving its location, advantages, and surroundings: *Little Rock etc. R. R. Co. v. Woodruff*, 49 Ark. 381; 4 Am. St. Rep. 51.

<sup>1</sup> *New Orleans Pacific R. R. Co. v. Murrell*, 36 La. Ann. 344; *Brown v. R. R. Co.*, 5 Gray, 35; *Virginia etc. R. R. Co. v. Henry*, 8 Nev. 165; *Springfield etc. R. R. Co. v. Rhea*, 44 Ark. 358; *Texas etc. R. R. Co. v. Eddy*, 42 Ark. 527.

<sup>2</sup> *Everett v. R. R. Co.*, 59 Iowa, 243.

<sup>3</sup> *St. Louis etc. R. R. Co. v. Smith*, 42 Ark. 265; *Cinn. etc. R. R. Co. v. Mims*, 71 Ga. 240; *Memphis v. Bolton*, 9 Heisk. 508; *Lawrence v. Boston*, 119 Mass. 126; *Somerville etc. R. R. Co. v. Doughty*, 22 N. J. L. 495.

<sup>4</sup> *Harrison v. Young*, 9 Ga. 359;

*Little Rock etc. R. R. Co. v. McGehee*, 41 Ark. 202.

<sup>5</sup> *Mills on Eminent Domain*, sec. 173; *Boom Co. v. Patterson*, 98 U. S. 403; *Little Rock etc. R. R. Co. v. Woodruff*, 49 Ark. 381; 4 Am. St. Rep. 51; *Doud v. R. R. Co.*, 76 Iowa, 438; *Haines v. R. R. Co.*, 65 Iowa, 216; *Russell v. R. R. Co.*, 33 Minn. 210; *Calumet etc. R. R. Co. v. Moore*, 124 Ill. 329; *McClean v. R. R. Co.*, 67 Iowa, 586; *Sherman v. R. R. Co.*, 30 Minn. 227; *Chicago etc. R. R. Co. v. Jacobs*, 110 Ill. 414; *Missouri Bridge Co. v. Ring*, 58 Mo. 491; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Somerville etc. R. R. Co. v. Doughty*, 22 N. J. L. 495; *Trustees of College Point v. Dennett*, 5 Thomp. & C. 217; *Goodin v. Cincinnati etc. Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *Chicago etc. R. R. Co. v. R. R. Co.*, 112 Ill. 589; *Dupuis v. R. R. Co.*, 115 Ill. 97; *Chicago etc. R. R. Co. v. Blake*, 116 Ill. 163; *Robb v. Maysville etc. Co.*, 3 Met. (Ky.) 117; *Boston etc. R. R. Co. v. R. R. Co.*, 12 Cush. 605; *King v. R. R. Co.*, 32 Minn. 224; *Cincinnati etc. R. R. Co. v. Longworth*, 30 Ohio St. 108; *Shenango etc. R. R. Co. v. Braham*, 79 Pa. St. 447; *Little Rock etc. R. R. Co. v. McGehee*, 41 Ark. 202; *Harrison v. Young*, 9 Ga. 359. Where part of a tract of land adjoining a city was condemned for railroad purposes, it was held that damages should be assessed upon the basis of what the land was "then worth, for sale, in view of the

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for dock purposes for which there is no immediate demand, their value, when improved by building docks at some future time to meet some future demand, is merely conjectural and remote, and no proper element in estimating the damages to be paid; but if the fact that the lots may be made available as dock property at some future time enhance their present value, such fact is proper to be considered in estimating the damages.<sup>1</sup> So the value of unopened mines is irrelevant;<sup>2</sup> or the prospective value of land as laid out in city lot;<sup>3</sup> or the possible or probable profits of the owner that might result from his enjoyment of the property.<sup>4</sup> The specific value of stone under the right of way is not an element of damage.<sup>5</sup> When land is increased in value because a railroad is to be built, or some other public improvements made, it is improper to base the damages on the value of the land before the improvement was projected, rather than on its value at the time it was taken or damaged.<sup>6</sup> When buildings are taken the owner must be paid in full for both buildings and land,<sup>7</sup> and the jury may take into consideration the inconvenience and loss resulting to the owner from being deprived of his home and established place of business.

As a general rule, disconnected properties are to be treated as separate and distinct properties, and damages for a right of way are assessed on this principle.<sup>8</sup> In order that two properties having no physical connection

uses to which it might be put, and not based upon matters purely speculative or fanciful, which might or might not happen. . . . The jury should not allow the defendant for a 'prospective use' he may never make; but may allow him what the land was then worth, considering its adaptability to be used for any purpose which may have appeared in evidence": *Sedalia etc. R. R. Co. v. Abell*, 18 Mo. App. 632.

<sup>1</sup> *Calumet etc. R. R. Co. v. Moore*, 124 Ill. 329.

<sup>2</sup> *Searle v. R. R. Co.*, 33 Pa. St. 57.

<sup>3</sup> *Everett v. R. R. Co.*, 59 Iowa, 243.

<sup>4</sup> *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479; *Eddings v. Seabrook*, 12 Rich. 504; *Munn v. People*, 69 Ill. 80.

<sup>5</sup> *Reading and Pottsville R. R. Co. v. Balthaser*, 119 Pa. St. 472.

<sup>6</sup> *Texas etc. R. R. Co. v. Cella*, 42 Ark. 529.

<sup>7</sup> *Forney v. R. R. Co.*, 23 Neb. 465. But when the owner of land taken with a building upon it has received compensation for both land and building, he cannot afterwards sue the company for the value of building: *Forney v. R. R. Co.*, 23 Neb. 465.

<sup>8</sup> *Potts v. R. R. Co.*, 119 Pa. St. 278; 4 Am. St. Rep. 646.



may be regarded as one in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied as that the injury or destruction of one must necessarily and permanently injure the other. If not so connected, the recovery of damages must be confined to the injury to that property a portion of which was taken.<sup>1</sup> The compensation to be awarded to an owner, part of whose lands are taken by a railroad company, should include a just compensation, both for the value of the part taken, and for the effect which the taking will have in depreciating the market value of what is left.<sup>2</sup> Where a farm consists of several lots, and only part of one of the lots has been condemned to the use of a railroad company, the measure of damages is the injury to the whole farm as a unit.<sup>3</sup>

The measure of damages when lessor and lessee claim compensation for land taken for public use is to give the lessor the value of the rent, and the reversion; the lessee, the value of his term, subject to the rent. The damages awarded take the place of the land, and the relation of lessor and lessee is extinguished, and all covenants between them at an end.<sup>4</sup> As to a life estate, the measure of damages is the difference between the value of the property before the making of the road and its value after the road is made, as affected by it, and of this difference the life tenant is entitled to the proportion of the whole which the value of the life estate bears to the whole difference.<sup>5</sup>

The rule of valuation of property of one corporation for the uses of another is not what the property was worth for the uses of the first corporation, but what it is worth

<sup>1</sup> *Potts v. R. R. Co.*, 119 Pa. St. 278; 4 Am. St. Rep. 646.

<sup>2</sup> *Albany etc. R. R. Co. v. Dayton*, 10 Abb. Pr., N. S., 182.

<sup>3</sup> *Cedar Rapids etc. R. R. Co. v. Ryan*, 36 Minn. 546.

<sup>4</sup> *Dyer v. Wightman*, 66 Pa. St. 425; *Chicago v. Gantz*, 7 Ill. App. 471. See *Becker v. R. R. Co.*, 126 Ill. 436.

<sup>5</sup> *Pittsburg etc. R. R. Co. v. Bentley*, 88 Pa. St. 178.

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for general purposes,—its value in the market.<sup>1</sup> In condemning a right of way across the right of way of another railroad, such latter road is entitled to damages sufficient to put and keep its embankment and track in as safe a condition as before.<sup>2</sup> So any additional expense created in the ordinary use of the respondent's road, or any other injury or damage to its track, right of way, or franchise, occasioned by the crossing, and which may properly be considered as the natural, necessary, and approximate consequence thereof, should be allowed to the respondent. And if, at the time the damages or compensation are assessed, it is not known in what manner the proposed crossing is to be made, it may be submitted to the jury or commissioners to find what the damages or compensation should be in either of the three modes that may be adopted in making the crossing.<sup>3</sup>

ILLUSTRATIONS.—A right of way was condemned over a small lot used as a shipping point for marble quarried a mile away. *Held*, in assessing damages, that the small lot could not be deemed appurtenant to the other lot with which it was unconnected: *Potts v. R. R. Co.*, 119 Pa. St. 278. A railroad was located diagonally through a quarter-section, cutting off water, timber, house, and corrals from the main body of the land, the whole tract consisting of 960 acres, and the quarter-section being separated from the rest of the land by a highway. *Held*, that in estimating damages, the injury to the whole tract should be considered, and not the injury to the quarter-section alone: *Kansas City etc. R. R. Co. v. Merrill*, 25 Kan. 421. A's business was that of raising and training blooded horses. On his farm he had a race-track in connection with his horse-breeding. A railroad company, in locating its right of way through the farm, destroyed the race-track. Damages were assessed as though A's business had been broken up. *Held*, that the measure of damages in this particular was the cost of constructing another track: *In re New York etc. R. R. Co.*, 29 Hun, 1. An award of two thousand dollars damages for the taking by a railroad company of a strip of land, about

<sup>1</sup> *Goodin v. Cincinnati Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95.

<sup>2</sup> *St. Louis etc. R. R. Co. v. R. R. Co.*, 96 Ill. 274.

<sup>3</sup> *Toledo etc. R. R. Co. v. R. R. Co.*, 62 Mich. 564; 4 Am. St. Rep. 875.

one and one sixth acres, cutting an old race-track into two nearly equal parts, *held*, not to be excessive; the whole land being worth, as a public race-course, about twenty-five thousand dollars; as a training track seven thousand dollars; and the strip for agricultural purposes about five hundred dollars: *In re New York etc. R. R. Co.*, 21 Hun, 250.

**§ 3897. Improvements on Land by Party before or Pending Proceedings.**—In a California case the United States had entered the land of a private owner against his will and erected a light-house on it. Subsequently the government sought to condemn the land for public use. It was held that the owner was entitled to have the value of the structure allowed him in the assessment of his damages.<sup>1</sup> But in another case in the same state, where a railroad company, under proceedings for condemnation, entered on land under an order of the county judge, and constructs its road across it in such manner that it was imbedded in the soil, and became a part of the realty, and the proceedings were dismissed, and new ones for the condemnation of the land commenced, it was held the owner was not entitled to have the value of the ties and iron constituting the track included in his damages upon the final condemnation.<sup>2</sup> The same ruling was made in Pennsylvania, where the railroad had entered the land

<sup>1</sup> *United States v. Land in Monterey Co.*, 47 Cal. 515; the court saying: "There can be no doubt that, upon the general principles of law, the defendants, as being owners of the fee, are also owners of the improvements and fixtures actually annexed to the soil, and these become part of it. If one erect buildings upon the land of another voluntarily and without any contract, he may not remove them. This is common learning. The law did not authorize the United States to take possession of these lands *manu forti*, and their agents in entering upon them and ejecting the defendants were mere tort-feasors. This case is, in this important respect, wholly unlike that of *California Pacific Railroad v. Arm-*

*strong*, 46 Cal. 85. In that case the road track was constructed by the railroad company, while its possession of the land of the defendant was rightful, being held at the time in pursuance of pending proceedings for its condemnation; and these proceedings having been dismissed, after the construction of the track, we held that the owner of the land was not entitled to be paid the value of the track upon the subsequent renewal of proceedings of condemnation by the same company." See *Cohen v. R. R. Co.*, 34 Kan. 158; 55 Am. Rep. 242; *Graham v. R. R. Co.*, 36 Ind. 463; 10 Am. Rep. 56; *Hunt v. R. R. Co.*, 76 Mo. 115.

<sup>2</sup> *California Pacific R. R. Co. v. Armstrong*, 46 Cal. 85.

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without objection by the owner, but without taking the proper proceedings to acquire the land.<sup>1</sup> Where a railroad company entered upon land in good faith, under the belief that it had title thereto, it was held in Mississippi that it was not a naked trespasser, though the title was in fact in another; and that it was entitled to all legal protection to its improvements upon the premises given by the statute to the parties in possession under color of title, and that the rails and ties were not the property of the land-owner.<sup>2</sup> In assessing for the damages for the taking of land for railroad purposes, work already done by the company upon the land cannot be regarded as part of the realty, for the purpose of increasing the damages.<sup>3</sup> The stone piers of a bridge built by a railroad company as a part of its road, on lands which it has acquired the right of using for its road, do not, though firmly imbedded in the earth, become the property of the owner of the land as a part of the realty. And on the project of completing the road being abandoned, the company may remove the structures as personal property.<sup>4</sup> So as to the materials used in constructing the locks of a canal, after the easement over the land has been determined by the abandonment of the enterprise.<sup>5</sup> Whether the proceedings of a railroad corporation to condemn land for right of way were sufficient to divest the owner's title or not is immaterial, where, after the proceedings, such as they were, there was no attempt on his part to prevent the execution of the work, and for a period of several years after such initiatory steps no dissent thereto nor claim of the iron laid down was made by such land-owner; in such case the land-owner must be assumed to have assented to the occupation of the land by the company, and

<sup>1</sup> Justice v. R. R. Co., 87 Pa. St. 28. See also Greve v. R. R. Co., 26 Minn. 66; Louisville etc. R. R. Co. v. Dickson, 63 Miss. 380; 56 Am. Rep. 809; Cohen v. R. R. Co., 34 Kan. 158; 55 Am. Rep. 242.

<sup>2</sup> Mississippi etc. R. R. Co. v. Dev- anye, 42 Miss. 555; 2 Am. Rep. 608.

<sup>3</sup> Morgan's Appeal, 39 Mich. 675.

<sup>4</sup> Wagner v. R. R. Co., 22 Ohio St. Rep. 809; 10 Am. Rep. 770.

<sup>5</sup> Corwin v. Cowan, 12 Ohio St. 629.

cannot, as against a vendee of the company, take up and hold the railroad iron which had previously been laid down and spiked to sleepers by said company on said land.<sup>1</sup> But it has been held in other cases that where a railroad company, being already in the occupation of land with its track, takes proceedings to acquire the title, if the company was a trespasser in laying its track, any fixtures placed thereon while its occupation was as a trespasser belong to the owner of the land, and the railroad track, composed of rails, ties, etc., or even buildings, are fixtures, and its value as such, enhancing the value of the land for the beneficial enjoyment thereof, is the measure of compensation.<sup>2</sup> Where one railroad appropriates a grade, which another company had previously made and abandoned, the land-owner is entitled to the value of the land taken, as enhanced by the grading.<sup>3</sup>

ILLUSTRATIONS.—A railroad company entered upon land and erected buildings. Two years thereafter it began proceedings to appropriate such land to its use. *Held*, that the owner of the land was entitled to compensation for its value, with the improvements thereon at the time the proceedings to appropriate were instituted, and not at the time the land was entered: *Graham v. R. R. Co.*, 36 Ind. 463; 10 Am. Rep. 56. A railroad company, in good faith, obtained a right of way from one whom it supposed to be the owner thereof. *Held*, that the true owner, in condemnation proceedings, was entitled to nothing on account of improvements placed there by the company: *Oregon R. R. etc. Co. v. Mosier*, 14 Or. 519; 58 Am. Rep. 321.

§ 3898. **Benefits.**—In some states it is held that benefits to the owner, resulting from the public work, may be set off both against his damages and the value of the land taken.<sup>4</sup> And therefore, when the benefit is equal to the

<sup>1</sup> *Dietrich v. Murdock*, 42 Mo. 279.

<sup>2</sup> *Van Sise v. R. R. Co.*, 3 Hun, 613; *Graham v. R. R. Co.*, 36 Ind. 463; 10 Am. Rep. 56.

<sup>3</sup> *Cohen v. R. R. Co.*, 34 Kan. 158; 55 Am. Rep. 242.

<sup>4</sup> *Whiteman v. R. R. Co.*, 2 Harr. (Del.) 514; 33 Am. Dec. 411; *San Fran-*

*cisco v. R. R. Co.*, 31 Cal. 367; *State v. Blauvelt*, 34 N. J. L. 261; *Root's Case*, 77 Pa. St. 276; *Greenville etc. R. R. Co. v. Partlow*, 5 Rich. 428; *Symonds v. Cincinnati*, 14 Ohio, 147; 45 Am. Dec. 529; *Comm'rs v. O'Sullivan*, 17 Kan. 58; the court saying: "Compensation is secured if the indi-

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damage, the owner can recover nothing.<sup>1</sup> But the incidental advantage to the owner, in common with all others, in the construction of the public work, is not to be taken into consideration in assessing his damages. "If the owner derive any incidental advantage or benefit from the manner in which it is applied to public use, others participate in some degree, and perhaps equally, in the same or similar advantages resulting to them also; and it would be unjust to exact from the one an equivalent for his incidental benefits while the others enjoy theirs without the like exactions."<sup>2</sup> In other cases the right to set off benefits is allowed in no case.<sup>3</sup> Other cases hold that benefits may be set off against damages, but not against

vidual receive an amount which, with the direct benefits accruing, will equal the loss sustained by the appropriation. We of course exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public, for he pays in taxation for his share of such general benefits. But if the proposed road or other improvement inures to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account into what is termed compensation. Otherwise he is favored above the rest, and instead of simply being made whole, he profits by the appropriation, and the taxes of the others must be increased for his special advantage. Upon general principles, then, and with due regard to right and justice, it should be held that the public may show what direct and special benefits accrue to an individual claiming road damages, and that these special benefits should be applied to the reduction of the damages otherwise shown to have been sustained."

<sup>1</sup> *Mills on Eminent Domain*, 151; *Whiteman v. R. R. Co.*, 3 Allen, 133; *Elgin v. Eaton*, 83 Ill. 535; 25 Am. Rep. 412; *Putnam v. Douglass Co.*, 6 Or. 378; 25 Am. Rep. 527; *Winona etc. R. R. Co. v. Waldron*, 11 Minn.

515; *Nichols v. Bridgeport*, 23 Conn. 189; 60 Am. Dec. 636; *Livermore v. Jamaica*, 23 Vt. 361. The fair cost of an improvement which reasonable owners would make for the better enjoyment of their property is a just criterion for determining the benefits received: *State v. Rahway*, 39 N. J. L. 646. In setting off benefits against a claim for damages where land is taken for railroad purposes, evidence that the railroad will increase the demand for chestnut ties, there being chestnut timber upon the land, is admissible. The benefit is too remote: *Childs v. New Haven and Northampton Co.*, 133 Mass. 253. And see *Pittsburg etc. R. R. Co. v. Robinson*, 75 Pa. St. 426.

<sup>2</sup> *Jacob v. Louisville*, 9 Dana, 114; 33 Am. Dec. 533; *St. Louis etc. R. R. Co. v. Richardson*, 45 Mo. 466; *Hornstein v. R. R. Co.*, 51 Pa. St. 87; *Carpenter v. Landaff*, 42 N. H. 218; *Carli v. R. R. Co.*, 16 Minn. 260; *Vicksburg etc. R. R. Co. v. Calderwood*, 15 La. Ann. 481; *Comm'rs v. Johnston*, 71 N. C. 398; *Keithsburg etc. R. R. Co. v. Henry*, 79 Ill. 290; *Henderson etc. R. R. Co. v. Dickerson*, 17 B. Mon. 173; 66 Am. Dec. 148; *Mississippi etc. R. R. Co. v. McDonald*, 12 Heisk. 54.

<sup>3</sup> *Robbins v. R. R. Co.*, 6 Wis. 636; *Alabama etc. R. R. Co. v. Burkett*, 42 Ala. 83; *New Orleans etc. R. R. Co. v. Moye*, 39 Miss. 374; *Woodfolk v. R. R. Co.*, 2 Swan, 422.

the value of the land actually taken.<sup>1</sup> But the question in several states is settled by constitutional provisions.<sup>2</sup> In a constitution providing that the jury "shall not take into consideration any advantage that may result to said owner on account of the improvement for which it is taken," the expression "any advantage" is used to cover all benefits of every kind that may result; incidental, indirect, consequential, and remote benefits are meant as well as direct and immediate. Those benefits that result to the land itself, as the improvement of the soil, if that be possible, the drainage of ponds, etc., which increase its intrinsic value, are included in the expression, as well as other consequences attending the location of highways, which increase the value of real estate. In short, whatever benefit results to the land on account of the improvement is covered by the provision, which covers benefits accruing on account of the road itself, as well as on account of its uses.<sup>3</sup>

ILLUSTRATIONS.—A railroad was located through a farm, leaving land of the owner on each side. The company acquired the exclusive use of the land taken. Provision was made by the company for the owner's crossing the location, and for the drainage and flowage of his cranberry meadow thus cut off, he accepting and using the same with the mutual understanding that he had a right so to do. *Held*, that these facts could not be considered in reduction of the damages, the use of the privileges being merely permissive and subject to the paramount right of the corporation: *Old Colony v. Miller*, 125 Mass. 1; 28 Am. Rep. 194.

§ 3899. **Payment.**—It is sometimes expressly provided by law that payment shall precede appropriation.<sup>4</sup> But where that is not the case, it is still essential in all cases where the appropriation is made for and payment to be

<sup>1</sup> *Shipley v. R. R. Co.*, 34 Md. 336; *Robinson v. Robinson*, 1 Duvall, 162; *Mayor v. R. R. Co.*, 53 Ga. 120; *Raleigh etc. R. R. Co. v. Wicker*, 74 N. C. 220; *Mitchell v. Thornton*, 21 Gratt. 164; *Buffalo etc. R. R. Co. v. Fervis*, 26 Tex. 588.

<sup>2</sup> See note to *Symonds v. Cincinnati*, 14 Ohio, 147, in 45 Am. Dec. 534.

<sup>3</sup> *Frederick v. Shane*, 32 Iowa, 254.

<sup>4</sup> *Breddell v. Bryan*, 14 Md. 444; 74 Am. Dec. 550.

made by a private corporation, such as a railroad or toll-road company.<sup>1</sup> When a statute provides that compensation shall be paid for lands appropriated to a public use, without designating the time of payment, it must be so construed as to make the payment a condition precedent to the appropriation.<sup>2</sup> But where the state takes the property for its own use,<sup>3</sup> or for the use of one of its own municipalities,<sup>4</sup> prepayment is not essential. The party may waive his right to payment in any case, either expressly, or by failing to claim it within such period of limitation as may be established by law.<sup>5</sup> The compensation must be made within a short period or the privilege of taking the property under the condemnation will be deemed abandoned.<sup>6</sup> The owner is entitled to the cash value of land appropriated, and to indemnity for damages to his adjacent land consequent upon the location of the road, and he cannot be compelled to receive as compensation in whole or in part the enhancement in the value of his remaining property.<sup>7</sup> A condemnation of land for railroad purposes which does not provide for compensation for the land taken is not rendered invalid thereby.<sup>8</sup> But the taking of the land will be enjoined until payment

<sup>1</sup> *Powers v. Bears*, 12 Wis. 220; 78 Am. Dec. 733; *Thompson v. R. R. Co.*, 4 Miss. 240; 34 Am. Dec. 81; *Wheeler v. Essex Co.*, 39 N. J. L. 291. Where the constitution does not require that compensation shall precede the taking, a statute allowing the taking of land by a railroad before either ascertainment or payment of damages is valid, provided the means of subsequently enforcing the payment are prescribed: *Townsend v. R. R. Co.*, 91 Ill. 545; *Cairo etc. R. R. Co. v. Turner*, 31 Ark. 424; 25 Am. Rep. 564; *Smith v. Taylor*, 34 Tex. 589. Just compensation means a fair equivalent in money. It must be paid when the property is taken, or within a reasonable time thereafter; and its payment must not depend on any hazard or uncertainty: *Per Senator Maison*, in *Bloodgood v. R. R. Co.*, 18 Wend. 9; 31 Am. Dec. 313.

Deposit of the amount of an award of damages for land taken by eminent domain, where a deposit is authorized to be made for use of the land-owner, is unavailing if a condition is imposed as to payment of the money deposited to the owner: *Kanne v. R. R. Co.*, 30 Minn. 423.

<sup>2</sup> *Bloodgood v. R. R. Co.*, 18 Wend. 9; 31 Am. Dec. 313.

<sup>3</sup> *Orr v. Quimby*, 54 N. H. 590; *White v. R. R. Co.*, 7 Heisk. 513.

<sup>4</sup> *Comm'r's v. Bowie*, 34 Ala. 461; *Talbot v. Hudson*, 16 Gray. 417; *Lowree v. Newark*, 38 N. J. L. 151.

<sup>5</sup> *In re Albany*, 11 Wend. 147; *Callison v. Herrick*, 15 Gratt. 244.

<sup>6</sup> *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; 73 Am. Dec. 575.

<sup>7</sup> *Brown v. Beatty*, 34 Miss. 227; 69 Am. Dec. 359.

<sup>8</sup> *Shute v. R. R. Co.*, 26 Ill. 436.



is made.<sup>1</sup> When a railroad company locates its line of road over the lands of private owners, it secures a right to enter upon and occupy the land covered by such location; and though actual entry cannot be made until the damages accruing to the owner shall be paid or secured, and though the parties cannot agree upon the amount of damages, still the owner cannot prevent the exercise of the right of eminent domain by the company.<sup>2</sup>

**§ 3900. Validity of Proceedings cannot be Attacked Collaterally.**—The validity of the proceeding cannot be attacked in a collateral suit.<sup>3</sup> A judgment of dismissal of proceedings for assessment of damages upon the appropriation of private lands by a railroad company is conclusive between the parties upon collateral attack, even though erroneous.<sup>4</sup> One whose lands have been taken for a railroad, and damages assessed, cannot afterwards recover for injury caused by the taking, which was not considered in the assessment. But he may recover for injury sustained from the improper construction of the road.<sup>5</sup> But jurisdictional defects may be attacked collaterally.<sup>6</sup> The rule that jurisdictional facts not stated in the record will be assumed in favor of the jurisdiction of courts of record applies to condemnation proceedings in a court of record.<sup>7</sup> It cannot be collaterally attacked on the ground that all the commissioners did not act.<sup>8</sup>

**§ 3901. Estoppel by Assessment of Damages.**—When the owner receives and accepts the damages assessed he is

<sup>1</sup> *People v. Law*, 34 Barb. 494; *Davis v. R. R. Co.*, 12 Wis. 16.

<sup>2</sup> *Lafferty v. R. R. Co.*, 124 Pa. St. 297; 10 Am. St. Rep. 587.

<sup>3</sup> *Secombe v. R. R. Co.*, 23 Wall. 108; *Hamilton v. R. R. Co.*, 1 Md. Ch. 107; *St. Joseph etc. R. R. Co. v. R. R. Co.*, 9 N. E. Rep. 727; *Van Steinburg v. Bigelow*, 3 Wend. 42.

<sup>4</sup> *Indiana etc. R. R. Co. v. Allen*, 113 Ind. 308; 3 Am. St. Rep. 650.

<sup>5</sup> *Perley v. R. R. Co.*, 57 N. H. 212.

<sup>6</sup> *Clement v. Burns*, 43 N. H. 607; *People v. Commissioners*, 27 Barb. 94. But failure to obtain jurisdiction of the person cannot be taken advantage of by any one but the person himself; *State v. Richmond*, 26 N. H. 232.

<sup>7</sup> *Ney v. Swinney*, 36 Ind. 454; *Galena Coal Co. v. Powell*, 22 Ill. 339.

<sup>8</sup> *Quayle v. R. R. Co.*, 63 Mo. 465.

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estopped to afterwards assert that the condemnation pro-  
ceedings were irregular or void,<sup>1</sup> or from afterwards denying  
that he consented to the taking.<sup>2</sup> An unreasonable delay  
in depositing the damages assessed is waived by an ac-  
ceptance of such damages when so deposited.<sup>3</sup> So delay  
in filing the papers relating to the opening of a highway  
is waived by the acceptance of damages.<sup>4</sup> A city by pro-  
ceeding to act upon the report of commissioners appointed  
by it to assess damages for land taken for a public street  
waives all objection to irregularities in the selection of  
appointment of such commissioners.<sup>5</sup> Where the owner  
accepts the damages assessed by commissioners or arbi-  
trators, he will be precluded from further prosecuting an  
appeal from such assessment theretofore commenced.<sup>6</sup>

§ 3902. Remedies. — A court of equity will not remedy  
defects in condemnation proceedings; the proper remedy  
is by *certiorari*.<sup>7</sup> A verdict awarding damages to a person  
not entitled may be quashed by *certiorari*.<sup>8</sup> The corpo-  
rate existence of a company, and its right to exercise  
corporate franchises, cannot properly be passed on by  
the inferior tribunals for assessing damages in condemn-  
ing lands, and cannot therefore be considered on *certi-  
orari* to review the action.<sup>9</sup> Although the amount of  
damages cannot be gone into on *certiorari*, still the pro-  
ceedings will be quashed if the damages are so high as to  
show clearly that the commissioners acted upon illegal  
principles in assuming them.<sup>10</sup> And when the decision

<sup>1</sup> Hitchcock v. R. R. Co., 25 Conn. 516; Kurber v. Nellis, 22 Wis. 215; Felch v. Gilman, 22 Vt. 38; Kile v. Yellowhead, 80 Ill. 208; Chatterton v. Parrott, 26 Mich. 432; Sparhawk v. Walpole, 20 N. H. 317; Whittesley v. R. R. Co., 23 Conn. 421; Union Mut. Ins. Co. v. Slee, 123 Ill. 57.

<sup>2</sup> Embury v. Connor, 3 N. Y. 511; 53 Am. Dec. 325.

<sup>3</sup> Hawley v. Hurrall, 19 Conn. 142.

<sup>4</sup> Gour v. Blackberry, 29 Ill. 137.

<sup>5</sup> City of Chicago v. Wheeler, 25 Ill. 478; 79 Am. Dec. 342.

<sup>6</sup> Baltimore etc. R. R. Co. v. Johnson, 84 Ind. 420; Mississippi etc. R. Co. v. Byington, 14 Iowa, 572; Dodge v. Burnis, 6 Wis. 514; Hatch v. Hawkes, 126 Mass. 177.

<sup>7</sup> Union Mut. Ins. Co. v. Slee, 123 Ill. 57; Ewing v. St. Louis, 5 Wall. 413; Kroop v. Foreman, 31 Mich. 144.

<sup>8</sup> Penny v. R. R. Co., 7 El. & Bl. 660.

<sup>9</sup> Schroeder v. R. R. Co., 44 Mich. 387.

<sup>10</sup> New Jersey etc. Co. v. Suydam, 17 N. J. L. 25.

of a board is made final and conclusive as to the award of damages for land taken, nevertheless a resolution of such board reducing the amount of damages awarded by the appraisers may be quashed on *certiorari*, where it fails to give ground for such reduction as required by statute.<sup>1</sup>

Equity will interfere by an injunction restraining the company from entering upon land, or constructing its road, until the statutory requirements have been fulfilled;<sup>2</sup> as where the statutes require that an effort shall be made to purchase the right of way;<sup>3</sup> or that the damages awarded shall be paid or tendered to the owner;<sup>4</sup> or that a deposit shall be made to secure the payment;<sup>5</sup> or that the line shall be surveyed, and a description of the route filed with the secretary of state;<sup>6</sup> or if the statute authorize the taking of private property without providing for the making of compensation.<sup>7</sup> Equity will enjoin the taking of land beyond what is necessary for the public purpose;<sup>8</sup> or where compensation is not made;<sup>9</sup> or before the consummation of the condemnation proceedings;<sup>10</sup> or where a railroad company, which has taken land without paying for it, becomes insolvent, and the land-owner has exhausted all the statutory remedies without avail.<sup>11</sup> An

<sup>1</sup> *People v. Canal Board*, 7 Lans. 220.

<sup>2</sup> *Stewart v. R. R. Co.*, 15 Miss. 568; *Richards v. R. R. Co.*, 18 Iowa, 259; *Western etc. R. R. Co. v. Owings*, 15 Md. 199; 74 Am. Dec. 563; *Ross v. R. R. Co.*, 2 N. J. Eq. 422; *People v. Law*, 34 Barb. 494.

<sup>3</sup> *Reitenbaugh v. R. R. Co.*, 21 Pa. St. 100.

<sup>4</sup> *Story v. R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Chambers v. R. R. Co.*, 69 Ga. 320; *Gammage v. R. R. Co.*, 65 Ga. 614; *Pittsburg etc. R. R. Co. v. Bruce*, 102 Pa. St. 23; *Starr v. R. R. Co.*, 24 N. J. L. 592; *Stacey v. R. R. Co.*, 25 Vt. 39; *Dimmick v. R. R. Co.*, 58 Iowa, 637; *Spencer v. R. R. Co.*, 23 W. Va. 406.

<sup>5</sup> *Bensley v. Mountain Lake etc. Co.*, 13 Cal. 306; 73 Am. Dec. 575; *Parker v. R. R. Co.*, 13 Lea, 669.

<sup>6</sup> *Morris etc. R. R. Co. v. Blair*, 9 N. J. Eq. 635.

<sup>7</sup> *Brewer v. Bowman*, 9 Ga. 37; *Watson v. Trustees etc.*, 21 Ohio St. 667; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Ex parte Martin*, 13 Ark. 198; 58 Am. Dec. 321; *Trenton Water P. Co. v. Raff*, 36 N. J. L. 335; *Williams v. R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; *Broiestedt v. R. R. Co.*, 55 N. Y. 220; *Carpenter v. R. R. Co.*, 24 N. Y. 655; *Mahan v. R. R. Co.*, 24 N. Y. 658; *Wager v. R. R. Co.*, 25 N. Y. 526.

<sup>8</sup> *Cooper v. Williams*, 5 Ohio, 391; 24 Am. Dec. 299; *Bird v. R. R. Co.*, 8 Rich. Eq. 46; 64 Am. Dec. 739.

<sup>9</sup> *Ex parte Martin*, 13 Ark. 198; 58 Am. Dec. 321.

<sup>10</sup> *New Central Coal Co. v. Coal Co.*, 37 Md. 537.

<sup>11</sup> *Provolt v. R. R. Co.*, 69 Mo. 633.

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injunction will not be granted in any case, previous to the determination of the rights of the parties, to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate. The erection of a trestle-work for a railroad upon plaintiff's land is not such an injury as to justify granting a preliminary injunction.<sup>1</sup> The court, in a proper case, may permit the company to give a bond of indemnity, instead of ordering an injunction.<sup>2</sup> Pending the determination of a controversy between a land-owner and a railroad company as to the true location of the road under a written grant of way, the court will not arrest the construction of the road by injunction, but will order security to be given sufficient to cover all damages.<sup>3</sup>

Where the state has failed to provide a remedy, the injured party may sue for his damages.<sup>4</sup> The owner may maintain ejectment where, from defects in condemnation proceedings, a railroad company has failed to acquire rights in the land.<sup>5</sup> But a statutory remedy is provided in most of the states. In most of the states where entry on land is allowed before compensation, it is held that the statutory remedy is exclusive of the remedies at common law.<sup>6</sup> But in those in which compensation is required by law to be made before the company can enter upon the lands, the statutory remedy is cumulative only.<sup>7</sup> Where

<sup>1</sup> Schurmeier v. R. R. Co., 8 Minn. 113; 83 Am. Dec. 770; Whitman v. R. R. Co., 8 Minn. 116.

<sup>2</sup> Campbell v. R. R. Co., 23 W. Va. 448.

<sup>3</sup> Rainey v. R. R. Co., 15 Fed. Rep. 707.

<sup>4</sup> Hooker v. New Haven Co., 14 Conn. 146; 36 Am. Dec. 477; Foote v. Cincinnati, 11 Ohio, 408; 38 Am. Dec. 737.

<sup>5</sup> Hull v. R. R. Co., 21 Neb. 371.

<sup>6</sup> See Beach on Railroads, sec. 848; Brown v. Beatty, 34 Miss. 229; 69 Am. Dec. 389. Though even in those jurisdictions there are cases holding

that the statutory remedy is cumulative: Beach on Railroads, sec. 848.

<sup>7</sup> Parker v. Tennessee, 13 Lea, 669. Where a railroad company takes land for a right of way without having it condemned, the owner may waive condemnation proceedings, and sue for damages: Cohen v. R. R. Co., 34 Kan. 158; 55 Am. Rep. 242. A railroad company may dispense with the assessment, by commissioners, of damages for laying its track over private property, by promising to pay such damages, and the land-owner may recover on the special promise: Plott v. R. R. Co., 65 N. C. 74.

a railroad has entered upon land for the purpose of constructing its road, without having complied with all the statutory provisions respecting condemnation, or without having paid or deposited or given security for the amount awarded, the land-owner may bring an action in ejectment<sup>1</sup> or in trespass to recover damages for the injury to his property.<sup>2</sup> Where damages have been assessed, and exceptions to the amount are withdrawn or not filed at all, and the money is not paid, the lessee's or owner's remedy is by suit for the compensation ascertained, and not by suit for nuisance.<sup>3</sup> Satisfying the judgment for trespass does not give the company title to the land; it must still acquire the right of way in the statutory mode.<sup>4</sup> But the wrongful entry is not a bar to proceedings to condemn.<sup>5</sup>

**§ 3903. Measure of Damages for Wrongful Entry. —**

The measure of damages in an action for wrongful entry against the company is not the value of the land, but the injury sustained by the plaintiff, in his crops, orchards, pastures, fences, and profits.<sup>6</sup> The damages in trespass

<sup>1</sup> *Wilmington etc. R. R. Co. v. High*, 89 Pa. St. 282; *Robinson v. R. R. Co.*, 57 Cal. 417; *McClinton v. R. R. Co.*, 66 Pa. St. 404; *Chicago etc. R. R. Co. v. Knox College*, 34 Ill. 195; *Congler v. R. R. Co.*, 41 Iowa, 419; *Gilman v. R. R. Co.*, 40 Wis. 653; *Levering v. R. R. Co.*, 8 Watts & S. 459; *St. Joseph etc. R. R. Co. v. Callendar*, 13 Kan. 496; *Holbert v. R. R. Co.*, 45 Iowa, 23; *Smith v. R. R. Co.*, 67 Ill. 191; *Harrington v. R. R. Co.*, 17 Minn. 215; *Cox v. R. R. Co.*, 48 Ind. 178; *New Orleans v. R. R. Co.*, 70 Ala. 227; *Galveston etc. R. R. Co. v. Pfeuffer*, 56 Tex. 66; *Rusch v. R. R. Co.*, 54 Wis. 136; *Susquehanna etc. R. R. Co. v. Quick*, 65 Pa. St. 189; *Stewart v. R. R. Co.*, 33 N. J. L. 115; *Sherman v. R. R. Co.*, 40 Wis. 645; *Graham v. R. R. Co.*, 27 Ind. 260; 89 Am. Dec. 498.

<sup>2</sup> *Lee v. Pembroke Iron Co.*, 57 Me. 481; 2 Am. Rep. 59; *Blodgett v. R. R.*

*Co.*, 64 Barb. 480; *Robinson v. R. R. Co.*, 27 Barb. 512; *McCord v. R. R. Co.*, 21 Mo. App. 92; *Cohen v. R. R. Co.*, 34 Kan. 158; 55 Am. Rep. 242; *Tinsman v. R. R. Co.*, 27 N. J. L. 148; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Eaton v. R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147; *Memphis etc. R. R. Co. v. Payne*, 37 Miss. 700.

<sup>3</sup> *Com. of Kensington v. Wood*, 10 Pa. St. 93; 49 Am. Dec. 582.

<sup>4</sup> *Plate v. R. R. Co.*, 37 N. Y. 472; *Mahon v. R. R. Co.*, 24 N. Y. 658; *Bird v. R. R. Co.*, 8 Rich. Eq. 46; 64 Am. Dec. 739; *Anderson etc. R. R. Co. v. Kernodle*, 54 Ind. 314; *Hetfield v. R. R. Co.*, 34 N. J. L. 251; *Carl v. R. R. Co.*, 46 Wis. 325; *Cain v. R. R. Co.*, 54 Iowa, 225; *Dickson v. R. R. Co.*, 71 Mo. 575.

<sup>5</sup> *State v. Baker*, 20 Fla. 616.

<sup>6</sup> *Houston etc. R. R. Co. v. Adams*, 63 Tex. 200; *Republican Valley R. R. Co. v. Fink*, 18 Neb. 82.

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include only past injuries, and successive suits must be brought,<sup>1</sup> except when the injury is permanent in its nature.<sup>2</sup> When condemnation proceedings are afterwards instituted by the company, the damages for the trespass are not to be added to the award for the condemnation.<sup>3</sup> Nor are the damages given in an action for trespass to be deducted from the amount awarded in condemnation proceedings subsequently instituted.<sup>4</sup>

§ 3904. **Appeals.**—A land-owner may appeal from the damages awarded, and at the same time dispute by *certiorari* the validity of proceedings.<sup>5</sup> "The practice in taking and perfecting appeals is regulated by statute, and the decisions present little of interest beyond the state in which they are made."<sup>6</sup> An appeal from the award of damages waives all defects in preliminary proceedings.<sup>7</sup> Where, under the charter, the question of damages to a land-owner has been submitted to assessors, and the company has appealed from their decision, it cannot, pending the appeal, construct its road across the land. An effort to do so will be enjoined.<sup>8</sup> When a property owner appeals to the district court from the award of commissioners in such proceedings, it is incumbent upon him to prosecute his appeal. Delay in such prosecution cannot be

<sup>1</sup> Blodgett v. R. R. Co., 64 Barb. 540; Anderson R. R. Co. v. Kernodle, 54 Ind. 314; Hartz v. R. R. Co., 21 Minn. 358; Harrington v. R. R. Co., 17 Minn. 215; Adams v. R. R. Co., 18 Minn. 260; Houston etc. R. R. Co. v. Adams, 63 Tex. 200.

<sup>2</sup> Central Branch R. R. Co. v. Twine, 23 Kan. 585; 33 Am. Rep. 203; Chicago etc. R. R. Co. v. Stein, 75 Ill. 41; Chicago etc. R. R. Co. v. Carey, 90 Ill. 514; Chicago etc. R. R. Co. v. Hoag, 90 Ill. 339; Troy, v. R. R. Co., 23 N. H. 83; 55 Am. Dec. 177; Cheshire Turnpike Co. v. Stevens, 13 N. H. 28; Parks v. City of Boston, 15 Pick. 198.

<sup>3</sup> Blodgett v. R. R. Co., 64 Barb. 580; McClinton v. R. R. Co., 66 Pa. St. 404; Missouri etc. R. R. Co. v.

Ward, 10 Kan. 352; Selma etc. R. R. Co. v. Keith, 53 Ga. 178; Praetz v. R. R. Co., 17 Minn. 163; Toledo etc. R. R. Co. v. Dunlap, 47 Mich. 456.

<sup>4</sup> Blodgett v. R. R. Co., 64 Barb. 580; Harsh v. R. R. Co., 17 Minn. 439; Oregon R. R. Co. v. Barlow, 3 Or. 311; Chicago etc. R. R. Co. v. Davis, 86 Ill. 20; Leber v. R. R. Co., 29 Minn. 256.

<sup>5</sup> State v. East Orange, 8 Atl. Rep. 107.

<sup>6</sup> Lewis on Eminent Domain, sec. 527.

<sup>7</sup> Delaware etc. R. R. Co. v. Burron, 61 Pa. St. 369; In re Weaver's Road, 45 Pa. St. 405; Pinkham v. Chelmsford, 109 Mass. 225.

<sup>8</sup> Chambers v. R. R. Co., 69 Ga. 320.

urged as tending to show abandonment of the proceedings by the respondent.<sup>1</sup> The constitutional provision that compensation shall be made before the taking is not affected by the fact that the land-owner has appealed from the assessment of his damages by the commissioners, nor that on such appeal he has recovered a judgment for the amount thereof, and he may maintain ejectment for the possession of his land.<sup>2</sup>

**§ 3905. Abandonment—Discontinuance of Proceedings.**

—If the corporation abandons the purpose after the verdict of the jury, it may do so, being liable only for the costs incurred.<sup>3</sup> But where the purpose, instead of being abandoned in good faith, is merely modified so as to enable the party exercising the right of eminent domain to take the chances of a verdict of another jury, the first proceedings are a bar to such a course.<sup>4</sup> So when land has once been taken, and the company for any period of time has been seised and possessed thereof, or if the land-owner has had at any time a perfected right to the damages awarded by the commissioners, a subsequent change of intention on the part of the company will have no effect to defeat his claim for the damages which have been awarded to him.<sup>5</sup> Whenever land is sought to be taken for a public purpose, the public authorities, in the absence of any statutory provision to the contrary, have a reasonable time, after ascertaining the expense of the scheme, to decide whether to accept or refuse the land at the price fixed.<sup>6</sup> It is held

<sup>1</sup> *Bradley v. R. R. Co.*, 38 Minn. 234.

<sup>2</sup> *St. Joseph etc. R. R. Co. v. Calender*, 13 Kan. 496.

<sup>3</sup> *Gear v. R. R. Co.*, 20 Iowa, 523; 89 Am. Dec. 550.

<sup>4</sup> *Rogers v. St. Charles*, 3 Mo. App. 46; *Neal v. R. R. Co.*, 31 Pa. St. 19; *Stafford v. Albany*, 7 Johns. 541.

<sup>5</sup> *Stacey v. R. R. Co.*, 27 Vt. 39; *First National Bank v. R. R. Co.*, 49 Vt. 167, 174; *North Missouri R. R.*

*Co. v. Lackland*, 25 Mo. 532; *Leisse v. R. R. Co.*, 2 Mo. App. 105; *State v. Hug*, 44 Mo. 116; *Baltimore etc. R. R. Co. v. Nesbit*, 10 How. 395; *Lancaster v. Kennebec Co.*, 62 Me. 272; *State v. Keokuk*, 9 Iowa, 438; *Wilkinson v. Buchanan Co.*, 12 Mo. 328; *In re Military Parade Grounds*, 60 N. Y. 319; *Farmer v. Hookset*, 28 N. H. 244.

<sup>6</sup> *O'Neill v. Hudson County Freeholders*, 41 N. J. L. 161; *Mabon v. Halsted*, 39 N. J. L. 640.

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in a number of the states that the rights become vested in the land-owners as soon as the report of the commissioners is confirmed by the court, and there is a final award in their favor in the nature of a judgment. Beyond that time the company cannot abandon and discontinue.<sup>1</sup> In other states the rights of the parties are not fixed until compensation has been made to the land-owner, or until the money has been deposited for his benefit, and until then the condemnation may be abandoned at any time.<sup>2</sup> An abandonment of the lands by the company may entitle the land-owner, if the fee was not divested, to re-enter. But a misuser does not operate as a forfeiture of which a private party can take any advantage. The remedy of the land-owner for a misuse of his land is by a proceeding for additional land damages.<sup>3</sup>

§ 3906. **Laches — Acquiescence — Limitations.** — The owner of land, by making no objection to the location of a railroad, and permitting it to go on and construct its road, will lose by his laches his right to maintain ejectment for a wrongful taking,<sup>4</sup> or to obtain an injunction restraining the further operation of the road,<sup>5</sup> or to maintain trespass for the wrongful taking,<sup>6</sup> or to recover

<sup>1</sup> In re Washington Park, 56 N. Y. 144, 154; Martin v. Mayor of Brooklyn, 1 Hill, 545; In re Canal Street, 11 Wend. 155; People v. Brooklyn, 1 Wend. 318; In re Department of Parks, 73 N. Y. 560; Stafford v. Mayor of Albany, 7 Johns. 542; In re Dover Street, 18 Johns. 545; In re Anthony Street, 20 Wend. 618; 32 Am. Dec. 608; In re Military Parade Grounds, 60 N. Y. 319; Application of Mayor of New Orleans, 4 Rob. (La.) 357; Duncan v. Mayor of Louisville, 8 Bush, 98, 104; In re Water Commissioners, 31 N. J. L. 72; 86 Am. Dec. 199; Mabon v. Halstead, 39 N. J. L. 640; O'Neill v. Freeholders of Hudson, 41 N. J. L. 161, 173; Harrington v. Berkshire, 22 Pick. 263; 33 Am. Dec. 741.

<sup>2</sup> Lamb v. Schottler, 54 Cal. 319; City of Bloomington v. Miller, 84 Ill.

621; Chicago v. Barbican, 80 Ill. 482; St. Louis etc. v. Teters, 68 Ill. 144; Blackshire v. R. R. Co., 13 Kan. 514; State v. R. R. Co., 17 Ohio St. 103; State v. Graves, 19 Md. 351, 370; Graff v. Mayor, 10 Md. 544; Merriek v. Mayor, 43 Md. 219; Williams v. R. R. Co., 60 Miss. 689.

<sup>3</sup> Proprietors of Locks etc. v. R. R. Co., 104 Mass. 1.

<sup>4</sup> Louisville etc. R. R. Co. v. Soltwedde, 116 Ind. 257; 9 Am. St. Rep. 852; Lawrence v. R. R. Co., 39 La. Ann. 427; Pryzbylowrez v. R. R. Co., 17 Fed. Rep. 492. But see Conger v. R. R. Co., 41 Iowa, 419.

<sup>5</sup> Spencer v. Falls Turnpike Co., 19 Md. L. J. 950; Abbott v. R. R. Co., 145 Mass. 450; Milwaukee etc. R. R. Co. v. Strange, 63 Wis. 178.

<sup>6</sup> Milwaukee etc. R. R. Co. v. Strange, 63 Wis. 178.



exemplary damages.<sup>1</sup> A land-owner who surrenders possession of his land to a railroad company without prepayment, and by express or implied acquiescence induces the company to expend money in constructing its road on the street in front of his land, cannot afterwards maintain ejectment and recover his land. His recovery is confined to damages and compensation on account of the location and construction of the road.<sup>2</sup> But mere silence and inaction for a few months, after being informed that the company is constructing its track over the land, will not be regarded such acquiescence as to estop the owner from his action of ejectment.<sup>3</sup> The mere failure of a land-owner to order a railroad company off his land, or to bring his action against it as a trespasser, until near the end of the statutory period of limitation, will not operate as a consent to its occupation and use of the land.<sup>4</sup> But acquiescence is no bar to recover his damages for the value of the land, or for injuries done him by the construction of the road.<sup>5</sup> Without a deed, a railroad location can never become legal, except on payment or waiver of the land damages, or by prescription. In no other way can the company acquire legal permanent possession.<sup>6</sup> Statutes imposing reasonable limitations upon the time for bringing actions for the recovery of compensation for the taking of private property are constitutional.<sup>7</sup> And a re-

<sup>1</sup> *Baltimore etc. R. R. Co. v. Boyd*, 67 Md. 32.

<sup>2</sup> *Louisville etc. R. R. Co. v. Soltwedde*, 116 Ind. 257; 9 Am. St. Rep. 852.

<sup>3</sup> *Walker v. R. R. Co.*, 57 Mo. 275.

<sup>4</sup> *Rusch v. R. R. Co.*, 54 Wis. 136.

<sup>5</sup> *St. Julian v. R. R. Co.*, 35 La. Ann. 924; *Bourdier v. R. R. Co.*, 35 La. Ann. 947; *Milwaukee etc. R. R. Co. v. Strange*, 63 Wis. 178; *Allen v. R. R. Co.*, 84 Mo. 646; *Thornton v. R. R. Co.*, 84 Ala. 109; 5 Am. St. Rep. 337. But one who for seventeen years has voluntarily consented that a railroad might be run across his land,

without compensation, cannot recover damages for the use of the land; nor is the right of the company to continue thus to occupy the land forfeited by its failure to keep open ditches and waterways. The remedy for such breach of duty is by action: *Texas etc. R. R. Co. v. Sutor*, 59 Tex. 29.

<sup>6</sup> *Perkins v. R. R. Co.*, 72 Me. 95.

<sup>7</sup> *Rexford v. Knight*, 11 N. Y. 308; *Carolina Central R. R. Co. v. McCaskill*, 94 N. C. 746; *Taylor v. Marcy*, 25 Ill. 518; *Harper v. Richardson*, 22 Cal. 251; *Cupp v. Comm'rs of Seneca*, 19 Ohio St. 173; *Sinms v. R. R. Co.*, 12 Heisk. 621, 623; *Reckner v. Warner*,

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quirement in the charter of a railroad that all claims for damages for land appropriated by the company must be made within a certain time bars all claims not made within the prescribed time, when the parties are *sui juris*.<sup>1</sup>

<sup>22</sup> Ohio St. 275; Shearer v. Comm'rs  
of Douglas County, 13 Kan. 145; Hen-  
driek v. R. R. Co., 101 N. C. 617.

<sup>1</sup> Carolina Central R. R. Co. v. Mc-  
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## PART VIII.—POLICE POWER.

## CHAPTER CCII.

## POLICE POWER.

- § 3907. Police power — In general.
- § 3908. Marriage — Divorce.
- § 3909. Schools.
- § 3910. Employments — In general.
- § 3911. Physicians and surgeons.
- § 3912. Public morals.
- § 3913. Public health and safety.
- § 3914. Carriers — Railroads.
- § 3915. Intoxicating liquors.
- § 3516. Personal rights.
- § 3917. Regulation of prices.
- § 3918. Monopolies.

§ 3907. **Police Power — In General.** — The authority to establish, for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others, is usually spoken of as the authority or power of police. This is a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the state, in society, and in private life.<sup>1</sup> The police power of state embraces its system of internal regulation by which it is sought to preserve the public order, and to prevent offenses against the state, and also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are

<sup>1</sup> Cooley on Constitutional Law, 227; Blair v. Forehand, 100 Mass. 136; 1 Am. Rep. 94.

calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.<sup>1</sup> The regulation of the internal police of the state is within its power, so far as its rules will operate only within its own limits, even though indirectly foreign and interstate commerce may be affected by it.<sup>2</sup> The right to exercise the police power cannot be alienated, surrendered, or abridged by the legislature by any grant, contract, or delegation whatsoever. Hence no legislative grant can confer upon any corporation beyond the control of subsequent legislative action the power to tear up the streets of a city, at such times, in such places, and under such circumstances as such corporation may determine, regardless of the public convenience and welfare and the rights of other claimants.<sup>3</sup> The legislature cannot so determine what is a proper exercise of the police power of the state that the determination will not be subject to scrutiny and revision by the courts. While it is generally for the legislature to decide what laws and regulations are needed to protect the public health, and serve the public comfort and safety, the courts must be able to see, upon the perusal of an enactment, that there is some fair, just, and reasonable connection between it and the ends above mentioned. Unless such relation exists, the enactment cannot be upheld as an exercise of the police power.<sup>4</sup>

§ 3908. **Marriage — Divorce.** — The state has power to regulate marriage. So the state may prescribe how divorces shall be obtained. It may establish laws by which divorces generally may be obtained, or it may grant special

<sup>1</sup> *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893.

<sup>2</sup> *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893.

<sup>3</sup> *Puryear v. Com.*, 5 Wall. 475;

<sup>4</sup> *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465.

*United States v. De Witt*, 9 Wall. 41; 41; *Sherlock v. Allen*, 93 U. S. 99.

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divorces at will.<sup>1</sup> And a marriage is not a "contract" within the constitutional provision concerning the obligation of contracts.<sup>2</sup> The constitutional provision that "the property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband," is not restricted to future marriages, but applies as well to marriages contracted before the enactment.<sup>3</sup>

§ 3909. **Schools.**—The state has power to pass laws regulating education and schools. Therefore colored children might be excluded from the public schools.<sup>4</sup> But since the adoption of the Fourteenth Amendment this is unlawful,<sup>5</sup> though it is legal to require colored persons to attend separate schools, provided the schools are equal in advantages, and the same measure of privilege and opportunity is afforded in each.<sup>6</sup> The legislature having placed the management of the public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given, or what books shall be read therein.<sup>7</sup>

<sup>1</sup> But by the constitutions of eleven states the legislature is prohibited from granting divorces: Stimson's American Statute Law, 101.

<sup>2</sup> *Starr v. Pease*, 8 Conn. 541; *Crane v. McGinnis*, 1 Gill & J. 463; 19 Am. Dec. 237; *Rugh v. Ottenheimer*, 6 Or. 231; 25 Am. Rep. 513.

<sup>3</sup> *Rugh v. Ottenheimer*, 6 Or. 231; 25 Am. Rep. 513.

<sup>4</sup> *Roberts v. Boston*, 5 Cush. 198.

<sup>5</sup> *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405.

<sup>6</sup> *Cory v. Carter*, 48 Ind. 327; 17 Am. Rep. 738; *State v. McCann*, 21 Ohio St. 198.

<sup>7</sup> *Board of Education of Cincinnati v. Minor*, 23 Ohio St. 211; 13 Am. Rep. 233.

**Teacher and Pupil.**—A teacher or school-master has "such portion of

the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he was employed": 1 Bla. Com. 453. He has the right to inflict reasonable corporal punishment: *State v. Pendergrass*, 2 Dev. & B. 365. The teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offense, and the age, size, and apparent powers of endurance of the pupil: *Com. v. Randall*, 4 Gray, 36. The chastisement must not exceed the limits of moderate correction, and though courts are bound, with a view to the maintenance of necessary order and decorum in schools, to look with reasonable indulgence upon the exercise of this right, yet whenever

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§ 3910. **Employments — In General.** — Employments are nevertheless subject to control under the state power of police, and may be regulated in various ways, and to some extent restricted. Thus the state may forbid certain classes of persons being employed in occupations which their age, sex, or health renders unsuitable for them.<sup>1</sup> It

the correction shall appear to have been clearly excessive and cruel, it must be adjudged illegal: *Hathaway v. Rice*, 19 Vt. 102. And the master is not relieved from liability in damages for the punishment of a scholar, which is clearly excessive and unnecessary, by the fact that he acted in good faith, and without malice, honestly thinking that the punishment was necessary, both for the discipline of the school and the welfare of the scholar: *Lander v. Seaver*, 32 Vt. 114; 76 Am. Dec. 156. And whether, under the facts, the punishment was excessive must be left to the jury to decide: *Com. v. Randall*, 4 Gray, 36. The teacher's right to chastise his pupils is not affected by the fact that the pupil, voluntarily in the school, is of lawful age, and therefore not entitled to attend school: *State v. Mizner*, 45 Iowa, 248; 24 Am. Rep. 769; *Stewart v. Fassett*, 27 Me. 260. Although a school-master has in general no right to punish a pupil for misconduct committed after the dismissal of the school for the day and the return of the pupil to his home, yet he may, on the return of the pupil to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school or subvert the master's authority: *Lander v. Seaver*, 32 Vt. 114; 76 Am. Dec. 156. The teacher has the power to expel a scholar for reasonable cause: *Fitzgerald v. Northcote*, 4 Fost. & F. 685. This power is usually placed in the hands of the school directors or other committee in charge of the school. The teacher generally has power only to suspend the pupil until the matter can be brought to the attention of such superior body. This is regulated by statute in some of the states. An action will lie against a teacher for failure to instruct a pupil: *Cooley on Torts*, 288.

Though it is held that the teacher of a town school is not liable to an action by the parent for refusing to instruct his children. If an action can be maintained in such case, it should be in the name of the child, and for his benefit: *Stephenson v. Hall*, 14 Barb. 222; *Spear v. Cummings*, 23 Pick. 224; 34 Am. Dec. 53.

**Reasonable and Unreasonable Rules.** — A rule providing that pupils may be suspended from school in case they shall be absent or tardy, except for sickness or other unavoidable cause, a certain number of times, is a reasonable and proper rule for the government of the school: *Bendick v. Babcock*, 31 Iowa, 562. So is a rule excluding a child whom it is deemed is of a licentious character and immoral, although such character is not manifested by any acts of licentiousness or immorality within the school: *Sherman v. Charleston*, 8 Cush. 160. So is a rule that the pupils in grammar schools shall write English compositions: *Guerney v. Pitkin*, 32 Vt. 234. So a rule is unreasonable requiring that no pupil should attend a social party: *Dritt v. Snodgrass*, 66 Mo. 286; 27 Am. Rep. 343. And so is a regulation that each scholar, when returning to school after recess, shall bring into the school-room a stick of wood for the fire: *State v. Board of Education*, 24 Am. L. Reg. 601. So is a rule requiring pupils to pay for school property which they may wantonly and carelessly break or destroy: *State v. Vanderbilt*, 116 Ind. 11; 9 Am. St. Rep. 820.

<sup>1</sup> *Cooley on Constitutional Law*, 231. The California constitution provides that no persons shall be disqualified by sex from pursuing any lawful vocation. An ordinance enacted that no person having charge or control of any place where malt, vinous, or spirituous liquors are sold should permit any

is competent for the legislature to provide a penalty against any agent of a foreign insurance company who shall act without authority from the state, although the contract is made out of the state, and provides that he shall be deemed the agent of the insured.<sup>1</sup> But it is not in the power of the legislature to prevent one person from buying or another from selling property. The rights of property are not subject to such absolute legislative control.<sup>2</sup> A statute making it a misdemeanor to manufacture cigars, in cities of more than five hundred thousand inhabitants, in any tenement-house occupied by more than three families, except on the first floor of houses on which there is a store for the sale of cigars and tobacco, is unconstitutional.<sup>3</sup>

**§ 3911. Physicians and Surgeons.**—The state may require special training for exercising the profession of a physician or a surgeon, and forbid persons engaging in such profession who have not been duly qualified or licensed.<sup>4</sup> As said in a recent case:<sup>5</sup> “The practice of

female to be there between six, P. M., and six, A. M., with an exception as to wives and daughters attending at hotels, restaurants, or grocery stores of their husbands and fathers, and excepting public gardens, and balls not held in drinking-saloons or bar-rooms. Held, unconstitutional: *In re Maguire*, 57 Cal. 604; 40 Am. Rep. 125.

<sup>1</sup> *Pierce v. People*, 106 Ill. 11; 46 Am. Rep. 683.

<sup>2</sup> *State v. Indiana etc. Co.*, 120 Ind. 575.

<sup>3</sup> *In re Jacobs*, 98 N. Y. 98; 33 Hun, 374; 50 Am. Rep. 636.

<sup>4</sup> *Cooley on Constitutional Law*, 231. As to attorneys at law, see *Title Attorneys*.

**Regulation by State—Licenses.**—The legislature has power to regulate the practice of medicine and surgery, and to prescribe the qualifications for applicants for license: *Ex parte Spinney*, 10 Nev. 323; *East-*

*man v. State*, 109 Ind. 278; 58 Am. Rep. 400; *State v. State Medical Board*, 32 Minn. 324; 50 Am. Rep. 575; *Logan v. State*, 5 Tex. App. 306; *Hewitt v. Charier*, 16 Pick. 353; *Harding v. People*, 10 Col. 387; *Williams v. People*, 121 Ill. 731; *State v. Green*, 112 Ind. 462; *Benham v. State*, 116 Ind. 112; *People v. O'Leary*, 77 Cal. 30; *People v. McCoy*, 125 Ill. 289. But see *Ex parte McNulty*, 77 Cal. 164; 11 Am. St. Rep. 257. Where the power to license is vested in a board, on the applicant furnishing it satisfactory proof of his qualification, the granting of the license by the board is discretionary, and its decision will not be controlled by *mandamus*: *State v. Gregory*, 83 Mo. 123; 53 Am. Rep. 565. But such a body cannot arbitrarily refuse a license on the ground that the applicant is not worthy of public confidence: *Gage v. Censors of N. H. etc. Soc.*, 63 N. H. 92; 56 Am.

<sup>5</sup> *Eastman v. State*, 109 Ind. 278; 58 Am. Rep. 400.

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medicine and surgery is a vocation that very nearly concerns the comfort, health, and life of every person in the

Rep. 492. But *mandamus* is the remedy where the board arbitrarily refuses the license: *Harding v. People*, 10 Col. 387. The power to accept or reject the application for license, under a statute regulating the practice of medicine, etc., is not a judicial one, although it may involve some exercise of discretion: *Eastman v. State*, 109 Ind. 278; 58 Am. Rep. 400. Where a state board, authorized by statute to determine what colleges are reputable, has prescribed a rule that "it will recognize as reputable only such colleges as require" a certain requisite for graduation, it has exercised its judicial power, and so long as the rule is in force only the ministerial act remains to be done: *Ill. State Board v. People*, 20 Ill. App. 457.

**Recovery for Services.** — In England, at common law, a physician — *aliter* as to a surgeon — (*Seare v. Prentice*, 8 East, 348; *Kannen v. McMullen*, Peake, 59; *Slater v. Baker*, 2 Wils. 359; *Battersby v. Lawrence*, Car. & M. 277) could not recover for his services (*Chorley v. Bolcot*, 4 Term Rep. 317), in the absence of a special contract: *Veitch v. Russell*, Car. & M. 362; *Attorney-General v. Royal College*, 1 Johns. & H. 561. Like a barrister, his services were presumed honorary: *Poucher v. Norman*, 3 Barn. & C. 745. But in the United States a physician is and was always permitted to sue for his fees: *Judah v. McNamee*, 3 Blackf. 269; *Alder v. Buckley*, 1 Swan, 69. A physician or surgeon performing services may recover from the patient on an implied promise to pay for them: *Hewitt v. Wilcox*, 1 Met. 154; *Mooney v. Lloyd*, 5 Serg. & R. 416; *Bronson v. Hoffman*, 7 Hun, 674. A physician may recover for the services of his student attending a patient: *Waring v. Monroe*, 4 Wend. 200. A physician may recover for services to a relative: *Mayfield's Estate*, 4 Week. Not. Cas. 155; 6 Week. Not. Cas. 27. Services in the last illness of a deceased are to be paid for out of his estate: *Rouse v. Morris*, 17 Serg. & R. 328; *Rollwagen v. Powell*, 8 Hun, 210. The employment of a physician by a husband, to attend

his sick wife, presumably continues through the illness; and the mere fact that the wife has moved, though with the husband's assent, from his home to her father's, will not enable him to resist payment of the physician's bill for subsequent visits: *Potter v. Virgil*, 67 Barb. 578. A physician under whose care a man places his wife, some distance from his own residence, is presumed to have authority to do all such acts and adopt such course of treatment and operations as are in his opinion necessary, without previously notifying the husband of an intended operation; nor need he prove to the satisfaction of the jury that the operation was necessary, or that it would be dangerous to the wife to wait until her husband was notified: *McClallen v. Adams*, 19 Pick. 333; 31 Am. Dec. 140. The superintendent of a hotel at a watering-place does not render himself liable for the services of a physician by sending to a friend in a neighboring town the following telegram, which is by him shown to the physician: "There are many cases of yellow fever at the Well; send out a physician this afternoon without fail"; *Williams v. Brickell*, 37 Miss. 682; 75 Am. Dec. 88. Where by statute a license is essential to the right of a medical man to recover for his services, he cannot, without proving that he has such license, recover: *Richardson v. Dorman*, 28 Ala. 679; *Thompson v. Hazen*, 25 Me. 104; *Adams v. Stewart*, 5 Harr. (Del.) 144; *Bower v. Smith*, 8 Ga. 74; *Orr v. Meek*, 111 Ind. 40; *Dow v. Haley*, 30 N. J. L. 354; *contra*, *Thompson v. Sayre*, 1 Denio, 175; even for vegetable remedies of domestic make administered by him: *Bailey v. Mogg*, 4 Denio, 60; or for medicines which he has patented: *Smith v. Tracy*, 2 Hall, 465; *Jordan v. Dayton*, 4 Ohio, 294. But slight evidence of one's right to practice medicine is sufficient as against one who called him: *Chicago etc. R. R. Co. v. Smith*, 21 Ill. App. 202. Notes, bonds, and other assumptions made to a person as a physician or surgeon, the consideration of which is services rendered in prescribing for the cure of diseases, with-



land. Physicians and surgeons have committed to their care the most important interests, and it is an almost

out a license, are null and void; so, also, any obligation which springs out of the exercise of the profession of medicine, without a license: *Coyle v. Campbell*, 10 Ga. 570. A note given in consideration of services rendered by the payee as a physician, when he has not obtained a license, is made void by statute; yet if he sells drugs and medicines apart from his professional business as a physician, he may recover for them, if they constitute a part of the consideration for the note: *Holland v. Adams*, 21 Ala. 680. But a statute prohibiting a recovery for medical services rendered by an unlicensed physician does not prevent a recovery there for services rendered in another state; nor can the court presume that a similar statute exists elsewhere: *Downs v. Minchew*, 30 Ala. 86. The New York statute, declaring the practice of medicine and surgery by one without a regular diploma a misdemeanor, does not apply to a person undertaking to effect cures by manipulation; and such a person may maintain an action for a compensation agreed upon, although not a graduate, and having no license to practice: *Smith v. Lane*, 24 Hun, 632. But professional services of a "medical clairvoyant" are "medical services," within a statute requiring persons rendering such services to be licensed: *Bibber v. Simpson*, 59 Me. 181. Want of success in curing the patient does not affect his claim for compensation, unless actual want of skill is shown: *Tiedeman v. Loewengrund*, 2 Week. Not. Cas. 272; *Hesse v. Knippel*, 1 Mich. N. P. 109. The physician may recover for his services, even though he was mistaken in his treatment of the case: *Ely v. Wilbur*, 49 N. J. L. 685; 60 Am. Rep. 668. A surgeon is entitled to compensation for an operation not performed with the highest degree of skill, and which might have been performed more skillfully by others, provided the operation was beneficial to the patient: *Alder v. Buckley*, 1 Swan, 69. But he must possess and have used the necessary professional skill: *Langolf v. Pfomer*, 2 Phila. 17; *Patten v. Wiggin*, 51 Me.

594; 81 Am. Dec. 593. A person who professes to cure certain disorders within a specific time, and induces another person to employ him by false and fraudulent professions of his skill, cannot recover either for his medicines or attendance: *Hupe v. Phelps*, 2 Stark. 480. In an action for his services, the defendant may plead and set off the damages resulting from his want of skill or care, or he may show that they were of no value, and that the medicine prescribed was worthless: *Jonas v. King*, 81 Ala. 285. A person knowing of the intemperate habits of a physician, and continuing to employ him, cannot set up such habits in defense to the physician's suit for services: *McKleroy v. Sewell*, 73 Ga. 657. Responding to a call for services without any limit upon the contract will be an undertaking to look after the case as long as it needs attention: *Ballou v. Prescott*, 64 Me. 305; or until his services are dispensed with by the patient: *Dale v. Donaldson Lumber Co.*, 48 Ark. 188; 3 Am. St. Rep. 224; *Potter v. Virgil*, 67 Barb. 578. It is competent for a physician and his patient to enter into such a contract as they think fit, limiting the attendance to a longer or shorter period, or to a single visit. If there is no such limitation, the physician can discontinue his attendance at his election, after giving reasonable notice of his intention to do so: *Ballou v. Prescott*, 64 Me. 305. But where he is sent for at the time of an injury by one whose family physician he has been for years, the effect of his responding to the call will be an engagement to attend to the case so long as it requires attention, unless he gives notice to the contrary, or is discharged by the patient; and he is bound to use ordinary care and skill, not only in his attendance, but in determining when it may be safely and properly discontinued: *Ballou v. Prescott*, 64 Me. 305. The physician is deemed the best and proper judge of the necessity of frequent visits; and in the absence of proof to the contrary, the court will presume that all the professional visits made were deemed necessary, and were properly made:

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Todd v. Myres, 40 Cal. 357. The employment of a physician, and a promise to pay him for his service, made on the sabbath, is not prohibited by statute: Smith v. Watson, 14 Vt. 332.

**Duty of Physicians and Surgeons as to Care and Skill—Malpractice.**—It has been held in a few cases that a physician or surgeon is required to exercise the skill and care such as those of his profession thoroughly educated in that profession ordinarily employ: Haire v. Reese, 7 Phila. 138; McCandless v. McWha, 22 Pa. St. 261. But this rule, according to the great weight of authority, is too severe. The law requires only that the physician or surgeon shall possess the ordinary skill and learning, and exercise the ordinary diligence, care, and caution, in the treatment of diseases and injuries, which is possessed and exercised by the average member of the profession to which he belongs, and he is liable in damages only for injuries resulting from the lack of either of these requisites: Leighton v. Sargent, 27 N. H. 460; 59 Am. Dec. 388; Gallaher v. Thompson, Wright, 466; West v. Martin, 31 Mo. 375; 80 Am. Dec. 107; Wood v. Clapp, 4 Sneed, 65; Long v. Morrison, 14 Ind. 595; 77 Am. Dec. 72; Almond v. Nugent, 34 Iowa, 304; 11 Am. Rep. 147; Smothers v. Hanks, 34 Iowa, 286; 11 Am. Rep. 141; Hathorn v. Richmond, 48 Vt. 557; Ritchey v. West, 23 Ill. 385; McNevins v. Lowe, 40 Ill. 209; Howard v. Grover, 28 Me. 97; 48 Am. Dec. 478; Landon v. Humphrey, 9 Conn. 209; 23 Am. Dec. 333; Graham v. Gautier, 21 Tex. 111; Patten v. Wiggin, 51 Me. 594; 81 Am. Dec. 593; Grannis v. Branden, 5 Day, 260; 5 Am. Dec. 143; Seare v. Prentice, 8 East, 343; Rich v. Pierpont, 3 Fost. & F. 35; Hesse v. Knippel, 1 Mich. N. P. 109; Hitchcock v. Burgett, 38 Mich. 501; Barnes v. Means, 82 Ill. 379; 25 Am. Rep. 328. What is required of him is that degree of skill ordinarily exercised in the profession by the members thereof as a body, the average of the skill and diligence ordinarily exercised by the profession as a whole; not that exercised by the thoroughly educated,

nor by the moderately educated, nor by the merely well educated, but by the average physician and surgeon: Smothers v. Hanks, 34 Iowa, 286; 11 Am. Rep. 141. In a leading case it is said: "By our law, a person who offers his services to the community generally, or to any individual, for employment in any professional capacity as a person of skill, contracts with his employer,—1. That he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community and by those conversant with that employment as necessary and sufficient to qualify him to engage in such business. . . . 2. That he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge to accomplish the purpose for which he is employed. He does not undertake for extraordinary care or extraordinary diligence any more than he does for uncommon skill. . . . 3. In stipulating to exert his skill and apply his diligence and care, the medical and other professional men contract to use their best judgment": Leighton v. Sargent, 27 N. H. 460; 59 Am. Dec. 388. And this is said by Judge Cooley (Cooley on Torts, 649) to be an accurate statement of the duties and responsibility of medical men. And see Wood v. Clapp, 4 Sneed, 65; Alder v. Buckley, 1 Swan, 69; Long v. Morrison, 14 Ind. 595; 77 Am. Dec. 73; Grannin v. Boener, 56 Ind. 497; Reilly v. Cavanagh, 29 Ind. 435; Bellinger v. Craigue, 31 Barb. 534; Carpenter v. Blake, 60 Barb. 488; Hathorn v. Richmond, 48 Vt. 557; Wilmot v. Howard, 39 Vt. 447; 94 Am. Dec. 338; Walker v. Goodman, 21 Ala. 647; Branner v. Stormont, 9 Kan. 51; Hord v. Grimes, 13 B. Mon. 188; Gambert v. Hart, 44 Cal. 542; Heath v. Gilsan, 3 Or. 64; O'Hara v. Wells, 14 Neb. 403; Small v. Howard, 128 Mass. 131; 35 Am. Rep. 363; Hitchcock v. Burgett, 38 Mich. 501; Utley v. Burns, 70 Ill. 162; Ritchey v. West, 23 Ill. 385; McNevins v. Lowe, 40 Ill. 209; Barnes v.

surgery. For centuries the law has required physicians to possess and exercise skill and learning, for it has

Means, 82 Ill. 379; 25 Am. Rep. 328; Howard v. Grover, 28 Me. 97; 48 Am. Dec. 478; Patten v. Wiggin, 51 Me. 594; 81 Am. Dec. 593; Simonds v. Henry, 39 Me. 155; 63 Am. Dec. 611; Holmes v. Beck, 1 R. I. 243; Craig v. Chambers, 17 Ohio St. 253; Gallaher v. Thompson, Wright, 466; Graham v. Gautier, 21 Tex. 111; West v. Martin, 31 Mo. 375; 80 Am. Dec. 107. Therefore a medical man is not responsible for errors of judgment regarding the proper treatment of a particular case: Leighton v. Sargent, 27 N. H. 460; 59 Am. Dec. 388; Patten v. Wiggin, 51 Me. 594; 81 Am. Dec. 593; Tefft v. Wilcox, 6 Kan. 46; Williams v. Poppleton, 3 Or. 139; unless the error is so gross as to be inconsistent with the possession of the required skill: West v. Martin, 31 Mo. 375; 80 Am. Dec. 107. An instruction is erroneous that if the surgeon could have learned the nature of the injury and applied the proper remedy and failed he is liable: Quinn v. Donovan, 85 Ill. 194. In an Indiana case (Gramm v. Boener, 56 Ind. 497), an action for malpractice in setting a limb, the following instruction had been asked on the trial on the part of the defendant, and refused: "The question in this class of cases is, whether he, the physician, has employed such reasonable skill and diligence as are ordinarily exercised in his profession in the locality where he practices." On appeal the supreme court held that the refusal was not error. Physicians, said the court, practicing in sparsely populated districts, are bound to possess and exercise at least the average degree of skill exercised by the profession in such localities generally. It will not do to say that if a physician or surgeon has exercised such a degree of skill as is ordinarily exercised in the particular locality he practices in, it will be sufficient. There might be but few practicing in the given locality, all of whom might be quacks, and it would not do to say that if one exercised as much skill as the others he would not be chargeable with want of reasonable skill. But in Massachusetts it is laid down that a country physician and

surgeon is not bound to the exercise of that high degree of art and skill possessed by eminent surgeons living in large cities, and making a specialty of the practice of surgery, but only to that reasonable degree of learning, art, and skill ordinarily possessed by others learned in his profession, having regard to the advanced state of the science: Small v. Howard, 128 Mass. 131; 35 Am. Rep. 363.

**Test of Physician's Acquirements—Different Schools.**—His acquirements are to be tested by the school of medicine he professes, and not by that of other schools: Musser v. Chase, 29 Ohio St. 577; Bowman v. Woods, 1 G. Greene, 441; Patten v. Wiggin, 51 Me. 594; 81 Am. Dec. 593; a homeopathist by the standard of homeopathy: Corsi v. Maretzek, 4 E. D. Smith, 1; and a "botanic doctor" may show his treatment to have been according to the botanic method: Bowman v. Woods, 1 G. Greene, 441. Under the statutes of New York regulating medical practice, which recognize no difference in legal status between different schools of practitioners, homeopathic physicians have the same right of action with allopathic for slanderous words spoken of them. A physician of either school may maintain an action for calling him a quack: White v. Carroll, 42 N. Y. 161; 1 Am. Rep. 503. The terms "physicians and surgeons," in a statute providing for the organization of county medical societies, embrace homeopathists although they are not named: Raynor v. State, 62 Wis. 289. But to constitute a school of medicine within the rule relieving from liability for malpractice a physician exercising the same skill and care as is ordinarily exercised by physicians in good standing who belong to the same school, it must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies, which each member is supposed to observe in any given case. Clairvoyant physicians have no recognized methods of treatment, and do not constitute a school of medicine within the above rule. Hence such a physician

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cannot escape liability for malpractice by showing that he treated plaintiff with the ordinary skill and knowledge of the clairvoyant system. To escape liability, he must show that he treated him with the ordinary skill and knowledge of physicians in good standing practicing in that vicinity: *Nelson v. Harrington*, 72 Wis. 591. A person not qualified as being a regular medical practitioner, but assuming to be or to practice as such, and undertaking to treat another for a disease, is liable for injury caused by ignorant and improper treatment, by which the patient is rendered worse instead of better, and is injured by the use of improper medicines: *Ruddock v. Lowe*, 4 Fost. & F. 519. It does not lessen the obligation to use due care, skill, and diligence to show that the service was gratuitous: *Baird v. Gillett*, 47 N. Y. 186; and it is inadmissible in an action for malpractice to prove that no fee has been demanded: *McNevin v. Lowe*, 40 Ill. 209; *Hord v. Grimes*, 13 B. Mon. 188; *Conner v. Winton*, 8 Ind. 315; *Musser's Ex'rs v. Chase*, 29 Ohio St. 577.

#### Calling in Another Physician

— **Associates.** — If a physician turns over the case to another medical man of his own selection, he is liable for the want of skill or diligence in the latter: *Walker v. Stevens*, 79 Ill. 193. But a mere recommendation of another, to be called in in case of need in his absence, does not render him liable: *Hitchcock v. Burgett*, 38 Mich. 501. His obligation, being a personal one, is not affected by his refusal of the proffer of assistance from another physician: *Potter v. Warner*, 91 Pa. St. 362; 36 Am. Rep. 668. Where several physicians are associated in partnership, all the members of the firm are liable for the negligence of one of them: *Hyrne v. Erwin*, 23 S. C. 226; 55 Am. Rep. 15; *Whittaker v. Collins*, 34 Minn. 299; 57 Am. Rep. 55.

#### Evidence Relevant and Irrelevant.

— The plaintiff may show particular acts of misconduct and incompetency in the physician: *Grannis v. Branden*, 5 Day, 260; 5 Am. Dec. 143;

that the physician had made declarations that it was a different disease from what the patient was really suffering from: *Grannis v. Branden*, 5 Day, 260; 5 Am. Dec. 143; that the point of amputation selected was too high, and increased the danger: *Wright v. Hardy*, 22 Wis. 348; that the defendant had not been regularly educated in his profession: *Grannis v. Branden*, 5 Day, 260; 5 Am. Dec. 143. The physician may show that he has received a good medical and surgical education: *Leighton v. Sargent*, 27 N. H. 460; 59 Am. Dec. 388; that he is ordinarily a skillful and proficient physician and surgeon: *Graham v. Gautier*, 21 Tex. 111; *West v. Martin*, 31 Mo. 375; 80 Am. Dec. 107. Where general skillfulness is not questioned, and the action is brought for negligence, evidence of the defendant's general skill is not competent: *Mertz v. Detweiler*, 8 Watts & S. 376; *Williams v. Poppleton*, 3 Or. 139; *Holtzman v. Hoy*, 19 Ill. App. 459; 118 Ill. 534; 59 Am. Rep. 390; although it is admissible if the issue is on the possession and not the use of skill. He may prove a specific instance of successful treatment of a different patient for the same disease: *Wooster v. Paige*, 1 Pac. C. L. J. 324; that he employed another skillful surgeon to help him: *Jones v. Angell*, 95 Ind. 376; that the treatment he gave was such as a surgeon of ordinary knowledge and skill would have given: *Quinn v. Higgins*, 63 Wis. 664; but not the opinion of the physician with whom the defendant had studied that he was skillful, nor that of his medical teachers: *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323; nor that he possessed skill two years after the act complained of: *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323; nor that a skilled physician assisted the defendant, they having disagreed as to the mode of treatment: *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323; nor evidence as to other cases, and the way he had treated them: *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323; nor of the reputation of the college where he studied: *Leighton v. Sargent*, 31

therefore no new principle of law that is asserted by our statute, but if it were it would not condemn the statute;

N. H. 119; 64 Am. Dec. 323; nor of the effect of the remedies used upon a person entirely well: *Turimby v. Leach*, 11 Cush. 397.

**Burden of Proof on Plaintiff.**—

The burden of proof is on the plaintiff to show want of knowledge and skill on the part of the defendant: *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323; *Craig v. Chambers*, 17 Ohio St. 253; *Haire v. Reese*, 7 Phila. 138; *Baird v. Morford*, 29 Iowa, 531; *Wooster v. Paige*, 1 Pac. C. L. J. 324. He does not guarantee a cure, and no presumption of the absence of diligence or skill arises from his failure to effect a cure: *Haire v. Reese*, 7 Phila. 138; *Hoopingarner v. Levy*, 77 Ind. 455; *O'Hara v. Wells*, 14 Neb. 403. If a surgeon called to attend one who has long been his employer leaves his patient before he has been properly cared for professionally, or while he needs further attention, and relies upon an alleged discharge by the patient as a defense to a suit brought for the abandonment, this being a new substantive matter of defense, the burden of proving it is upon the defendant: *Ballou v. Prescott*, 64 Me. 305.

**Measure of Damages.**—No recovery can be had for injuries resulting from the original hurt, but only for those arising from the physician's negligent treatment of his patient: *Wenger v. Calder*, 78 Ill. 275. The plaintiff is not entitled to recover anything on account of pain and suffering caused by the injury, but only for such additional pain and suffering as is produced by the negligence or want of skill of the defendant in the treatment: *Wenger v. Calder*, 78 Ill. 275. But the physician is liable in damages, although part of the patient's sufferings are from other causes than his malpractice: *Gates v. Fleischer*, 67 Wis. 504.

**Other Liabilities.**—A physician in charge of an insane asylum is liable in false imprisonment for detaining a sane person against his will: *Van Deusen v. Newcomer*, 40 Mich. 90; *Fletcher v. Fletcher*, 28 L. J. Q. B. 134. In a Michigan case the supreme court was divided as to whether the super-

intendent of an asylum is liable for detaining a sane person whom in good faith he believes to be insane, and whether, in doubtful cases, an inquisition to determine the insanity of a person is prerequisite to his confinement in an asylum, *Campbell, C. J.*, and *Cooley, J.*, holding in the affirmative, and *Marston and Graves, J.J.*, in the negative: *Van Deusen v. Newcomer*, 40 Mich. 90. Where the plaintiff alleged that defendants, who were practicing physicians, falsely and maliciously certified, under oath, that she was insane, and by means of such certificate wrongfully caused and procured her to be arrested and imprisoned in the state asylum for the insane, the court held that the declaration stated no cause for action, as it failed to aver that defendants actually caused or procured the arrest, and disclosed no facts from which it appeared that the false certificate could have been the means of procuring the same: *Force v. Probasco*, 43 N. J. L. 539. In another case the plaintiff sued the physicians upon whose certificate she was confined in an asylum as insane, charging that they falsely and negligently certified to the fact of her insanity. Her declaration denied that she was insane, and defendants pleaded the general issue. The court held that it was for plaintiff to establish the fact of her sanity; that defendants could not be made liable for the insufficiency of methods pursued in reaching their conclusion, but only for their falsehood; and that defendants might show precisely the circumstances under which they acted, that such evidence was admissible in mitigation of damages, even if it failed to justify their action: *Pennell v. Cummings*, 75 Me. 163. Where a physician takes an unprofessional unmarried man with him to attend a confinement case, and no real necessity exists for the latter's assistance, both are liable in damages to the woman, and it makes no difference that the patient or her husband supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence: *De May v. Roberts*, 46 Mich. 160; 41 Am. Rep.

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for the statute is an exercise of the police power inherent in the state. It is, no one can doubt, of high importance

154. A physician attending patients with infectious diseases must take all proper precautions to prevent the communication of such diseases to his other patients: *Piper v. Menifee*, 12 B. Mon. 465; 54 Am. Dec. 547; *Seavy v. Preble*, 64 Me. 120.

**Who may Sue.**—The action will lie in every case by the patient injured, even though he did not employ the physician himself. An action will lie by the husband against the surgeon for an unskillful operation upon his wife, though she dies in consequence of it: *Cross v. Guthery*, 2 Root, 90; 1 Am. Dec. 61. He may recover also for negligent treatment of the wife, whereby he has been subjected to expense and deprived of her society: *Mowry v. Chaney*, 43 Iowa, 600; *Long v. Morrison*, 14 Ind. 595; 77 Am. Dec. 72. A husband suing for damages for injuries occasioned to his wife from a physician's malpractice may recover for loss of services necessarily resulting, even though he does not specially claim such: *Stone v. Evans*, 32 Minn. 243. If the suit is brought for personal injuries and suffering of a wife, caused by malpractice, the husband must join: *Gallaher v. Thompson*, Wright, 466; *Long v. Morrison*, 14 Ind. 595; 77 Am. Dec. 72; 1 Chitty's Pleading, 16th Am. ed., 83; *Pomeroy on Remedies*, secs. 191, 242. But if the suit is for loss of services, the wife is not a proper party: 1 Chitty's Pleading, 83; *Pomeroy on Remedies*, 191, 242.

**Contributory Negligence of Patient.**—The contributory negligence of the patient is a good defense; he cannot recover damages if his own negligence directly contributed to the result: *Hibbard v. Thompson*, 109 Mass. 286; *Jones v. Angell*, 95 Ind. 396; or the negligence of those in charge of him: *Potter v. Warner*, 91 Pa. St. 362; 36 Am. Rep. 668. Thus he is bound to obey the instructions of the medical man; and if his failure to do so contributed to the injury he sues for, he cannot recover: *Gieselmann v. Scott*, 25 Ohio St. 86; *Baird v. Morford*, 29 Iowa, 531; *Gramm v. Boener*, 56 Ind. 497; *McCandless v. McWha*,

22 Pa. St. 261. If it is impossible to separate the injury occasioned by the neglect of the patient from that occasioned by the neglect of the physician, the patient cannot recover: *Gramm v. Boener*, 56 Ind. 497; *Gieselmann v. Scott*, 25 Ohio St. 86. If, however, they can be separated, the patient may recover damages for such injuries as he can show were produced solely by a want of ordinary care or skill on the part of the physician: *Hubbard v. Thompson*, 109 Mass. 286. The insanity of the patient will excuse him from following the physician's directions, and it is the duty of the latter to take this into consideration in his treatment: *People v. New York Hospital*, 3 Abb. N. C. 229. The fact that the patient, or those having him in charge, refused to permit the physician, after he had inflicted an injury upon the patient by his negligence or want of skill, to make an experiment for the purpose of repairing the injury, is not to be imputed to the patient as negligence, unless they were reasonably assured that the attempt would be successful: *Chamberlin v. Morgan*, 68 Pa. St. 168. The information given by a surgeon to his patient concerning the nature of his malady is relevant in determining whether the patient, in disobeying the instructions of the surgeon, was guilty of contributory negligence or not: *Gieselmann v. Scott*, 25 Ohio St. 86. Where, because of improper treatment by a physician, the patient must inevitably have a crooked arm, the mismanagement and carelessness of those having charge of the patient, whereby his injury is much aggravated, does not destroy his right of action against the physician; such mismanagement will only operate to reduce the damages: *Wilmot v. Howard*, 39 Vt. 447; 94 Am. Dec. 338. Where the patient requests and takes the risk of a dangerous or unnecessary operation against the advice of the physician, the latter cannot be made liable for undertaking it: *Gramm v. Boener*, 56 Ind. 497.

**Dentists.**—The practice of dentistry may be regulated and the quali-

to the community that health, limb, and life should not be left to the treatment of ignorant pretenders and charla-

fications of dentists prescribed by statute: *Wilkins v. State*, 113 Ind. 514. A dentist is liable for not exercising a reasonable degree of skill and care in his professional operations, but is not answerable for injuries arising from his lack of the highest knowledge in his profession: *Simonds v. Henry*, 39 Mo. 155; 63 Am. Dec. 611; A dentist or surgeon using an anæsthetic is not bound to look for any but the probable and natural effects of the drug, and is not liable for results arising from the peculiar temperament or condition of the patient of which he had no knowledge: *Bogle v. Winslow*, 5 Phila. 136.

**Druggists.** — Practicing as an apothecary is the mixing up and preparing medicines prescribed by a physician, or by any other person, or by the apothecary himself: *Woodward v. Ball*, 6 Car. & P. 577; *Thompson v. Lewis*, *Moody & M.* 255. There is no rule of law to preclude an apothecary from recovering both for medicines and attendance, where the united charges do not exceed a reasonable remuneration; and it is a question for the jury what is reasonable: *Morgan v. Hallen*, 3 Nev. & P. 498; *Smith v. Chambers*, 2 Phila. 221. But an apothecary who furnishes medicines, not being in a capacity to recover, cannot recover even for the vials in which the medicines were contained: *Steed v. Henley*, 1 Car. & P. 574. A druggist who negligently sells a poison for a harmless medicine is liable in damages for any injuries which may result from it: *Norton v. Sewall*, 106 Mass. 143; *Quin v. Moore*, 15 N. Y. 432; *Fleet v. Hollenkemp*, 13 B. Mon. 219; 56 Am. Dec. 563. A druggist who, by mistake, sells sulphate of zinc for Epsom salts is liable for the damage caused thereby: *Walton v. Booth*, 34 La. Ann. 913. And it is no defense that the medical treatment was negligent; but a charge that the defendant is liable without regard to negligence or legal fault is error: *Brown v. Marshall*, 47 Mich. 576; 41 Am. Rep. 728. An action by a husband against a druggist for improperly compounding a prescription, taken by

his wife, with poisons, which caused her death, is not barred by proof that the woman was at the time very sick with yellow fever, that the attending physician gave a certificate of death from yellow fever, and that the husband caused this certificate to be published in the newspapers: *McCubbin v. Hastings*, 27 La. Ann. 713. It is no defense that defendant was personally absent from the city at the time the prescription was called for, having left his business in the charge of competent clerks and servants, by one of whom the prescription was erroneously compounded: *McCubbin v. Hastings*, 27 La. Ann. 713. A dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label. His liability arises, not out of any contract or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured: *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455; *Longmeid v. Holliday*, 6 Ex. 761. In a Massachusetts case, the declaration alleged that the defendants, being druggists and chemists, through negligence and want of skill, sold and delivered to certain persons an article which defendants supposed to be black oxide of manganese, but which was, in fact, sulphide of molybdenum; that the vendees, acting on the belief that it was oxide of manganese, resold it to the plaintiff, who, influenced by the same belief, mixed it with chlorate of potassia, whereby a dangerous and explosive substance was created, which exploded, damaging the plaintiff; it was held that no cause of action was set forth. The averments, the court held, did not disclose any duty or obligation resting on the defendants towards the plaintiff in the



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**§ 3912. Public Morals.**—The legislature may regulate the use and keeping of property, so far as may be necessary to prevent it being a detriment to the public morals or public good.<sup>1</sup> Under this power the state may prohibit lotteries, and take back a franchise of this nature already granted.<sup>2</sup>

**§ 3913. Public Health and Safety.**—The legislature may, subject to constitutional limitations, prescribe just and reasonable regulations and restraints upon the use which an owner makes of his property, so as to protect the rights of the public, and of others, to use their prop-

erty. The article to the person from whom the plaintiff purchased it: *Davidson v. Nichols*, 11 Allen, 514. For a druggist to sell a poisonous preparation without notifying the purchaser that it is poison, either verbally or by placing the word "poison" on the label of the bottle, is negligence at common law: *Wohlfahrt v. Beckert*, 92 N. Y. 490; 44 Am. Rep. 406. But where a druggist sells poison, fully warning the purchaser of its dangerous character, and clearly informing him as to what is a safe dose, and the purchaser is killed by taking an overdose in disregard of such direction, the druggist is not liable for not having labeled the parcel "poison," in conformity to a statute making it a misdemeanor for any person to sell "any arsenic, corrosive sublimate, prussic acid, or any other substance or liquid usually denominated poisonous, without having the word 'poison' written or printed upon a label attached to the vial, box, or parcel, in which the same is so sold": *Wohl-*

*fahrt v. Beckert*, 92 N. Y. 490; 44 Am. Rep. 406. Where a druggist, in good faith, recommends a prescription, not as his own, but as that of another named person, and thereupon is ordered by his customer to fill it, and does so, charging only for the medicines and for compounding them, he is not responsible to the customer for any damage which may result from the use or administration of the remedy by the latter: *Ray v. Burbank*, 61 Ga. 505; 34 Am. Rep. 103. In an English case an injunction to prevent a chemist from selling a quack medicine under a false and colorable representation that it was a medicine of the plaintiff, an eminent physician, was refused: *Clark v. Freeman*, 11 Beav. 112.

<sup>1</sup> *Stevens v. State*, 2 Ark. 291; 35 Am. Dec. 72.

<sup>2</sup> *Moore v. State*, 48 Miss. 147; 12 Am. Rep. 367; *Miss. Soc. v. Musgrove*, 44 Mass. 820; 7 Am. Rep. 723; *New Orleans v. Horton*, 119 U. S. 265; *Stone v. Mississippi*, 101 U. S. 814; *Justice v. Com.*, 81 Va. 209.



erty.<sup>1</sup> The legislature has power to pass laws for the protection of the health and safety of its citizens. It may determine what articles injurious to the public health shall not constitute property within its jurisdiction.<sup>2</sup> The police power extends to unwholesome trades, to slaughter-houses,<sup>3</sup> to factories for reducing the bodies of animals into agricultural manure,<sup>4</sup> and to all regulations concerning the buildings, poles, and wires of telegraph companies, to insure the comfort and convenience of the community.<sup>5</sup> Under this power statutes of the following nature have been sustained: A statute directing the removal of bodies from a cemetery, and the vacation and sale thereof;<sup>6</sup> a statute making it an offense to disinter or remove from the place of burial the remains of any deceased person, without a permit, for which a fee of ten dollars must be paid;<sup>7</sup> a statute prohibiting the use, in cities and towns of a certain size, of any building not then so in use for carrying on the "business of slaughtering cattle, sheep, or other animals, or for melting or rendering establishments, or for other noxious and offensive trades or occupations," without the permission of the mayor;<sup>8</sup> a statute regulating the keeping of dogs, and enforcing the regulations by forfeitures, fines, and penalties;<sup>9</sup> a statute forbidding the use of bicycles on a certain road, unless permitted by the superintendent of the road;<sup>10</sup> a law prohibiting the adulteration of articles of food, or preventing imposition or fraud in the sale of such articles;<sup>11</sup> a

<sup>1</sup> *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305. As to police regulations applying to carriers of persons and property, see *post*, § 3914, Carriers—Railroads.

<sup>2</sup> *Preston v. Drew*, 33 Me. 558; 54 Am. Dec. 639.

<sup>3</sup> *Butchers' etc. Co. v. Crescent City Co.*, 111 U. S. 746.

<sup>4</sup> *Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

<sup>5</sup> *Western etc. Co. v. Pendleton*, 122 U. S. 347.

<sup>6</sup> *Kincaid's Appeal*, 66 Pa. St. 411; 5 Am. Rep. 377. But see *Lake View v. Rose Hill Cem. Co.*, 70 Ill. 191; 22 Am. Rep. 71.

<sup>7</sup> *In re Wong Yung Quy*, 6 Saw. 442.

<sup>8</sup> *Watertown v. Mayo*, 109 Mass. 315; 12 Am. Rep. 694.

<sup>9</sup> *Faribault v. Wilson*, 34 Minn. 254.

<sup>10</sup> *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305.

<sup>11</sup> *State v. Campbell*, 64 N. H. 402; 10 Am. St. Rep. 419.

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statute intended to restrain or suppress manufacture and sale of oleomargarine, and like compounds resembling and intended as a substitute for butter;<sup>1</sup> a statute prohibiting the sale of opium;<sup>2</sup> a statute requiring physicians and midwives to report births and deaths to the clerks of courts.<sup>3</sup> A statute regulating sale of commercial fertilizers, if its controlling purpose is to guard the agricultural public against spurious and worthless compounds sometimes sold as fertilizers, and to furnish to buyers cheap and reliable means of proving the deception and fraud, should such be attempted, is constitutional.<sup>4</sup>

§ 3914. **Carriers—Railroads.**—The limit to the exercise of the police power over charter contracts is substantially this: The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under the pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers.<sup>5</sup> Thus a railroad corporation, even with an irrevocable charter, may be bound by subsequent laws established by the state for the safety or the protection of the public. The state may forbid discriminations by common carriers in the carriage of passengers or goods.<sup>6</sup> It may fix the rates of transportation, and compel submission to the supervision of commissioners, whose duty it shall be to see that the laws are obeyed, and that absolute impartiality is observed.<sup>7</sup> Thus

<sup>1</sup> *Butler v. Chambers*, 36 Minn. 69; 1 Am. St. Rep. 638; *Powell v. Pennsylvania*, 127 U. S. 678; *State v. Groves*, 15 R. I. 208; *Pierce v. State*, 63 Md. 592; *In re Uddington*, 12 Mo. App. 214. *Contra*, *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34.

<sup>2</sup> *State v. Ah Chew*, 16 Nev. 50; 40 Am. Rep. 488.

<sup>3</sup> *Robinson v. Hamilton*, 60 Iowa, 134; 46 Am. Rep. 63.

<sup>4</sup> *Steiner v. Ray*, 84 Ala. 93; 5 Am. St. Rep. 332.

<sup>5</sup> *Cooley on Constitutional Law*, 311; *Beer Co. v. Massachusetts*, 97 U. S. 25.

<sup>6</sup> *De Cuir v. Benson*, 27 La. Ann. 1; *Chicago etc. R. R. Co. v. People*, 67 Ill. 11; 16 Am. Rep. 599.

<sup>7</sup> *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Peck v. R. R. Co.*, 94 U. S. 164; *Blake v. R. R. Co.*, 19 Minn. 418; 18 Am. Rep. 345. *Aliter* where the corporation by its charter has been given the power to regulate its charges for a certain period; *Sloan v. R. R. Co.*, 61 Mo. 24; 21 Am. Rep. 397.

statutes of the following nature have been sustained: Requiring tracks to be fenced;<sup>1</sup> requiring railroad companies to fence their roads against the incursions of live-stock, and providing that any company which fails in this duty shall be liable for all stock killed upon its track, without reference to the question of negligence, misconduct, or inevitable accident;<sup>2</sup> making a railroad company neglecting to maintain proper fences along its tracks liable in double damages for stock straying on the track and being killed;<sup>3</sup> requiring railroad companies to advertise annually and adhere through the year to a tariff of fares;<sup>4</sup> requiring a railroad to establish a station at a certain point on its line and run a certain number of trains each day;<sup>5</sup> providing that all railroad corporations should be liable for damages from fires caused by the operating of such railroads;<sup>6</sup> requiring a railroad to build and maintain highway or farm crossings;<sup>7</sup> compelling railroads to maintain depots and waiting-rooms at crossings;<sup>8</sup> author-

<sup>1</sup> *Thorpe v. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625.

<sup>2</sup> *Gorham v. R. R. Co.*, 26 Mo. 441; 72 Am. Dec. 220; *Ohio etc. R. R. Co. v. McClelland*, 25 Ill. 140; *Galena etc. R. R. Co. v. Crawford*, 25 Ill. 529; *Wildler v. R. R. Co.*, 65 Me. 333; 20 Am. Rep. 698; *Waldron v. R. R. Co.*, 8 Barb. 390; *Clark v. R. R. Co.*, 36 Mo. 203; *Suydam v. Moore*, 8 Barb. 858; *Thorpe v. R. R. Co.*, 27 Vt. 141; 62 Am. Dec. 625; *New Albany etc. R. R. Co. v. Tilton*, 12 Ind. 3; 74 Am. Dec. 195; *New Albany etc. R. R. Co. v. Maiden*, 12 Ind. 10; *Indianapolis etc. R. R. Co. v. Parker*, 29 Ind. 471; *Kansas etc. R. R. Co. v. Mower*, 16 Kan. 573; *Nelson v. R. R. Co.*, 26 Vt. 717; 62 Am. Dec. 614; *Blair v. R. R. Co.*, 20 Wis. 254; *Indianapolis etc. R. R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville etc. R. R. Co. v. Applegate*, 10 Ind. 49; *Indianapolis etc. R. R. Co. v. McKinney*, 24 Ind. 283; *Gilmore v. R. R. Co.*, 60 Me. 237; *Rhodes v. R. R. Co.*, 5 Hun. 344; *McCall v. Chamberlain*, 13 Wis. 640; *Staats v. R. R. Co.*, 4 Abb. App. 287. So of a statute mak-

ing it the duty of the company to repair fences along its line "destroyed by fire caused by the running of trains or by the employees of the road"; *Pennsylvania R. R. Co. v. Riblet*, 66 Pa. St. 164; 5 Am. Rep. 360.

<sup>3</sup> *Cairo etc. R. R. Co. v. Peoples*, 92 Ill. 97; 34 Am. Rep. 112; *Little Rock etc. R. R. Co. v. Payne*, 33 Ark. 816; 34 Am. Rep. 55; *Barnett v. R. R. Co.*, 68 Mo. 56; 30 Am. Rep. 773; *Humes v. R. R. Co.*, 82 Mo. 221; 52 Am. Rep. 369; *Meyers v. Union Trust Co.*, 82 Mo. 237. *Contra*, *Atchison etc. R. R. Co. v. Baty*, 6 Neb. 37; 29 Am. Rep. 356.

<sup>4</sup> *R. R. Co. v. Fuller*, 17 Wall. 560.

<sup>5</sup> *Com. v. R. R. Co.*, 103 Mass. 254;

4 Am. Rep. 555; *R. R. Comm'r v. R. R. Co.*, 63 Me. 269; 18 Am. Rep. 208.

<sup>6</sup> *Rodemacher v. R. R. Co.*, 41 Iowa, 297; 20 Am. Rep. 592.

<sup>7</sup> *Portland etc. R. R. Co. v. Deering*, 78 Me. 61; 57 Am. Rep. 784; *Illinois etc. R. R. Co. v. Willenborg*, 117 Ill. 203; 57 Am. Rep. 862.

<sup>8</sup> *State v. R. R. Co.*, 32 Fed. Rep. 722.

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 to cross the railroad track, and to share with them the  
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 at crossings, or to station a flag-man at such or any other  
 dangerous places;<sup>5</sup> to respond in damages in case the  
 death of any person shall be caused by the company's  
 wrongful act, neglect, or default.<sup>6</sup> But a statute making  
 railroad companies liable "for all expenses of the coroner  
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 die on the cars, or who may be killed by collision or other  
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§ 3915. **Intoxicating Liquors.** — The sale of intoxicat-  
 ing liquors may be prohibited altogether.<sup>8</sup> So a state  
 may tax the wholesale importation of liquors from other  
 states, as a legitimate exercise of the police power.<sup>9</sup> The  
 regulation of the sale of intoxicating drinks within a state  
 belongs to the state, and it may require the taking out of  
 a license as a condition to the dealing in intoxicating

<sup>1</sup> Nashville etc. R. R. Co. v. State, 83 Ala. 71; affirmed 126 U. S. 96.

<sup>2</sup> Chicago etc. R. R. Co. v. Haggerty, 67 Ill. 113; Haas v. R. R. Co., 41 Wis. 44; Pennsylvania R. R. Co. v. Lewis, 79 Pa. St. 33.

<sup>3</sup> Chicago etc. R. R. Co. v. People, 67 Ill. 11; 16 Am. Rep. 599.

<sup>4</sup> Fitchburg etc. R. R. Co. v. R. R. Co., 1 Allen, 552.

<sup>5</sup> Galena etc. R. R. Co. v. Loomis, 13 Ill. 548; 56 Am. Dec. 471; Pittsburgh etc. R. R. Co. v. Brown, 67 Ind. 45; 33 Am. Rep. 73; Kamnitzky v. R. R. Co., 25 S. C. 53. See Toledo etc. R. R.

Co. v. Jacksonville, 67 Ill. 37; 16 Am. Rep. 611.

<sup>6</sup> Steamboat Co. v. Barclay, 30 Ala. 120; Boston etc. R. R. Co. v. State, 31 N. H. 215.

<sup>7</sup> Ohio R. R. Co. v. Lackey, 78 Ill. 55; 20 Am. Rep. 259.

<sup>8</sup> Beer Co. v. Massachusetts, 99 U. S. 25; License Cases, 5 How. 504; License Tax Cases, 5 Wall. 462; State v. Common Pleas, 36 N. J. L. 72; 13 Am. Rep. 422; Santo v. State, 2 Iowa, 168; 63 Am. Dec. 487.

<sup>9</sup> People v. Walling, 53 Mich. 264.

drinks, whether of home or foreign production, or may prohibit the sale of such drinks as a beverage, including those imported after they have passed from the hands of the importer and become a part of the general merchandise of the state.<sup>1</sup> Statutes giving a civil remedy for injuries arising from the sale of intoxicating liquors are constitutional.<sup>2</sup> A statute is valid enacting that the lessor of premises, with knowledge that they are to be used for the sale of intoxicating liquors, is liable for damage caused by the act of one intoxicated by liquors sold there.<sup>3</sup>

**§ 3916. Personal Rights.**—A statute is constitutional which declares that “no person can, by reason of race, color, or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility, or privilege furnished by innkeepers or common carriers, or by owners, managers, or lessees of theaters or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations.”<sup>4</sup>

**§ 3917. Regulation of Prices.**—The state may regulate charges in the following cases, viz.:<sup>5</sup> 1. Where the business is one the following of which is not a matter of right, but is permitted by the state as a privilege or franchise, as the business of setting up lotteries, of giving shows, etc., of keeping billiard-tables for hire, of selling intoxicating drinks, and of keeping a ferry or toll-bridge;

<sup>1</sup> License Cases, 5 How. 504; License Tax Cases, 5 Wall. 462; State v. Cassidy, 22 Minn. 312; 21 Am. Rep. 765; Bostick v. State, 47 Ark. 126.

<sup>2</sup> Dedore v. Newton, 54 N. H. 117; Mulford v. Clewell, 21 Ohio St. 191; Duvoy v. Lechter, 10 Ohio St. 483; Wilkerson v. Rust, 57 Ind. 172; Franklin v. Schemerhorn, 15 N. Y. Sup. Ct. 412; State v. Ludington, 33 Wis. 107; Horning v. Wendell, 57 Ind. 171; Sibila v.

Bahney, 34 Ohio St. 399; Bertholf v. O'Reilly, 74 N. Y. 509; 30 Am. Rep. 323; Werner v. Edmiston, 24 Kan. 147; Moran v. Goodwin, 130 Mass. 158; 39 Am. Rep. 443.

<sup>3</sup> Bertholf v. O'Reilly, 74 N. Y. 509; 30 Am. Rep. 323.

<sup>4</sup> People v. King, 110 N. Y. 418; 6 Am. St. Rep. 389.

<sup>5</sup> See Cooley on Constitutional Law, 234.

2. When the state, on public grounds, renders to the business special assistance by taxation, or under the eminent domain, as in the case of railroads; 3. When, for the accommodation of the business, special privileges are given in the public streets, or exceptional use allowed of public property or public easements, as is the case with hackmen, draymen, etc.; 4. When exclusive privileges are granted in consideration of some special return to the public, or in order to secure something to the public not otherwise attainable; 5. When private property is devoted to public use, or when the employment is *quasi* public, as elevators for the storage of grain.<sup>1</sup> A statute providing that a "track-scale" shall be furnished by the operators of coal mines, and that "all coal produced in this state

<sup>1</sup> *Munn v. People*, 69 Ill. 80; *Munn v. Illinois*, 94 U. S. 113; the court saying: "It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable,

is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms or forego the use. But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common-law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one. We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses by the legislatures the people must resort to the polls, not to the courts."

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Constitutional Law,

shall be weighed on the scales as above provided, and the weight so determined shall be considered the basis upon which the wages of persons mining coal shall be computed," is not an unconstitutional interference with the right of operators and miners to contract for payment on another basis than that of weight.<sup>1</sup>

§ 3918. **Monopolies.** — Monopolies cannot be granted in such ordinary vocations as can be left open to all to the common benefit; but they sometimes may be given as a matter of regulation, where the business is such that the public interest can be best subserved and protected by confiding it to one person, or association of persons, who shall manage it exclusively.<sup>2</sup> Thus the exclusive right to supply water or gas-light in a city or part of a city may be granted,<sup>3</sup> or the exclusive right to lay railroad tracks in its streets; so a corporation may be given the exclusive right to slaughter cattle for the markets of a city, it being required to do so impartially for all who apply, and at reasonable rates.<sup>4</sup> A statute granting to a state corporation the exclusive right for a term of years to control the slaughtering of cattle in and near to one of its cities, and requiring that all cattle and other animals intended for sale or slaughter in that district shall be brought to the yards and slaughter-houses of the corporation, and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed or slaughtered, is valid.<sup>5</sup> But notwithstanding such a grant, the business may afterwards, within the term, be opened to general competition.<sup>6</sup> A legislature may empower a city to grant an exclusive license to ferry across a navi-

<sup>1</sup> *Jones v. People*, 110 Ill. 590.

<sup>2</sup> *Cooley on Constitutional Law*, 235; *Philadelphia etc. R. P. Co.'s Case*, 6 Whart. 25; 36 Am. Dec. 202.

<sup>3</sup> *State v. Milwaukee Gas Co.*, 29 Wis. 454; 9 Am. Rep. 598. See *ante*, Title Gas Companies.

<sup>4</sup> *Slaughter-house Cases*, 16 Wall.

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<sup>5</sup> *Slaughter-house Cases*, 16 Wall.

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<sup>6</sup> *Butchers' Union Slaughter-house etc. Co. v. Crescent City Live-stock etc. Co.*, 111 U. S. 746.

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gable river, and the conferring of power to grant or refuse such license authorizes the granting of an exclusive license.<sup>1</sup> Even when the bill of rights declares that no set of men are entitled to exclusive privileges but in consideration of public services, this does not preclude a legislative grant of the exclusive right to supply gas to a city.<sup>2</sup>

ILLUSTRATIONS. — Under a special charter, granted in 1846, the defendant was empowered to "manufacture and sell gas" for the purpose of lighting the city of Columbus. The grant was exclusive for the term of twenty years. The charter contained no provision as to the price to be charged for gas, nor on the subject of meters. *Held*, that the defendant was subject to the provisions of the act of 1867, restricting the price to be charged for the use of meters: *State v. Columbus Gas-light and Coke Co.*, 34 Ohio St. 572; 32 Am. Rep. 390.

<sup>1</sup> *Burlington and Henderson County Ferry Co. v. Davis*, 48 Iowa, 133; 30 Am. Rep. 390. <sup>2</sup> *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683.





TITLE XXXIX.  
MUNICIPAL CORPORATIONS.



# TITLE XXXIX.

## MUNICIPAL CORPORATIONS.

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### CHAPTER CCIII.

#### POWERS AND LIABILITIES OF MUNICIPAL CORPORATIONS.

- § 3919. Municipal corporations defined and classified.
- § 3920. Quasi corporations.
- § 3921. Are created by state.
- § 3922. Acceptance of charter.
- § 3923. Form of grant.
- § 3924. Proof of corporate existence.
- § 3925. Charter may be altered or repealed.
- § 3926. Powers of corporation are only those expressly given or incident.
- § 3927. Discretionary powers not judicially controlled.
- § 3928. Corporation may delegate powers to agents.
- § 3929. When delegation not permitted.
- § 3930. When duty imposed on corporation is imperative, and when discretionary.
- § 3931. Implied powers of corporation — Becoming surety or guarantor.
- § 3932. To compromise claims.
- § 3933. To employ attorneys.
- § 3934. To purchase and hold property.
- § 3935. To hold property in trust or in gift.
- § 3936. To convey property.
- § 3937. To mortgage property.
- § 3938. To borrow money.
- § 3939. Express limitations as to indebtedness.
- § 3940. Offering rewards.
- § 3941. Public buildings.
- § 3942. Prevention of fires.
- § 3943. Health — Powers as to.
- § 3944. Indemnifying officers.
- § 3945. Celebrations and entertainments.
- § 3946. Animals.
- § 3947. Subscribing to railroad stock — Railroad aid.
- § 3948. Power of corporation to make contracts.
- § 3949. Contracts prohibited by charter or law.

- § 3930. Contracts with officers or agents—Persons bound to know limits of authority.
- § 3931. May contract without seal.
- § 3932. How contracts may be entered into.
- § 3933. Statutory mode must be followed.
- § 3934. Duty to let contract to lowest bidder.
- § 3935. Implied contracts of municipal corporations.
- § 3936. Contracts ultra vires not binding.
- § 3937. Ratification of unauthorized contracts.
- § 3938. Dissolution of municipal corporations.
- § 3939. The corporation name.
- § 3960. Boundaries of corporations.

**§ 3919. Municipal Corporations Defined and Classified.**

—Municipal corporations are bodies politic and corporate, established by law, to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.<sup>1</sup> A corporation is private, as distinguished from public, unless the whole interest belongs to the government, or the corporation is created for the administration of political or municipal power.<sup>2</sup> A state is not included in the term "corporation."<sup>3</sup> It is the citizens of a city, and not the common council, who constitute the "corporation" of the city. The aldermen and other charter officers are only officers of the corporation.<sup>4</sup>

**§ 3920. Quasi Corporations.**—Where bodies are created by statute, and given certain powers, and called upon to exercise certain duties, but is not called a corporation

<sup>1</sup> 1 Dillon on Municipal Corporations, c. 2; *Hamilton Co. v. Mighels*, 7 Ohio St. 109.

<sup>2</sup> *Rundle v. Delaware and Raritan Canal*, 1 Wall. Jr. 275. Overseers of the poor in New York are a corporation: *Rouse v. Moore*, 18 Johns. 407; *Jansen v. Ostrander*, 1 Cow. 681. So are supervisors of a town: *Jansen v. Ostrander*, 1 Cow. 670, 684. In Mississippi, trustees of the poor are a public corporation: *Governor v. Gridley*, 1 Miss. 328. A corporation is not public because it may be for the public benefit. Therefore a canal company is a private corporation:

*Ten Eyck v. Delaware and Raritan Canal*, 18 N. J. L. 200; 37 Am. Dec. 233. So an incorporated academy is a private corporation, although it may derive a part of its support from the government: *Cleveland v. Stewart*, 3 Ga. 283. The water commissioners of the city of New York are not a corporation: *Appleton v. Water Commissioners*, 2 Hill, 432.

<sup>3</sup> *Georgia v. Atkins*, 35 Ga. 315.

<sup>4</sup> *Lowber v. Mayor etc. of N. Y.*, 5 Abb. Pr. 325; *Clarke v. City of Rochester*, 24 Barb. 446; 5 Abb. Pr. 107; 14 How. Pr. 193.

by the legislature, it is spoken of as a *quasi* corporation, and is considered to have the powers of suing and to be liable to be sued in its public capacity.<sup>1</sup> The term "municipal corporation" is, in its strict sense, confined to cities, towns, and villages.<sup>2</sup> The county is generally spoken of as a *quasi* corporation.<sup>3</sup> So are overseers of the poor;<sup>4</sup> and of the same character is the school district,<sup>5</sup>

<sup>1</sup> *Palmer v. Vandenberg*, 3 Wend. 193; *Todd v. Birdsall*, 1 Cow. 260; 13 Am. Dec. 523; *Chapline v. Overseers*, 7 Leigh, 231; 30 Am. Dec. 505; Civil townships have no corporate powers, and cannot sue or be sued. *West Bend v. Munch*, 52 Iowa, 132.

<sup>2</sup> The word "town," as used in constitutional inhibition of special laws regulating the internal affairs of towns and counties, is a generic term including cities: *Van Riper v. Parsons*, 40 N.J. L. 1. In the absence of any clear expression of a contrary intent, the term "municipal corporations" in any statute must be taken in the strict constitutional sense, as not including towns: *Eaton v. Manitowoc Co. Supervisors*, 44 Wis. 489.

<sup>3</sup> *Coles v. County of Madison*, 1 Ill. 154; 12 Am. Dec. 161; In *Hamilton Co. v. Mighels*, 7 Ohio St. 109, the court says: "Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons who compose them. Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) organization is asked for, or at least assented to, by the people it embraces; the latter organization (counties) is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of

the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy."

<sup>4</sup> *Todd v. Birdsall*, 1 Cow. 260; 13 Am. Dec. 523; *Overseers v. Overseers*, 18 Johns. 407; *Armine v. Spencer*, 4 Wend. 406; *Palmer v. Vandenberg*, 3 Wend. 193; *Van Keuren v. Johnston*, 3 Denio, 183.

<sup>5</sup> *Inhabitants v. Wood*, 13 Mass. 103; *Clarke v. School District*, 3 R. I. 199; *Grant v. Fancher*, 5 Cow. 309; *Lexington v. McQuillan*, 9 Dana, 519; 35 Am. Dec. 159; *District v. McCloon*, 4 Wis. 79; *State v. Hulin*, 2 Or. 306; *Andrews v. Estes*, 11 Mo. 267; 26 Am. Dec. 521. In *Harris v. School District*, 28 N. H. 58, it is said: "School districts are *quasi* corporations of the most limited powers known to the laws. They have no powers derived from usage, their existence extending back but a few years. They have the powers expressly granted to them, and such implied powers as are necessary to enable them to perform their duties, and no more. Among them are the power to vote money for specified purposes, and the power to appoint committees to carry their votes relative to those purposes into effect. The district may clearly by their votes for building and repairing school-houses limit the expense to a definite sum; and they may limit the precise repairs or the exact description of the school-house to be built, and it seems very clear that no committee can bind the district by exceeding those limits. . . . These committees to build and repair school-houses are special

and school trustees.<sup>1</sup> The same has been held of New England towns,<sup>2</sup> levee districts in California,<sup>3</sup> fire departments,<sup>4</sup> and police boards.<sup>5</sup>

§ 3921. **Are Created by State.**—Municipal corporations can only be created by the state, either by a special act or, as in recent times, by a general law.<sup>6</sup> The power to create corporate bodies for municipal purposes with the means of self-government is a legitimate exercise of sovereignty, belonging to the legislative power of a state.<sup>7</sup> The relation of principal and agent does not exist between the state and municipal corporations in respect to the exercise of corporate functions; and money raised by municipal corporations for corporate purposes, but fraudulently obtained by wrong-doers, does not belong to the state, either in the capacity of trustee, principal, or owner, and cannot be sued for by the state without express legislative authority.<sup>8</sup> The power which prescribes the formalities to be observed in order to create a corporation is able to dispense with them.<sup>9</sup>

§ 3922. **Acceptance of Charter.**—A statute creating a municipal corporation is effectual without any acceptance, unless such charter is made conditional on its acceptance by the municipality.<sup>10</sup> So amendments to a municipal charter take effect without acceptance by the municipi-

agents without any general powers over the affairs of the district, and their powers are confined to a special purpose, and no inference can be drawn from the general nature of their powers. The liability of such powers to abuse, if the committees should be deemed to possess them, seems to furnish the strongest arguments against their existence."

<sup>1</sup> *Trustees v. Tarran*, 13 Ill. 27; *Carmichael v. Trustees*, 8 How. (Miss.) 84; *Connell v. Woodard*, 5 How. (Miss.) 665; 37 Am. Dec. 173.

<sup>2</sup> *Adams v. Bank*, 1 Greenl. 361; 10 Am. Dec. 88.

<sup>3</sup> *Dean v. Davis*, 51 Cal. 406.

<sup>4</sup> *Clarissey v. Metropolitan Fire Department*, 1 Sweeny, 224.

<sup>5</sup> *Board of Police of Attala County v. Grant*, 9 Smedes & M. 77; 47 Am. Dec. 102.

<sup>6</sup> *Dillon on Municipal Corporations*, c. 3.

<sup>7</sup> *Hope v. Deaderick*, 8 Humph. 1; 47 Am. Dec. 597.

<sup>8</sup> *People v. Ingersoll*, 58 N. Y. 1; 17 Am. Rep. 178.

<sup>9</sup> *Black River etc. R. R. v. Barnard*, 31 Barb. 258.

<sup>10</sup> *Dillon on Municipal Corporations*, c. 3.

ality.<sup>1</sup> The implied contract which is deemed to arise out of the acceptance of a charter by a municipal corporation is a contract between the city and the state, and not between the city and individuals; and is not "impaired" by a statute exempting from liability for torts.<sup>2</sup> The legislature cannot divest a municipal corporation, without its consent, of property legally acquired by it.<sup>3</sup>

§ 3923. **Form of Grant.**—The grant may be in express words, or may be inferred without the use of technical words.<sup>4</sup> The question is, Did the legislature intend to create a corporation? if it did, the form of the grant is immaterial.<sup>5</sup> The legality of the organization of a municipal corporation cannot be impeached in a collateral proceeding.<sup>6</sup>

§ 3924. **Proof of Corporate Existence.**—The charter or statute of incorporation will be judicially noticed by the courts without being specially pleaded, though the ordinances and by-laws of the corporation will not.<sup>7</sup> The

<sup>1</sup> Girard v. Philadelphia, 7 Wall. 1; and see cases cited in 53 Am. Dec. 471; Lycoming v. Union, 15 Pa. St. 166; 53 Am. Dec. 575. "The machinery for organizing villages and similar municipal corporations is not uniform, but is found modified in different states and countries by local usage. There are, however, some generally recognized principles which are never lost sight of. The most important, perhaps, is the fundamental rule that while the law may extend great facilities to persons and communities desirous of becoming incorporated, yet a compulsory incorporation can only come from direct legislative action or the actions of such persons or bodies as may by the law of the land be vested with sufficient delegated authority to bind the community. There are few, if any, acts of state bearing upon individuals more important than those which determine their liberty to be included in particular municipalities; and the cases are very rare

in which they have not been allowed an opportunity of being heard in every step of the proceedings": People v. Bennett, 29 Mich. 451; 18 Am. Rep. 107.

<sup>2</sup> Gray v. City of Brooklyn, 2 Abb. App. 267.

<sup>3</sup> Mayor v. Steamboat Co., R. M. Charlt. 342.

<sup>4</sup> Thomas v. Dakin, 22 Wend. 9, 84.

<sup>5</sup> Inhabitants v. Wood, 13 Mass. 193; Bow v. Allenstown, 34 N. H. 451; 69 Am. Dec. 489.

<sup>6</sup> Tisdale v. Minonk, 46 Ill. 9.

<sup>7</sup> Beatty v. Knowles, 4 Pet. 152, 157; Aldermen v. Finley, 10 Ark. 423; Fauntleroy v. Hannibal, 1 Dill. 118; Prell v. McDonald, 7 Kan. 426; 12 Am. Rep. 423; West v. Blake, 4 Blackf. 234; Briggs v. Whipple, 7 Vt. 15, 18; Case v. Mobile, 30 Ala. 538; Clarke v. Bank, 10 Ark. 516; State v. Mayor, 11 Humph. 217; Vance v. Bank, 1 Blackf. 80; Young v. Bank, 4 Cranch, 384; Swails v. State, 4 Ind. 516; Portsmouth etc. Co. v. Watson,



charter or act of incorporation is the best proof of the authority of a corporation, but if this cannot be had, secondary evidence of it is admissible;<sup>1</sup> as, for example, reputation;<sup>2</sup> or that the place has for a long time exercised corporate powers;<sup>3</sup> or has been recognized as such by legislation.<sup>4</sup>

§ 3925. **Charter may be Altered or Repealed.** — The powers of a municipal corporation may be amended, altered, or taken away by the legislature by a general law or a special act,<sup>5</sup> if vested rights already acquired are saved.<sup>6</sup> The legislature may amend their charters, extend or reduce their boundaries, divide and consolidate, or abolish them, according to public convenience, and with the consent of the body politic.<sup>7</sup> When a town is divided, and a new town created out of a part of the territory, the

10 Mass. 91; *Clapp v. Hartford*, 35 Conn. 66; *People v. Potter*, 35 Cal. 110. A city cannot be a party to a suit commenced before its incorporation: *Lowndale v. Portland*, 1 Or. 381.

<sup>1</sup> *Stockbridge v. West Stockbridge*, 12 Mass. 400; *Braintree v. Battles*, 6 Vt. 395; *Blackstone v. White*, 41 Pa. St. 330; *Dillingham v. Snow*, 5 Mass. 547.

<sup>2</sup> *Dillingham v. Snow*, 5 Mass. 547; *Barnes v. Barnes*, 6 Vt. 388; *London-derry v. Andover*, 28 Vt. 416; *Sherwin v. Bugbee*, 16 Vt. 439; *Ryder v. R. R. Co.*, 13 Ill. 523; *Highland Turnpike v. McKean*, 10 Johns. 154; 6 Am. Dec. 324; *Owings v. Speed*, 5 Wheat. 420.

<sup>3</sup> *Bassett v. Porter*, 4 Cush. 487; *New Boston v. Dunbarton*, 15 N. H. 201; *Bow v. Allentown*, 34 N. H. 351; 69 Am. Dec. 489; *People v. Farnham*, 35 Ill. 562; *Sherwin v. Bugbee*, 16 Vt. 439; *Worley v. Harris*, 82 Ind. 493. Municipal corporations are created for the public good, and demanded by the wants of the community; and the law, after long-continued use of corporate powers and the public acquiescence, will presume in favor of their legal existence: *Jameson v. People*, 16 Ill. 257; 63 Am. Dec. 304.

<sup>4</sup> *Jameson v. People*, 16 Ill. 257; 63

Am. Dec. 304; *Swain v. Comstock*, 13 Wis. 463; *People v. Farnham*, 35 Ill. 562; *Bow v. Allentown*, 34 N. H. 351; 69 Am. Dec. 489; *Society etc. v. Pawlet*, 4 Pet. 480; *Toledo etc. R. R. Co. v. Chenoa*, 43 Ill. 209; *Virginia City v. Mining Co.*, 2 Nev. 86; *R. R. Co. v. Plumas County*, 37 Cal. 354.

<sup>5</sup> *East St. Louis v. Amy*, 120 U. S. 600; *Sloan v. State*, 8 Blackf. 361; *Yarmouth v. North Yarmouth*, 34 Me. 411; 56 Am. Dec. 667; *State v. Linn Co.*, 44 Mo. 504; *Jersey City v. R. R. Co.*, 20 N. J. Eq. 360; *Barnes v. Dist. of Columbia*, 91 U. S. 540; *Guild v. Chicago*, 82 Ill. 472; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *State v. Steen*, 43 N. J. L. 542; *Boyd v. Chambers*, 78 Ky. 140; *Eichels v. R. R. Co.*, 78 Ind. 261; 41 Am. Rep. 561.

<sup>6</sup> *Blanding v. Burr*, 13 Cal. 343; *Davidson v. Mayor etc. of New York*, 27 How. Pr. 342; *Richland v. Lawrence*, 12 Ill. 1; *People v. Wren*, 5 Ill. 269; *Clinton v. R. R. Co.*, 24 Iowa, 455; *Reynolds v. Baldwin*, 1 La. Ann. 162; *Police Jury v. Shreveport*, 5 La. Ann. 664; *Layton v. New Orleans*, 12 La. Ann. 515; *Berlin v. Gorham*, 34 N. H. 266; *People v. Pinckney*, 32 N. H. 377; *Montpelier v. East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748.

<sup>7</sup> *Eagle v. Beard*, 33 Ark. 497.

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latter is not bound to contribute towards the payment of debts contracted before the division, in the absence of any statute to that effect.<sup>1</sup> Where, by an act of the legislature, an incorporated town is changed to a city, the municipality remains the same under its new organization as in its former condition, and any debt incurred while a town continues to be the debt of the corporation as a city. Such a transition does not work the dissolution or civil death of the corporation, so as to extinguish its indebtedness.<sup>2</sup> The repeal of a town charter deprives its authorities of the power to levy taxes, or to collect taxes already levied, and puts an end to process for the enforcement thereof; but moneys collected and in hand may be controlled by the courts.<sup>3</sup> The reincorporation of a town with the same name and substantially the same powers, but with some excision of population and territory, does not extinguish the debts of the original corporation.<sup>4</sup> The legislature may pass an act revising a city charter, to take effect only when assented to by a vote of the people of the city.<sup>5</sup>

ILLUSTRATIONS. — A charter of incorporation was given to a city, and also certain lands for its benefit, with full power to sell and apply the purchase-money to build a jail and courthouse for the county, and the remainder for certain educational purposes, and the charter was revoked. *Held*, that the trust for education (while unexecuted) was still dependent on legislative will, and could be revoked: *Bass v. Fontleroy*, 11 Tex. 698. The town of A was organized as a corporation under the general law. Subsequently it accepted a special charter, and organized thereunder. This charter was afterwards repealed by the legislature. *Held*, that A was no longer an incorporated town: *Burk v. State*, 5 Lea. 349. A legislative enactment incorporated the town of T., with "all the rights, privileges, and powers conferred upon the town of H." by an act of an earlier date. Afterwards additional powers were conferred upon the town of H. by an amendatory act. *Held*, that the town of T. obtained no additional

<sup>1</sup> *Town of Depere v. Town of Bellevue*, 31 Wis. 120; 11 Am. Rep. 602.

<sup>2</sup> *Olney v. Harvey*, 50 Ill. 453; 99 Am. Dec. 530.

<sup>3</sup> *Lilly v. Taylor*, 88 N. C. 489.

<sup>4</sup> *Ross v. Wimberly*, 60 Miss. 345.

<sup>5</sup> *Mayor etc. of Brunswick v. Finney*, 54 Ga. 317.

powers by virtue of such amendatory act: *Tatum v. Tamaroa*, 14 Fed. Rep. 103.

§ 3926. **Powers of Corporation are only Those Expressly Given or Incident.**—Municipal corporations possess only such powers as are expressly granted to them, or are necessary to carry into effect the powers so granted.<sup>1</sup> The doctrine of *ultra vires* is applied with greater strictness to municipal bodies than to private corporations; and, in general, a municipal corporation is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such a contract.<sup>2</sup> An act authorizing a municipal corporation to enter into a contract with a party to supply the city with water and machinery, and connecting pipes for conducting the water, confers no authority to purchase a site upon which to erect the water-works.<sup>3</sup>

§ 3927. **Discretionary Powers not Judicially Controlled.**—Where power is given to a corporation to do an act, the discretion of its proper officers in the method of doing it will not be controlled by the courts.<sup>4</sup> There can ordi-

<sup>1</sup> *New London v. Brainerd*, 22 Conn. 552; *Petersburg v. Metzger*, 21 Ill. 205; *Bridgeport v. R. R. Co.*, 15 Conn. 475; *Spaulding v. Lowell*, 23 Pick. 71; *Bangs v. Snow*, 1 Mass. 181; *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *Willard v. Newburyport*, 12 Pick. 227; *Keyes v. Westford*, 17 Pick. 273; *Com. v. Turner*, 1 Cush. 493; *Cooley v. Granville*, 10 Cush. 57; *Merriam v. Moody*, 25 Iowa, 163; *Minturn v. Larue*, 23 How. 435; *Lafayette v. Cox*, 5 Ind. 38; *Paine v. Spratley*, 5 Kan. 525; *Vincent v. Nantucket*, 12 Cush. 103; *Clark v. Davenport*, 14 Iowa, 494; *Mays v. Cincinnati*, 1 Ohio St. 268; *Gallia Co. v. Holcomb*, 7 Ohio (part 1), 232; *Comm'r's v. Mighels*, Ohio St. 109; *Fitch v. Pinckard*, 4 Scam. 78; *Caldwell v. Alton*, 33 Ill. 416; *Trustees etc. v. McConnell*, 12 Ill. 140; *Louisiana State Bank v. New Orleans Nav. Co.*, 3 La. Ann. 294; *State v. Mayor etc.*, 5 Port. 279; 30

Am. Dec. 564; *Head v. Ins. Co.*, 2 Cranch, 168; *De Russey v. Davis*, 13 La. Ann. 468; *People v. Bank etc.*, 1 Doug. (Mich.) 282; *City Council v. Plank Road Co.*, 31 Ala. 76; *Ex parte Burnett*, 30 Ala. 461; *Le Couteux v. Buffalo*, 33 N. Y. 333; *People v. R. R. Co.*, 12 Mich. 387; 86 Am. Dec. 64; *Thompson v. Lee Co.*, 3 Wall. 320; *Thomas v. Richmond*, 12 Wall. 349; *Leonard v. Canton*, 35 Miss. 189; *Johnson v. Louisville*, 11 Rush, 527; *Williams v. Davidson*, 43 Tex. 1.

<sup>2</sup> *Newbery v. Fox*, 37 Minn. 141; 5 Am. St. Rep. 830.

<sup>3</sup> *People v. McClintock*, 45 Cal. 11.

<sup>4</sup> *Baker v. Boston*, 12 Pick. 184; 22 Am. Dec. 421; *Fay, Petitioner*, 15 Pick. 243; *Parks v. Boston*, 8 Pick. 218; 19 Am. Dec. 322; *Hovey v. Mayo*, 43 Me. 322; *Methodist Church v. Baltimore*, 6 Gill, 391; 48 Am. Dec. 540; *Wiggin v. Mayor*, 9 Paige, 16; *State v. Swearingen*, 12 Ga. 23; *Hill v.*

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narily be no judicial restraint or interference with municipal corporations in the *bona fide* exercise of powers, legislative or discretionary in their nature, provided private rights are not violated; but when the corporation is about to carry its legislation into effect, if vested rights are violated, or irreparable wrong will be inflicted, the courts may intervene.<sup>1</sup>

ILLUSTRATIONS. — A city has power to grade streets. *Held*, that the court will not inquire into the necessity of the exercise of it, or the refusal to exercise it, nor whether a particular grade adopted, or a particular mode of executing the grade, is judicious: *Hovey v. Mayo*, 43 Me. 322. A city has power to build a market-house. *Held*, that the court cannot inquire into the size and fitness of the building for the object intended: *Spaulding v. Lowell*, 23 Pick. 71. A statute directs that contracts shall be awarded to the "lowest responsible bidder." *Held*, that this imposes duties upon the city authorities which are discretionary and deliberative; and the court will not interfere to restrain these authorities from a contract to one who is not the lowest bidder, even though their action has been indiscreet, unless it be shown that they have acted corruptly and in bad faith: *Findley v. Pittsburgh*, 82 Pa. St. 351.

### § 3928. Corporation may Delegate its Powers to Agents.

— A corporation may appoint agents and give them power to make contracts, or appoint committees to carry on its work.<sup>2</sup> A municipal council may delegate to a committee the duty of procuring furniture for rooms leased to the city. The act is ministerial, not judicial; and that one appointed on such a committee is not a member of the council is immaterial.<sup>3</sup> Where a city council is vested with power to cause sidewalks in the city to be constructed, it may authorize the mayor and the chairman of the committee on streets and alleys to make in its behalf and

Thompson, 50 N. Y. Sup. Ct. 165.  
When a city charter makes the common council the final judges of the election of alderman, *mandamus* will not lie to compel them to reinstate one whom they had excluded without a proper hearing on the merits: *People v. Fitzgerald*, 41 Mich. 2.

<sup>1</sup> *Cape May etc. R. R. Co. v. Cape May*, 35 N. J. Eq. 419.

<sup>2</sup> *Railroad Co. v. Marion Co.*, 36 Mo. 294; *Schenley v. Commonwealth*, 36 Pa. St. 62.

<sup>3</sup> *Edwards v. Watertown*, 61 How. Pr. 463; 24 Hun, 426.

pursuant to its directions a contract for doing the work.<sup>1</sup> Under an ordinance requiring a trial to "be had upon the written report of the chief of police," it was held that a report of the chief signed by some one authorized by him was sufficient.<sup>2</sup> It is competent for the legislature to transfer the control of the streets of a city or village to park commissioners for the purposes of a boulevard and driveway not inconsistent with the ordinary use of such street.<sup>3</sup>

§ 3929. **When Delegation not Permitted.**—But the governing body cannot delegate its discretionary powers to others.<sup>4</sup> Thus where, by the charter of a town, the power to decide whether a sidewalk is out of repair is vested in the board of mayor and aldermen, said power cannot be delegated to street committee-men.<sup>5</sup> A municipal council cannot delegate to a street committee the power to grade and ditch a street according to their discretion.<sup>6</sup> Where a city charter gives to the common council the power to employ an attorney, such power can only be exercised by the common council, and cannot be delegated by ordinance to the mayor.<sup>7</sup> An authority to make a grant to build a street-railroad cannot be delegated by the municipal council to any officer or board.<sup>8</sup> A power to establish pounds and appoint pound-keepers, conferred by statute on the board of commissioners of a public corporation, cannot be delegated by them to their president.<sup>9</sup>

**ILLUSTRATIONS.**—An ordinance of San Francisco made the consent of the supervisors to the establishment of a laundry

<sup>1</sup> *Hitchcock v. Galveston*, 96 U. S. 92; 55 Am. Dec. 385; *Day v. Green*, 4 Cush. 433; *Birdsall v. Clark*, 73 N. Y. 73; 29 Am. Rep. 105.

<sup>2</sup> *Ex parte Washington*, 10 Mo. App. 495.

<sup>3</sup> *People v. Walsh*, 96 Ill. 232; 36 Am. Rep. 135.

<sup>4</sup> *State v. Jersey City*, 25 N. J. L. 309; *State v. Paterson*, 34 N. J. L. 153; *White v. Mayor*, 2 Swan, 364; *Thompson v. Schermerhorn*, 6 N. Y.

92; 55 Am. Dec. 385; *Day v. Green*, 4 Cush. 433; *Birdsall v. Clark*, 73 N. Y. 73; 29 Am. Rep. 105.

<sup>5</sup> *Macon v. Patty*, 57 Miss. 378; 34 Am. Rep. 451.

<sup>6</sup> *Chilson v. Wilson*, 38 Mich. 267.

<sup>7</sup> *East St. Louis v. Thomas*, 11 Ill. App. 283.

<sup>8</sup> *State v. Bell*, 34 Ohio St. 194.

<sup>9</sup> *Dillard v. Webb*, 55 Ala. 468.

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within certain limits dependent upon the recommendation of twelve tax-payers in the block where the laundry was proposed to be established. *Held*, invalid, as delegating the power vested in the supervisors to others: *In re Quong Woo*, 7 Saw. 536. It was provided by a city charter that the sidewalks should be built and maintained at the expense of the adjacent owners, and that when the common council should order work thereon, and notify the owners thereof, if it was not done within the specified time, the common council should, by contract or otherwise, cause it to be done. The common council directed the superintendents of streets, by resolution, to cause such work to be done when the owners neglected to do it. The plaintiff brought an action to enjoin the superintendent from doing such work in front of the plaintiff's premises. *Held*, that the action was maintainable; that the power conferred by the charter, involving the exercise of discretion as to the time and manner of performance of the work, must be pursued by the council, and could not be delegated: *Birdsall v. Clark*, 73 N. Y. 73; 29 Am. Rep. 105.

§ 3930. **When Duty Imposed on Corporation is Imperative, and when Discretionary.**—Where the charter or statute says that a municipal corporation or its officers "may" act in a certain way, or "it shall be lawful" for them to do so, it may be imperative on them to do so, or it may be discretionary. Says Dillon: "On this subject some of the cases declare the doctrine that what public corporations or officers are empowered to do for others, and that which is beneficial to them or to the public to have done, the law holds they ought to do, especially if the law specifically or adequately supplies them with the means of executing the power. The power in such cases is conferred for the benefit of others, or to the public; and the intent of the legislature, which is the test in such cases, ordinarily seems, under such circumstances, to be to impose a positive and absolute duty. But under other circumstances, where the act to be done does not affect third persons, and is not clearly beneficial to them or the public, and the means for its performance are not supplied, the words 'may' do an act, or it is 'lawful' to do it, do

not mean 'must,' but rather indicate an intent in the legislature to confer a discretionary power."<sup>1</sup>

**§ 3931. Implied Powers of Corporation — Becoming Surety or Guarantor.** — A municipal corporation has no implied authority to become surety for another, either an individual or another corporation.<sup>2</sup> It has no implied power to lend its credit or make accommodation paper for the benefit of citizens, to enable them to execute private enterprises.<sup>3</sup> The power to borrow money for any public purpose does not authorize the loan of the credit of the city.<sup>4</sup>

**§ 3932. To Compromise Claims.** — It has an implied power to settle disputed claims against it.<sup>5</sup> A board of county supervisors may compromise a judgment in favor of the county.<sup>6</sup> A city has an inherent power to sue, and need never specially allege that power.<sup>7</sup>

**§ 3933. To Employ Attorneys.** — It has authority to employ an attorney to prosecute or defend suits in which it is interested,<sup>8</sup> or to defend its officers sued for official acts.<sup>9</sup> A town has power to employ counsel to defend an action for false imprisonment brought against the town

<sup>1</sup> 1 Dillon on Municipal Corporations, c. 5, sec. 62, citing *Mason v. Fearson*, 9 How. 248; *Mayor v. Furze*, 3 Hill, 612; *Vason v. Augusta*, 38 Ga. 542; *Seiple v. Elizabeth*, 27 N. J. L. 407; *Grant on Corporations*, 34, 35; *Rex v. Mayor etc. of Hastings*, 5 Barn. & Ald. 592, note; *Attorney-General v. Lock*, 3 Atk. 164; *Rex v. Mayor etc. of Chester*, 1 Maule & S. 101; *Rex v. Bailiffs etc.*, 1 Barn. & C. 86; 3 Barn. & C. 272; *Railroad Co. v. Platte Co.*, 42 Mo. 171; *Railroad Co. v. Buchanan Co.*, 39 Mo. 485; *Grant v. Erie*, 69 Pa. St. 420; 8 Am. Rep. 272; *Goodrich v. Chicago*, 20 Ill. 445; *Ottawa v. People*, 48 Ill. 233; *Carr v. North Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342; *Joliet v. Verley*, 35 Ill. 58; 85 Am. Dec. 342; *Wilson v. Mayor etc.*, 1 Denio, 595; 43 Am. Dec. 719.

<sup>2</sup> *Louisiana Bank v. Orleans Nav. Co.*, 3 La. Ann. 294.

<sup>3</sup> *Clark v. Des Moines*, 19 Iowa, 199, 224; 1 *Parsons on Notes and Bills*, 166; *Smead v. Railroad Company*, 11 Ind. 105.

<sup>4</sup> *Chamberlain v. Burlington*, 19 Iowa, 395. *Contra*, *Rogers v. Burlington*, 3 Wall. 654.

<sup>5</sup> *Augusta v. Leadbetter*, 16 Me. 45; *Bean v. Jay*, 23 Me. 117; *People v. Coon*, 25 Cal. 648; *People v. Supervisors*, 27 Cal. 655; *Petersburg v. Mapin*, 14 Ill. 193; 56 Am. Dec. 501.

<sup>6</sup> *Collins v. Welch*, 58 Iowa, 72; 43 Am. Rep. 111.

<sup>7</sup> *Janesville v. R. R. Co.*, 7 Wis. 484.

<sup>8</sup> *Smith v. Sacramento*, 13 Cal. 531.

<sup>9</sup> *Roper v. Laurinburg*, 90 N. C. 427.

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marshal by a person arrested by him for violating a town ordinance.<sup>1</sup> A town may order its attorney to assist the state's attorney in conducting prosecutions in which the town has a special interest, and may pay him therefor.<sup>2</sup> A "counsel to the corporation" has no larger powers, as such, to bind his clients than those connected with the ordinary relations of attorney and client.<sup>3</sup>

ILLUSTRATIONS. — A supervisor was directed, by resolution of a town meeting, to procure legal services to carry on suits in which the town was interested. *Held*, that a contract made by him with an attorney at law was valid against the town: *Mt. Vernon v. Patton*, 94 Ill. 65. A city was the owner of stock in a railroad corporation, concerning which there was litigation in another state. The mayor and register of the city executed a power of attorney under the corporate seal, appointing the plaintiff to represent the interests of the city in such litigation, and this appointment and employment was subsequently ratified by the city council. *Held*, that the plaintiff was duly employed; that the contract was within the implied powers of the city government, and that the city was liable for the services rendered: *City of Memphis v. Adams*, 9 Heisk. 518; 24 Am. Rep. 331. An attorney was retained by the mayor and council of a city to defend a suit brought against them and other of the city officials, at the relation of citizens, charging defendants with malfeasance in office, and seeking an injunction and account. *Held*, that the attorney could not recover the value of his services from the city: *Smith v. Nashville*, 4 Lea, 69.

§ 3934. To Purchase and Hold Property. — A municipal corporation has an implied power to purchase and hold such real estate as may be necessary to the exercise of its functions.<sup>4</sup> A power in a municipal corporation to purchase carries with it a power to incur an indebtedness for purchase-money, unless, indeed, that power is so restricted as that it cannot be exercised unless there are sufficient funds in hand to pay for the property.<sup>5</sup>

<sup>1</sup> Cullen v. Carthage, 103 Ind. 196; 53 Am. Rep. 504.

<sup>2</sup> People v. Warren, 14 Ill. App. 296.

<sup>3</sup> People v. Mayor etc. of New York, 11 Abb. Pr. 66.

<sup>4</sup> Ketchum v. Buffalo, 14 N. Y. 356; Worcester v. Eaton, 13 Mass. 371; 7 Am. Dec. 155.

<sup>5</sup> People v. Brennan, 39 Barb. 522.



Under a charter authorizing a city to buy real and personal property "for the use, convenience, and improvement of the city," there is no power to buy real estate for the exclusive benefit of a fair association as a place for holding their annual fairs.<sup>1</sup> All property of a private nature belonging to a corporation upon which no specific trust is imposed may be sold by the corporation; but property of a public nature, such as streets, etc., so long as they are held for the public use, cannot be sold.<sup>2</sup> A city cannot buy land at a tax sale.<sup>3</sup>

**ILLUSTRATIONS.**—The city of St. Louis had, under its charter, power to erect, repair, and regulate wharves in the city, and to pass ordinances to promote the welfare of the commerce and trade of the city. *Held*, that the city could not sell or alien any portion of its wharf property, whether acquired by dedication or condemnation. Neither could it make a lease of such property to private individuals for a fixed period, incapable of determination by the city at its will: *Illinois etc. R. R. & Canal Co. v. St. Louis*, 2 Dill. 70.

**§ 3935. To Hold Property in Trust or in Gift.**—So it may take property, real and personal, in trust or in gift, for purposes germane to the objects of the corporation.<sup>4</sup>

<sup>1</sup> *Eufaula v. McNab*, 67 Ala. 588; 42 Am. Rep. 118.

<sup>2</sup> *People v. City of Albany*, 4 Hun, 675.

<sup>3</sup> *Champaign v. Harmon*, 98 Ill. 491.

<sup>4</sup> *McDonough Will Case*, 15 How. 367; *Perin v. Carey*, 24 How. 465; *Chambers v. St. Louis*, 29 Mo. 543; *Mayor v. Elliott*, 3 Rawle, 170; *Duke of Richmond v. Milne*, 17 La. 312; 36 Am. Dec. 613; *Sergeant v. Cornish*, 54 N. H. 100. In *Vidal v. Girard*, 2 How. 127, the court say: "Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no

ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust." And in the leading case of *Philadelphia v. Fox*, 64 Pa. St. 169, the court say: "Such a municipal corporation may be a trustee, under the grant or will of an individual or private corporation, but only, as it seems, for public purposes germane to its objects: *Mayor v. Elliott*, 3 Rawle, 170; *Cresson's Appeal*, 30 Pa. St. 437; *Vidal v. Mayor*, 2 How. 127. I am aware that it has been said by high authority in England that it may take and hold in trust for purposes altogether private: *Mayor v. Gloucester*, 1 H. L. Cas. 285. But the administration of such trusts, and the consequent liabilities incurred, are altogether inconsistent with the pub-

But it cannot hold property in trust "for any object or matter foreign to the purpose for which it was created and in which it has no interest."<sup>1</sup> Thus it has been held

lic duties imposed upon the municipality. It could hardly be pretended, I think, in this country, that it could be a trustee for the separate use of a married woman, to educate the children of a donor or testator, or to accumulate for the benefit of particular persons. It certainly is not compellable to execute such trusts, nor does it seem competent to accept and administer them. The trusts held by the city of Philadelphia, which are enumerated in the bill before us, are germane to its objects. They are charities, and all charities are in some sense public. If a trust is for any particular persons, it is not a charity. Indefiniteness is of its essence. The objects to be benefited are strangers to the donor or testator. The widening and improvement of streets and avenues, planting them with ornamental and shade trees, the education of orphans, the building of school-houses, the assistance and encouragement of young mechanics, rewarding ingenuity in the useful arts, the establishment and support of hospitals, the distribution of soup, bread, or fuel to the necessitous, are objects within the general scope and purpose of the municipality. The king himself may be a trustee, though he cannot be reached by the process of any court without his consent: *Hill on Trustees*, 49. And so may the state, though, as I take it, under the constitution, only for objects germane to the purpose of government. The government of the United States has accepted and administered such a trust under the will of James Smithson 'for the promotion of knowledge among men.' When, therefore, the donors or testators of these charitable funds granted or devised them in trust to the municipality, they must be held to have done so with the full knowledge that their trustee so selected was a mere creature of the state, an agent acting under a revocable power. Substantially they trusted the good faith of the sovereign. It is plain — too plain, indeed, for argument — that the corporation, by accepting such trusts,

could not thereby invest itself with any immunity from legislative action. Such an act could not change its essential nature. It is surely not competent for a mere municipal organization, which is made a trustee of a charity, to set up a vested right in that character to maintain such organization in the form in which it existed when the trust was created, and thereby prevent the state from changing it as the public interest may require: *Montpelier v. East Montpelier*, 29 Vt. 21. This whole question is put at rest, and that as to one of the most important of these trusts and as to this trustee, by the opinion of the supreme court of the United States in *Girard v. Philadelphia*, 7 Wall. 14. 'It cannot admit of a doubt,' says Mr. Justice Grier, 'that where there is a valid devise to a corporation, in trust for charitable purposes, unaffected by any question as to its validity, because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator, if the corporation be dissolved, or if not, by modifying or enlarging its franchises, provided the trust be not perverted and no wrong done to the beneficiaries. Where the trustee is a corporation, no modification of its franchises or change in its name, while its identity remains, can affect its right to hold property devised to it for any purpose.' With equal plausibility might it be pretended that the acceptance by the government of the United States of the bequest of James Smithson limited the power of amendment contained in the federal constitution. If it could have such effect, the only logical consequence would be that the acceptance of a trust would be *ultra vires* and void; and so if the acceptance of a trust by a municipal corporation can operate to impair the power of the sovereign over it as such, the acceptance is a nullity."

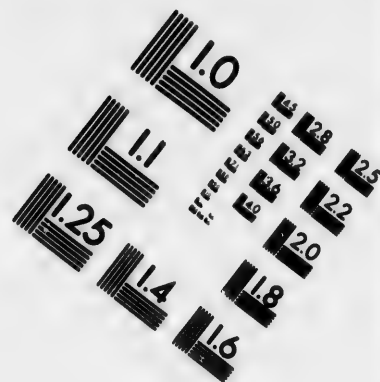
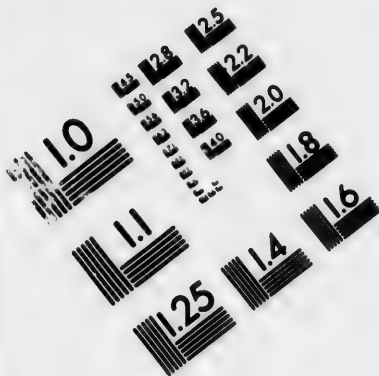
<sup>1</sup> 2 Dillon on Municipal Corporations, sec. 443; *Trustees v. Peaslee*, 15 N. H. 317.

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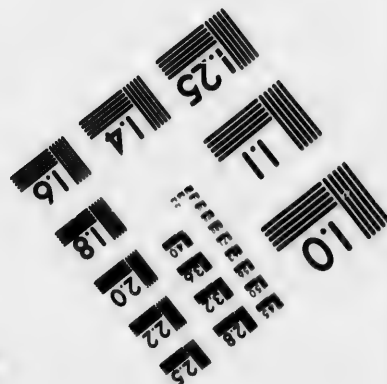
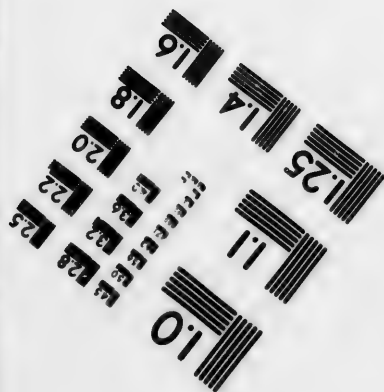
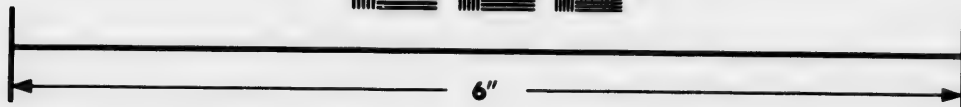
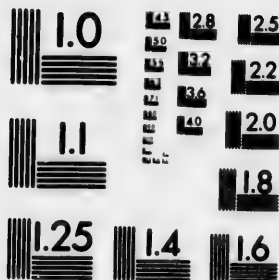
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that it cannot take land as trustees for the use of an individual.<sup>1</sup>

**§ 3936. To Convey Property.** — And municipal corporations "possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute; they cannot, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, nor of the public squares, streets, or commons."<sup>2</sup>

**§ 3937. To Mortgage Property.** — The power to mortgage its property is incident to its power to hold and dispose of its property.<sup>3</sup> Under charter authority to make all contracts which they may deem necessary for the welfare of the city, a mayor and council may mortgage the city water-works to secure payment of bonds lawfully issued for the erection of the same.<sup>4</sup>

**§ 3938. To Borrow Money.** — Whether a municipal corporation — like a private corporation — has an implied power to borrow money is an unsettled question. In a number of cases the power is conceded,<sup>5</sup> while in others it

<sup>1</sup> *Jackson v. Hartwell*, 8 Johns. 422; the court saying: "Our laws are full of instances of persons clothed with corporate powers for certain special purposes. The loan officers of a county are a corporation; and could they, as such, receive a grant of land for the use of a town or of a church? Certainly not. Nor can the supervisors of Oneida (County) take a grant of land for the use of the town of Rome. Such a grant must be deemed void upon every principle, whether we consider the special and defined objects of a corporate capacity in the board of supervisors; whether we consider the power given them by statute, to take conveyances of land for the use of the county; or, lastly, whether we refer to the incapacity of all corporations to hold lands in trust for any other object than that for which the corporation was created."

<sup>2</sup> *Dillon on Municipal Corporations*, sec. 445; citing *Smith v. Barrett*, Sid. 162; 2 Kent's Com. 281; *Reynolds v. Stark Co.*, 5 Ohio, 204; *Augusta v. Perkins*, 3 B. Mon. 437; *Colchester v. Lowton*, 1 Ves. & B. 226; *Alvez v. Henderson*, 16 B. Mon. 131; *Bowlin v. Furman*, 28 Mo. 427; *Kennedy v. Covington*, 8 Dana, 50; *Newark v. Elliott*, 5 Ohio St. 113; *Ransom v. Boal*, 29 Iowa, 68; *Angell and Ames on Corporations*, sec. 187; *Sill v. Lansingburg*, 16 Barb. 107; *Knox Co. v. McComb*, 19 Ohio St. 320; *Philadelphia v. R. R. Co.*, 58 Pa. St. 253; *Holliday v. Frisbie*, 15 Cal. 630.

<sup>3</sup> *Dillon on Municipal Corporations*, sec. 448; *Adams v. R. R. Co.*, 2 Cold. 645.

<sup>4</sup> *Adams v. Rome*, 59 Ga. 765.

<sup>5</sup> *Bank v. Chillicothe*, 7 Ohio (part 2), 31; 30 Am. Dec. 185; *State v. Madison*, 7 Wis. 688; *Clark v. Janesville*, 10 Wis.

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is denied.<sup>1</sup> A committee of a town appointed to rebuild a bridge has authority to borrow money for that purpose.<sup>2</sup> The right to purchase real estate conferred on a city implies the right to purchase on credit, and to issue bonds for the purchase-money.<sup>3</sup> So a municipal corporation, authorized to contract for service and purchase of property, and unrestricted as to amount or mode of payment, may bind itself to pay by interest-bearing orders on its treasurer.<sup>4</sup> A provision in a city charter authorizing the corporation to borrow money for any public purpose whenever, in the opinion of the city council, it shall be deemed expedient to exercise the power justifies the borrowing of money to aid in the construction of a plank road, where such road leads from, extends to, or passes through the limits of its territory.<sup>5</sup> Express power to a municipal corporation "to borrow money" includes the power to issue its negotiable bonds or other usual securities to the lender;<sup>6</sup> but not to issue notes to circulate as money, in violation of the statute law and public policy of the state.<sup>7</sup> So when a corporation has lawfully created

136; *Mills v. Gleason*, 11 Wis. 470; 78 Am. Dec. 721; *City v. Lamson*, 9 Wall. 477; *Commonwealth v. Pittsburg*, 41 Pa. St. 278; *Williamsport v. Commonwealth*, 84 Pa. St. 487. For objects expressly authorized by its charter, as building markets, providing fire-engines, etc.: *Mills v. Gleason*, 11 Wis. 470; 78 Am. Dec. 721; or to aid a railroad company making its road as a way for public travel and transportation: *Rogers v. Burlington*, 3 Wall. 654.

<sup>1</sup> *Town of Hackettstown v. Swackhamer*, 37 N. J. L. 191; *Knapp v. Hoboken*, 37 N. J. L. 394; *Beaman v. Leake Co.*, 42 Miss. 237. In *Gause v. City of Clarksville*, 5 Dill. 165, Judge Dillon, the learned author of the *Law of Municipal Corporations*, in an exhaustive opinion reviewing all the cases, holds that it has no such incidental or inherent authority, under the usual grants of municipal powers as a means of discharging its ordinary functions. Such authority may be inferred from

special and extraordinary powers, which require the expenditure of unusual sums of money, when it is usual to execute such powers by means of borrowing, and when upon the whole legislation applicable to the municipality such appears to have been the legislative intent.

<sup>2</sup> *Simonds v. Heard*, 23 Pick. 120; 34 Am. Dec. 41.

<sup>3</sup> *Richmond v. McGirr*, 78 Ind. 192.

<sup>4</sup> *Jackson v. Rendleman*, 100 Ill. 379; 39 Am. Rep. 44.

<sup>5</sup> *Mitchell v. Burlington*, 4 Wall. 270; *Larned v. Burlington*, 4 Wall. 275.

<sup>6</sup> *Commonwealth v. Pittsburg*, 34 Pa. St. 496; *Evansville etc. R. R. Co. v. Evansville*, 15 Ind. 395, 412; *Middleton v. Allegheny Co.*, 37 Pa. St. 241; *Reinboth v. Pittsburg*, 41 Pa. St. 278; *Seybert v. Pittsburg*, 1 Wall. 272; *Rogers v. Burlington*, 3 Wall. 654; *De Voss v. Richmond*, 18 Gratt. 338; 98 Am. Dec. 647; *Galena v. Corwith*, 48 Ill. 423; 95 Am. Dec. 557.

<sup>7</sup> *Thomas v. Richmond*, 12 Wall. 349.

a debt, it has the power, unless restrained by its charter or by statute, to issue bonds therefor.<sup>1</sup> Under a power to borrow money, the corporation may make the principal and interest payable at any place it pleases, even outside the state.<sup>2</sup>

ILLUSTRATIONS.—A city agrees with an individual that if the latter will pay or advance the amount of interest due and to become due on certain bonds of the city already issued, the city will pay or refund the amount. *Held*, not a "borrowing of money" within that phrase in a charter: *Gelpcke v. Dubuque*, 1 Wall. 221.

§ 3939. **Express Limitations as to Indebtedness.**—A limitation in the constitution against state indebtedness does not limit city or municipal indebtedness,<sup>3</sup> and a prohibition on municipal authorities going beyond a certain limit does not bind the legislature of the state.<sup>4</sup> Where the constitution forbids any municipal corporation to become indebted beyond a certain amount, "in any manner or for any purpose," that amount may not be exceeded, even for necessary current expenses.<sup>5</sup> A debt payable in the future, or payable upon a contingency, or the happening of some event, such as the rendering of service or the delivery of property, as well as a debt payable presently and absolutely, is within the constitutional prohibition

<sup>1</sup> *City of Williamsport v. Commonwealth*, 84 Pa. St. 487; 24 Am. Rep. 208; *Tucker v. City of Raleigh*, 75 N. C. 267.

<sup>2</sup> *Evansville etc. R. R. Co. v. Evansville*, 15 Ind. 395; *Meyer v. Muscatine*, 1 Wall. 384; the court saying: "The power of a municipal corporation to make any contract does not depend upon the place of performance, but upon its scope and object. A city authorized to establish gas-works and water-works, and to gravel its streets, may buy water, coal, and gravel beyond its limits, and agree to pay where they are found, or elsewhere. The principal power, when expressed, draws to it by necessary implication the means of its execution. This is the settled

rule in the construction of all grants of authority, whether to governments or individuals." But in Illinois it is held that it cannot bind itself to pay its indebtedness at any other place than at its treasury, unless specially authorized by statute: *Pekin v. Reynolds*, 31 Ill. 529; 83 Am. Dec. 244; *People v. Tazewell*, 22 Ill. 147.

<sup>3</sup> *Patterson v. Supervisors*, 13 Cal. 175; *Cass v. Dillon*, 2 Ohio St. 607; *Clark v. Janesville*, 10 Wis. 136; *Prettyman v. Supervisors*, 19 Ill. 406; *Slack v. R. R. Co.*, 13 B. Mon. 16.

<sup>4</sup> *Amey v. Alleghany City*, 24 How. 364.

<sup>5</sup> *Prince v. Quincy*, 105 Ill. 138; 44 Am. Rep. 785.

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relating to the incurring of debts by municipal corpora-  
tions; and it makes no difference whether the debt be for  
current expenses or for something else.<sup>1</sup> A contract  
entered into by a city with a company for the supply of  
water to the city for a term of years by such company,  
which was to receive a certain annual rate therefor, is one  
relating to the ordinary expenses of the city, and the rate  
agreed to be paid is not an indebtedness prohibited by the  
Iowa constitution.<sup>2</sup> A charter provision that a city shall  
not borrow for general purposes more than fifty thousand  
dollars does not prohibit the council from entering into  
a contract involving an expenditure exceeding that  
amount for special improvements, such as the grading  
and paving of streets and the construction of sidewalks,  
which are authorized by the charter.<sup>3</sup> Under a charter  
prohibiting the common council of a city from "author-  
izing any expenditure, for any purpose," in the current  
political year, exceeding the amount of the annual tax  
levy, the council cannot authorize any expenditure to be  
made within the year exceeding the limit; but they are  
not forbidden to authorize, in that year, an expenditure  
to be made in a subsequent year, for services to be per-  
formed in such subsequent year.<sup>4</sup>

ILLUSTRATIONS.—A city was authorized by statute to borrow  
money for city purposes not to exceed two hundred thousand  
dollars, and to issue bonds therefor. *Held*, not to limit the in-  
herent power of the city to issue bonds beyond that amount for  
municipal purposes: *City of Williamsport v. Commonwealth*, 84  
Pa. St. 487; 24 Am. Rep. 208. The charter provided that no  
funded debt should be created. *Held*, that a city bond issued  
on time for the purchase of market-grounds was not a "funded  
debt": *Ketchum v. Buffalo*, 14 N. Y. 356.

§ 3940. **Offering Rewards.**—A municipal corporation  
has a right to offer a reward for the detection or punish-

<sup>1</sup> *Springfield v. Edwards*, 84 Ill. 626.

<sup>2</sup> *Hitchcock v. Galveston*, 96 U. S.

<sup>3</sup> *Grant v. City of Davenport*, 36

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Iowa, 396.

<sup>4</sup> *Weston v. Syracuse*, 17 N. Y. 110.



ment of crimes committed within its limits,<sup>1</sup> but such a reward cannot be claimed by a city officer whose duty it is and who is paid to detect and prosecute criminals.<sup>2</sup>

§ 3941. **Public Buildings.**—So it has power to fit up and furnish proper quarters for its officers,<sup>3</sup> and even to build school-houses,<sup>4</sup> or a town-hall.<sup>5</sup> But a special

<sup>1</sup> *York v. Forscht*, 23 Pa. St. 391; *Janvrin v. Exeter*, 48 N. H. 121; *Cranshaw v. Roxbury*, 7 Gray, 374. *Contra*, *Gale v. South Berwick*, 51 Me. 174; *Hawk v. Marion Co.*, 48 Iowa, 472; *Hanger v. Des Moines*, 52 Iowa, 193; 35 Am. Rep. 267; *Murphy v. Jacksonville*, 18 Fla. 318; 43 Am. Rep. 323.

<sup>2</sup> *Pool v. Boston*, 5 Cush. 219; *Kick v. Merry*, 23 Mo. 72; 66 Am. Dec. 658. As to rewards, see *ante*, Title Contracts, § 2230.

<sup>3</sup> *People v. Harris*, 4 Cal. 9; *Reynolds v. Mayor*, 8 Barb. 597. As to furniture, see *Reynolds v. Mayor*, 8 Barb. 597.

<sup>4</sup> *Cartersville v. Baker*, 73 Ga. 686.

<sup>5</sup> *French v. Quincy*, 3 Allen, 9. In *Torrent v. Muskegon*, 47 Mich. 115, 41 Am. Rep. 715, the court say: "If we examine into the usages of municipal bodies from the earliest times, we shall generally, and almost universally, find that in all cities and boroughs there have been from the beginning public buildings known as guild, town, or city halls, or by some equivalent name, devoted to none but municipal purposes. In those buildings the local courts and councils meet, and the documents are preserved, and the municipal business of all kinds is conducted. From the early settlement of this country the same usages have prevailed, and in many of the old towns of New England the municipal building has always been preserved and maintained. The power to erect such buildings has seldom, if ever, been questioned in that part of the country, and it has frequently been referred to as an illustration of what may be regarded as public necessities. In *Stetson v. Kempton*, 13 Mass. 272, it was used for that purpose to distinguish such powers from others. After referring to the meaning of the word 'neces-

sary' for municipal purposes, some instances are given which, the court say, 'are necessary charges,' because the effect of a legal discharge of their corporate duty. The erection of public buildings for the accommodation of the inhabitants, such as town-houses to assemble in, and market-houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term 'necessary'; for these may be essential to the comfort and convenience of the citizen. This case has been referred to since as setting forth the true doctrine on this particular subject. In *Willard v. Newburyport*, 12 Pick. 227, it was cited to sustain the legality of maintaining a town-clock. In *Spaulding v. Lowell*, 23 Pick. 72, it was also referred to as sanctioning the building of market-houses, in the silence of the charter on the subject. This last case is the more significant, as Lowell had already a town-hall, and the market-house was built with rooms for a court and some other public purposes. It was held to come within the power to expend money for necessary charges, the necessity being determined by fair municipal discretion. So, also, in *French v. Quincy*, 3 Allen, 9, it was held a town-hall might be lawfully built with a view to future wants, and the use of portions not of present necessity might be made for other purposes, without violating a condition in the grant of the property that it should not be used for any other purpose than a town-house. A somewhat similar view of the general doctrine is found in *Ketchum v. Buffalo*, 14 N. Y. 356. The decision of this court in *Attorney-General v. Burrell*, 31 Mich. 25, maintaining the power of a town to buy land for a common, contains a discussion bearing on the same subject. We need not multiply authorities on the

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authority to repair a public building gives no power to erect a new one.<sup>1</sup> At the same time, power to rebuild or repair gives authority to determine on the plan.<sup>2</sup> A charter power to a city to build a market-house involves power to hire a building for market purposes.<sup>3</sup> A city has the right to allow a building erected for municipal purposes to be used incidentally for other purposes, either gratuitously or for compensation.<sup>4</sup> Although a city cannot be compelled to bear the whole expense of a county building, yet it may do so, if authorized, and if it sees fit.<sup>5</sup>

**ILLUSTRATIONS.**—An ordinance of a city provides that the city may use, and the water-works company shall supply, water from its works "for use in all public buildings and offices in the city." *Held*, that the public-school buildings of the city were included: *National Water-Works Co. v. School District*, 4 McCrary, 198. A general power was vested in the common council of a city to build markets. At the request of a committee of the council, not appointed for that purpose, plaintiff had prepared plans and working drawings for a market. With notice of the facts, the council passed a resolution adopting the plans, etc., and directing the erection of a market in accordance with them. *Held*, that the council had authority to employ an

matter. The constitution of this state, as has been pointed out in some of the decisions referred to, contemplates that the legislature shall create cities and other municipalities with full powers of beneficial legislation. The checks on extravagance are therein prescribed as to be found in limiting their powers of taxation and borrowing money, or incurring debts: Art. 15, sec. 13. When the legislature of the state prescribes the limits of financial action, it must be assumed to permit all reasonable and proper expenditures within those limits. Charters are, or at any rate should be, passed with a view to a long and growing progress. If any reasons were necessary beyond ancient and general usage, they might be found in the manifest propriety of furnishing cities with official buildings of their own. They must either own or rent them, and it is not desirable to have the public convenience too much subjected to the chances of pri-

vate action. If there were no other danger than that of inconvenience from unsuitable quarters, that alone is a serious mischief. But experience has shown that there is no security for public records, where they are not kept by themselves in a safe and permanent repository. Loss by pillage or destruction, or by carelessness or forgetfulness, is of so common occurrence as to make the records of many of our communities very imperfect. And most cities and towns that have any pride in preserving the records of their past history find it an advantage in many ways to have permanent buildings with which their history is visibly connected."

<sup>1</sup> Peterson v. Mayor, 17 N. Y. 449.

<sup>2</sup> Ely v. Rochester, 26 Barb. 133.

<sup>3</sup> Wade v. Newbern, 77 N. C. 460.

<sup>4</sup> Worden v. New Bedford, 131 Mass. 23; 41 Am. Rep. 185.

<sup>5</sup> Callam v. Saginaw, 50 Mich. 7.

architect, and that the proceedings were equivalent to an original appointment by resolution: *Peterson v. Mayor etc. of New York*, 17 N. Y. 449.

§ 3942. **Prevention of Fires.**—It has power to appropriate money for the purchase and maintenance of fire engines.<sup>1</sup> So to assist fire and ladder companies established by individuals.<sup>2</sup> Although a city charter does not in terms confer the power to purchase fire-engines, the city may purchase them, even though, under an earlier charter, the power was expressly given, and a later amendatory charter omitted the provision.<sup>3</sup> It has an implied power to forbid the erection and compel the removal of combustible buildings within the thickly settled portion of the town.<sup>4</sup> The fact that one had already dug the cellar and contracted for the materials and erection of a wooden building does not exempt him from the operation of an ordinance forbidding erection of such buildings in certain limits, including the site.<sup>5</sup> A city may summarily tear down a wooden structure erected within designated fire limits, and dangerous on account of fires;<sup>6</sup> or destroy buildings to prevent the spread of fire;<sup>7</sup> or prohibit the keeping on any block at one time of more than five tons of straw, unless protected by a fire-proof inclosure.<sup>8</sup> Where municipal authorities are empowered by statute to direct the tearing down and removal of certain buildings within the fire limits, they cannot themselves tear down

<sup>1</sup> *Allen v. Taunton*, 19 Pick. 485; *Robinson v. St. Louis*, 28 Mo. 488; *Heinemann v. Fire District*, 37 Vt. 40; *Miller v. Savannah Fire Co.*, 26 Ga. 678; *Green v. Cape May*, 41 N. J. L. 45.

<sup>2</sup> *Allen v. Taunton*, 19 Pick. 485; *Van Sicklen v. Burlington*, 27 Vt. 70.

<sup>3</sup> *Bluffton v. Studabaker*, 106 Ind. 129.

<sup>4</sup> *Mayor of Monroe v. Hoffman*, 29 La. Ann. 651; 29 Am. Rep. 345; *Bradley v. Ins. Co.*, 11 Mich. 425; *Respublica v. Duquet*, 2 Yeates, 493; *Wadleigh v. Gilman*, 12 Me. 403; 28 Am. Dec. 188; *City of Troy v. Winters*, 4 Thomp.

& C. 256; *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89; *Des Moines v. Gilchrist*, 67 Iowa, 210; 56 Am. Rep. 341. See *contra*, *Mayor v. Thorne*, 7 Paige, 261; *Pye v. Peterson*, 45 Tex. 312; *Keokuk v. Scroggs*, 39 Iowa, 447; *Kneedler v. Norristown*, 100 Pa. St. 368; 45 Am. Rep. 383.

<sup>5</sup> *Salem v. Maynes*, 123 Mass. 372.

<sup>6</sup> *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830.

<sup>7</sup> *Field v. Des Moines*, 39 Iowa, 575; 18 Am. Rep. 46. And see *Title Eminent Domain*.

<sup>8</sup> *Clark v. South Bend*, 85 Ind. 276; 44 Am. Rep. 13.

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and remove such buildings. They must direct the owner to do it.<sup>1</sup> Under a statute authorizing a city to prohibit the erection of wooden buildings within certain limits, on petition of certain of the owners of property, such petition is a necessary prerequisite to the exercise of the power.<sup>2</sup>

ILLUSTRATIONS.—A room in a town fire-engine house had been supplied with furniture for the use of the firemen, purchased by contributions from the town, from citizens, and from members of the company, by prize money gained in a contest with another company, and by assessments on the members. The furniture was used for ten years by the succeeding companies, until the members of the existing company removed it, divided it among themselves, and disbanded. The members were appointed by the town engineers. *Held*, that the town could replevy it: *Brookline v. Sherman*, 140 Mass. 1; 54 Am. Rep. 434.

§ 3943. **Health, Powers as to.**—The legislature may delegate to municipalities the power to regulate or restrain acts, where necessary for the public health. The municipality in such case becomes the judge as to the necessity for the exercise of such power.<sup>3</sup> The power to

<sup>1</sup> *Louisville v. Webster*, 108 Ill. 414.

<sup>2</sup> *Des Moines v. Gilchrist*, 67 Iowa, 210; 56 Am. Rep. 341.

<sup>3</sup> *Ex parte Shrader*, 33 Cal. 279; *Harrison v. Baltimore*, 1 Gill, 264. In *Harrison v. Baltimore*, 1 Gill, 264, the city of Baltimore was vested with "full power and authority to enact all ordinances necessary to preserve the health of the city, prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within three miles of the same." In construing this power the court of appeals say: "The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the general assembly could have exercised. Of the degree of necessity for such municipal legislation, the mayor and city

council of Baltimore were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians. 'To prevent the introduction of contagious diseases within the city, and within three miles of the same,' they might impose heavy penalties on the captain, owner, or consignee of any ship or other vessel entering the port of Baltimore, on board of which small-pox or other contagious diseases might prevail, or they might seek the accomplishment of their object by causing the vessel and all persons to be taken possession of and controlled until their purification and disinfection were effected, and impose on the captain, owner, or consignee the payment or reimbursement of all the expenses incurred by such proceedings; or they might adopt, at the same time, both

relieve the indigent sick, especially in time of epidemic disease, and to provide for the poor who are unable to labor, is inherent in every municipal corporation.<sup>1</sup> Under the power as to health, a city may bore an artesian well in a public square.<sup>2</sup> Where health officers of a city are empowered to remove persons infected with small-pox, and helpless, to a pest-house, they have implied authority to employ nurses for them at the expense of the city.<sup>3</sup> A city has no authority to seize property outside its limits for a pest-house without consent of the owner.<sup>4</sup> In the absence of express statutory authority, the board of health of a town has no right to take possession of a dwelling-house and its furniture without the consent and to the exclusion of the owner and occupant, and use the house as a hospital for a person found therein infected with a contagious disease, and too sick to be removed without danger to his health.<sup>5</sup>

§ 3944. **Indemnifying Officers.**—It has power to indemnify its officer against liability which they may have incurred in transacting its affairs, or in discharging his duty, even though they acted beyond their jurisdiction.<sup>6</sup> But the duty must have been one authorized or imposed by law, and the matter one in which the corporation had an interest.<sup>7</sup> A city may raise and appropriate money to reimburse to its agents expenses of their defense in an

suggested remedies, if for the successful and faithful execution of their powers, they deemed it necessary to do so."

<sup>1</sup> *Vionet v. Municipality No. 1*, 4 La. Ann. 42.

<sup>2</sup> *Livingston v. Pippin*, 31 Ala. 522.

<sup>3</sup> *Labrie v. Manchester*, 59 N. H. 120; 47 Am. Rep. 179.

<sup>4</sup> *Dooley v. Kansas*, 82 Mo. 444; 52 Am. Rep. 380.

<sup>5</sup> *Spring v. Hyde Park*, 137 Mass. 554; 50 Am. Rep. 334.

<sup>6</sup> *Pike v. Middleton*, 12 N. H. 278; *Bancroft v. Lynnfield*, 18 Pick. 566; 29 Am. Dec. 623; *Fuller v. Groton*, 14

*Gray*, 340; *Nelson v. Milford*, 7 Pick. 18; *Hasdell v. Hancock*, 3 Gray, 526; *Babbitt v. Savoy*, 3 Cush. 530; *Briggs v. Whipple*, 6 Vt. 95; *Sherman v. Carr*, 8 R. I. 431; *Baker v. Windham*, 13 Me. 74; *Cushing v. Stoughton*, 6 Cush. 392; *Friend v. Gilbert*, 108 Mass. 412; *Lawrence v. McAlvin*, 109 Mass. 312; *Minot v. West Roxbury*, 112 Mass. 1; 17 Am. Rep. 52; *Gregory v. Bridgeport*, 41 Conn. 76; 19 Am. Rep. 485; *Pike v. Middleton*, 12 N. H. 280; *Gove v. Epping*, 41 N. H. 545; *Merrill v. Plainfield*, 45 N. H. 134.

<sup>7</sup> *Gregory v. Bridgeport*, 41 Conn. 76; 19 Am. Rep. 485.

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investigation of their official conduct, made by order of the city government, by a committee of that body, charges of which proved to be groundless.<sup>1</sup>

ILLUSTRATIONS.—An officer was appointed by a city to execute a by-law relating to wharves and the mooring of vessels. His duty was simply to regulate differences among owners and masters of vessels and owners of wharves, and his compensation was paid by the persons at whose request he acted. *Held*, that the city could not appropriate money to indemnify him for expenses incurred in defending an action brought against him for an act done in the discharge of his duty: *Gregory v. Bridgeport*, 41 Conn. 76; 19 Am. Rep. 485.

§ 3945. **Celebrations and Entertainments.**—It has no authority to contract or vote money for entertaining guests or other persons, or for celebrating holidays or other events of this kind.<sup>2</sup> In an Ohio case it was held that the court could not restrain legislation by the council of a municipal corporation, but could enjoin the officers or members from carrying out illegal legislation, as the paying of an appropriation of money for "incidentals" not authorized by law to be incurred, namely, expenses for the entertainment of a presidential candidate attending an industrial exposition.<sup>3</sup> Under a statute authorizing the city council of a city, in a manner specified, to appropriate money, not exceeding a certain amount, for armories, for the celebration of holidays, "and for other public purposes," a city council may appropriate money for public concerts by a band.<sup>4</sup>

§ 3946. **Animals.**—Authority to impound and forfeit or kill domestic animals must be expressly granted.<sup>5</sup> The right to enact an ordinance forbidding the permitting of

<sup>1</sup> *Lawrence v. McAlvin*, 109 Mass. Rep. 648. *Contra*, *Tatham v. Philadelphia*, 11 Phila. 226.

<sup>2</sup> *Hodges v. Buffalo*, 2 Denio, 110. See *Hood v. Lynn*, 1 Allen, 103; *Gerry v. Stoneman*, 1 Allen, 319; *Tash v. Adams*, 10 Cush. 252; *Austin v. Coggeshall*, 12 R. I. 329; 34 Am.

<sup>3</sup> *Moore v. Hoffman*, 2 Cin. Rep. 453.  
<sup>4</sup> *Hubbard v. Taunton*, 140 Mass. 467.

<sup>5</sup> 1 *Dillon on Municipal Corporations*, sec. 101.

stock to run at large in a town or city, and adjudging a forfeiture therefor, must be plainly conferred. Such right is not conferred by a charter allowing the trustees to enact, etc., "for good order, health, and comfort," and "for the safety of property, the abatement or prevention of nuisances, and for the convenience of the public good, as may in their opinion be necessary or politic."<sup>1</sup> A city having power by charter "to exercise control over the streets," and "to cause nuisances to be removed," may pass an ordinance impounding hogs going at large in the streets.<sup>2</sup> Under a power in its charter to pass all necessary rules it might deem advisable in relation to dogs, hogs, horses, mules, and any other stock straying at large, a city may require stray cattle to be impounded, and, after being advertised for five days, unless the owner should claim them and pay charges, to be sold.<sup>3</sup> A penal ordinance of a city providing a punishment for wantonly injuring, or causing to be injured, "any private or public property, or shade or ornamental trees," etc., does not authorize the city to maintain an action against the owner of a domestic animal which has voluntarily injured any such tree.<sup>4</sup> A city is liable in damages for an injury to an animal impounded by it, when caused by the improper tying of the animal, and by the insufficient height of the fence. But where the fence is of the ordinary height, and the animal hurts itself by wild and vicious attempts to overleap it, the city is not liable by reason of the improper tying, nor by reason of a failure to post notices and sell the animal within the statutory time.<sup>5</sup>

**§ 3947. Subscribing to Railroad Stock — Railroad Aid.**

—The power, in the absence of special authority, of a municipal corporation to aid the construction of railroads

<sup>1</sup> *Varden v. Mount*, 78 Ky. 86; 39 Am. Rep. 208.

<sup>2</sup> *Waco v. Powell*, 32 Tex. 258.

<sup>3</sup> *Carterville v. Lanham*, 67 Ga. 753.

<sup>4</sup> *Goshen v. Crary*, 58 Ind. 268.

<sup>5</sup> *Greencastle v. Martin*, 74 Ind. 449; 39 Am. Rep. 93.

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— **Railroad Aid.**  
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by subscribing to their stock or issuing bonds is sus-  
tained in a large number of cases in the different states  
and in the federal courts.<sup>1</sup> But on the other hand, in  
other states such power is not recognized by the courts.<sup>2</sup>  
Unquestionably the legislature of a state has power to  
authorize towns and cities to become share-holders in  
railroad companies.<sup>3</sup> An authority to a city corporation  
to subscribe for stock in a railway company, "as fully as  
any individual," authorizes also the issue by the city of  
its negotiable bonds in payment of the stock.<sup>4</sup> A municip-  
al corporation authorized by law to subscribe for cer-  
tain railroad stock, if voted for by the people of the  
county, and to levy a special tax to pay for the stock, has  
no authority to modify or alter the subscription voted for,  
nor to make a compromise with the railroad company to  
pay a less amount.<sup>5</sup> Where a subscription to the stock of  
a railroad company, on behalf of a city, is authorized by  
ordinance to be made on certain conditions precedent,  
the subsequent issue of bonds in payment of the subscrip-  
tion proves the conditions to have been either complied  
with or waived by the city.<sup>6</sup> Where authority is given to  
a city to take stock in a road, provided the act be "on the  
petition of two thirds of the citizens," this proviso will be

<sup>1</sup> *Olcutt v. Supervisors*, 16 Wall. 678; *Sharpless v. Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759; *Leavenworth Co. v. Miller*, 7 Kan. 479; 12 Am. R.p. 425; *Phillips v. Albany*, 28 Wis. 340; 1 *Dillon on Municipal Corporations*, sec. 104, citing a large number of cases; *Butler v. Denham*, 27 Ill. 474; *Gould v. Venice*, 29 Barb. 442. Counties and cities in Illinois have not the right to make bonds, issued in aid of railroads, payable in the city of New York: *People v. Tazewell*, 22 Ill. 147.

<sup>2</sup> *Whiting v. R. R. Co.*, 25 Wis. 167; 3 Am. Rep. 30; *Hanson v. Vernon*, 27 Iowa, 28; 1 Am. Rep. 215; *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400; *M. O. etc. R. R. Co. v. Mayor etc. of Camden*, 23 Ark. 300; *Aurora v. West*, 22 Ind. 88; 85 Am. Dec. 413.

<sup>3</sup> *Johnson v. Stark*, 24 Ill. 75; *Perkins v. Lewis*, 24 Ill. 208; *Prettyman v. Supervisors*, 19 Ill. 406; *Keithsburg v. Frick*, 34 Ill. 405; *Bank of Rome v. Rome*, 18 N. Y. 38; *Grant v. Courter*, 24 Barb. 232; *Clark v. Rochester*, 24 Barb. 446; *Sharpless v. Philadelphia*, 21 Pa. St. 147; 59 Am. Dec. 759; *Moers v. Reading*, 21 Pa. St. 188; *Commonwealth v. Taylor*, 36 Pa. St. 263; *Commonwealth v. Perkins*, 43 Pa. St. 400; *San Antonio v. Jones*, 28 Tex. 19.

<sup>4</sup> *Seybert v. Pittsburgh*, 1 Wall. 272; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278.

<sup>5</sup> *Bell v. R. R. Co.*, 4 Wall. 598.

<sup>6</sup> *Commonwealth v. Pittsburg*, 43 Pa. St. 391.



presumed to have been complied with where the bonds show on their face that they were issued in virtue of an ordinance of the city making the subscription, the bonds being in the hands of *bona fide* holders for value.<sup>1</sup> A statute which enacts that whenever any railroad company "shall have received or may hereafter receive the bonds of any city or county upon subscription of stock by such city or county, such bonds may bear an interest" at a rate specified, and "may be sold by the company, in a way mentioned, implies that a city (whose charter gave it power to borrow money for public purposes) had power to subscribe to the stock, and to issue its bonds in payment, and makes the subscription and bonds as valid as if authorized by the statute directly.<sup>2</sup>

ILLUSTRATIONS.—By the charter of a city, the common council was authorized "to take stock in any chartered company for making roads to said city." *Held*, that a railroad is such a "road" as is embraced in the terms of the charter: *Evansville etc. R. R. Co. v. Evansville*, 15 Ind. 395. An act of the legislature authorized a city to subscribe for the stock of a railroad corporation, and "to issue bonds for the stock or for money to pay for the same, bearing interest at the rate of ten per cent per annum." *Held*, that the city had no authority to sell its bonds, and thus raise money to pay for the stock, particularly to sell the bonds below par, when they bore interest at ten per cent on their face, as this would be to raise the rate of interest above ten per cent: *Atchison v. Butcher*, 3 Kan. 104.

§ 3948. **Power of Corporation to Contract.**—The power to enter into contracts necessary and proper for the carrying out of its objects, and to discharge its duties, is impliedly granted to every municipal corporation.<sup>3</sup> But municipal corporations have no power to make contracts which will embarrass or control their legislative powers and duties.<sup>4</sup> One who contracts with a municipal corpo-

<sup>1</sup> *Van Hostrup v. Madison City*, 1 Wall. 291.

<sup>2</sup> *Gelpeke v. Dubuque*, 1 Wall. 222; *Meyer v. Muscatine*, 1 Wall. 384.

<sup>3</sup> 1 *Dillon on Municipal Corporations*, sec. 371.

<sup>4</sup> *New York v. R. R. Co.*, 32 N. Y. 261.

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v. R. R. Co., 32 N. Y.

ration for the performance of works which the corpora-  
tion has no authority to construct, and who has received  
the benefit of his contract, is not estopped, when sued by  
the corporation, from setting up its want of authority to  
make the contract.<sup>1</sup>

§ 3949. **Contracts Prohibited by Charter or Law.**—  
But contracts made which are prohibited by the charter  
of the corporation, or are contrary to the statute law of  
the state, are void.<sup>2</sup>

§ 3950. **Contracts with Officers or Agents.**—**Persons  
Bound to Know Limits of Authority.**—Persons contract-  
ing with a municipal corporation must, at their peril,  
inquire into the power of the corporation or its officers  
to make the contract; and a contract beyond the scope of  
the corporate power is void, although it be under the seal  
of the corporation.<sup>3</sup>

ILLUSTRATIONS.—The treasurer of a town not authorized by  
statute to issue notes, etc., gave a promissory note. *Held*,  
that the payee could not recover: *Parsons v. Monmouth*, 70 Me.  
262. The charter of a city prohibited it from incurring liabil-  
ity except in a specified manner. *Held*, that the city was not  
liable for material purchased by an officer of the city and used  
in repairing its streets, when the method of contracting speci-  
fied by the charter was not followed: *McDonald v. Mayor*, 68  
N. Y. 23; 23 Am. Rep. 144.

<sup>1</sup> *Montgomery v. R. R. Co.*, 31 Ala.  
76.

<sup>2</sup> *Jackson v. Bowman*, 39 Miss. 671;  
*Thomas v. Richmond*, 12 Wall.  
349.

<sup>3</sup> *Marsh v. Fulton County*, 10 Wall.  
676; *Leavenworth v. Rankin*, 2 Kan.  
357; *Horn v. Baltimore*, 30 Md. 218;  
*Bridgeport v. R. R. Co.*, 15 Conn. 475;  
*Haynes v. Covington*, 13 Smedes & M.  
408; *Taft v. Pittsford*, 28 Vt. 286;  
*City Council v. Plank Road Company*,  
31 Ala. 76; *Steam Navigation Com-  
pany v. Dandridge*, 8 Gill & J. 248;  
*Hodges v. Buffalo*, 2 Denio, 110; *Balti-  
more v. Eschbach*, 18 Md. 276; *Balti-  
more v. Reynolds*, 20 Md. 1; 83 Am.

Dec. 535; *Dill v. Inhabitants etc.*, 7  
Met. 438; *Branham v. San José*, 24  
Cal. 585; *Sturtevant v. Alton*, 3 Mc-  
Lean, 393; *Wallace v. San José*, 29  
Cal. 180; *State v. Kirkley*, 29 Md. 85,  
111; *Bateman v. Mayor etc.*, 3 Hurl.  
& N. 323; *State v. Haskell*, 20 Iowa,  
276. This rule has been applied to an  
attorney's employment by the mayor,  
in the absence of the ordinance there-  
for required by the charter; and it was  
held that the attorney could not re-  
cover of the city for a legal opinion  
given under such employment, al-  
though us : by the common council;  
*Bryan v. Page*, 51 Tex. 532; 32 Am.  
Rep. 637.

§ 3951. **May Contract without Seal.**—The corporation has an implied power to adopt a corporate seal.<sup>1</sup> The modern doctrine is, that the contracts of corporations need not be under seal, unless so required by the charter.<sup>2</sup>

§ 3952. **How Contracts may be Entered into.**—Contracts may be made by ordinance,<sup>3</sup> or by resolution.<sup>4</sup> Where the general power is given to a municipal corporation "to make all necessary contracts and agreements for the benefit of the city," it is as well bound by implied as by written contracts, while acting within the scope of its powers.<sup>5</sup> A contract is entered into between two corporations, when one of them, by some proper corporate action, proposes terms to the other, and this other, a municipal corporation, thereupon passes an ordinance embracing them; and it cannot be objected to such a contract that it is not signed by the party to be charged, or that the ordinance is nothing more than a declaration of intention.<sup>6</sup> A city contract, specially authorized by ordinance, can only be altered by ordinance, or some properly authenticated act.<sup>7</sup>

§ 3953. **Statutory Mode must be Followed.**—When the mode of contracting is prescribed by statute, that mode must be pursued.<sup>8</sup> A verbal executory agreement of the common council to employ a person to build sewers cannot bind the city, where, by its charter, such contracts are required to be in writing.<sup>9</sup>

<sup>1</sup> 1 Dillon on Municipal Corporations, sec. 130.

<sup>2</sup> City of Selma v. Mullen, 46 Ala. 411; Ross v. City of Madison, 1 Ind. 281; 48 Am. Dec. 361; Brennan v. Weatherford, 53 Tex. 330; 37 Am. Dec. 758.

<sup>3</sup> People v. San Francisco, 27 Cal. 655; Logansport v. Blakemore, 17 Ind. 318.

<sup>4</sup> 1 Dillon on Municipal Corporations, sec. 374.

<sup>5</sup> Tucker v. Virginia, 20 Nev. 20.

<sup>6</sup> People v. San Francisco, 27 Cal. 655.

<sup>7</sup> Sacramento v. Kirk, 7 Cal. 419.

<sup>8</sup> Head v. Ins. Co., 2 Cranch, 127; White v. New Orleans, 15 La. Ann. 657; Dey v. Jersey City, 19 N. J. Eq. 412; Baltimore v. Reynolds, 20 Md. 1; 83 Am. Dec. 535; Bladen v. Philadelphia, 60 Pa. St. 464; Butler v. Charlestown, 7 Gray, 12; Leavenworth v. Rankin, 2 Kan. 357; Trustees v. Cherry, 8 Ohio St. 564; Los Angeles Gas Co. v. Toberman, 61 Cal. 199.

<sup>9</sup> Starkey v. Minneapolis, 19 Minn. 203.

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ILLUSTRATIONS. — By resolution of the board of aldermen, the mayor of a city was authorized to borrow money from the bank, and to execute the note of the corporation therefor. The mayor accordingly borrowed the money, and executed a bond therefor, under the seal of the corporation. *Held*, that he did not pursue his authority, and that his act was not binding on the corporation: *Little Rock v. State Bank*, 8 Ark. 227. An ordinance providing for the improvement of a street directed the city clerk to advertise for proposals for doing the work, in a newspaper, and also by posting up printed notices in five of the most public places in the city. Publication was made in the newspaper, but the printed notices were not posted up as required by the ordinance. *Held*, that the letting of the contract without giving the notice provided for in the ordinance was illegal, and an assessment for work done under a contract so let could not be sustained: *Kretsch v. Helm*, 45 Ind. 438. A city charter provided for the exercise by ordinance of the power to employ legal counsel for the assistance of the common council, etc. No such ordinance was passed, but the mayor employed attorneys to give an opinion regarding municipal matters, which was read at a meeting of the common council and acted on. *Held*, that the attorneys could not recover of the city for their services in giving the opinion: *City of Bryan v. Page*, 51 Tex. 532; 32 Am. Rep. 637. The city council of Philadelphia, in authorizing the paving of a street, required that the contractor employed to do the work should be selected by a majority of the lot-owners representing at least one half of the feet front to be paved. A contractor paved the street without being selected by a majority of the lot-owners as required; but he did the work under a contract with the department of highways. *Held*, that he could not recover the cost of the work: *Reilly v. Philadelphia*, 60 Pa. St. 467. Where the charter of a city directed the common council to make compensation to land-owners for damages caused by altering street grades, such damages to be assessed in an appointed manner, and imposed on the lands benefited by the improvement, *held*, that a suit would not lie in favor of a land-owner injured by the alteration of a grade, against the corporation, for the amount of damages thus sustained, no assessment having been made of the same in the mode prescribed: *Reock v. Newark*, 33 N. J. L. 129. The common council of New York, in pursuance of its general powers, passed an ordinance directing the paving of a certain street, but, in violation of the charter, failed to give prior notice thereof in all the corporation newspapers. A contractor duly and in good faith performed the work. In an action on the contract, *held*, that the omission to publish in the prescribed manner was a mere irregularity

to v. Kirk, 7 Cal. 419.  
Ins. Co., 2 Cranch, 127;  
New Orleans, 15 La. Ann.  
Jersey City, 19 N. J. Eq.  
re v. Reynolds, 20 Md. 1;  
535; Bladen v. Philadel-  
St. 464; Butler v. Charles-  
ay, 12; Leavenworth v.  
Kan. 357; Trustees v.  
Ohio St. 564; Los Angeles  
oberman, 61 Cal. 199.  
v. Minneapolis, 19 Minn.

not affecting the jurisdiction of the common council to award the contract; and the contractor having acted in good faith and reliance on the regularity of the proceedings, the city, having received and accepted the benefit, was estopped from denying the regularity of the proceedings in that respect: *Moore v. Mayor*, 73 N. Y. 238; 29 Am. Rep. 134.

**§ 3954. Duty to Let Contract to Lowest Bidder.—**

Where the charter or statute requires the officers of the city to award contracts for work to be done to the lowest bidder, a contract not so made is illegal,<sup>1</sup> unless, it seems, where the competition sought by such method would be impossible, as where one person or one corporation only was the owner of the patent or could supply the goods required.<sup>2</sup> It has been held that a contract for furnishing fire-works (for a Fourth of July celebration) is not within a statute requiring contracts for services, supplies, etc., to be advertised and given to the lowest bidder; for the reason that the articles are of a peculiar character, depending for their value upon the personal skill of the manufacturer;<sup>3</sup> nor does the requirement apply to professional service; e. g., those of a surveyor in preparing a map. Where professional services are to be employed, the common council have a power of selection, with reference to securing the requisite skill, and no advertisement is required;<sup>4</sup> nor does it apply to a contract for carriage hire of aldermen or councilmen while engaged in public duties.<sup>5</sup> Where a city charter provides that all work done for the city shall be let by contract to the lowest bidder, and due notice shall be given of the time and place of letting such

<sup>1</sup> *Brady v. Mayor*, 20 N. Y. 312; *Addis v. Pittsburg*, 85 Pa. St. 379; *Weed v. Beach*, 56 How. Pr. 470; *Bigler v. New York*, 5 Abb. N. C. 51.

<sup>2</sup> *Harlem Gas Co. v. Mayor*, 33 N. Y. 309; *Hobart v. Detroit*, 17 Mich. 246; 97 Am. Dec. 185. *Contra*, *Dean v. Charlton*, 23 Wis. 590; 99 Am. Dec. 205. Where a municipal corporation advertises for proposals for doing certain public work, the provision which

entitles the person making the lowest estimate to have the contract awarded to him does not apply to estimates for patented articles or modes of work: *People v. Van Nort*, 65 Barb. 331.

<sup>3</sup> *Detwiler v. Mayor etc. of New York*, 1 Thomp. & C. 657; 46 How. Pr. 218.

<sup>4</sup> *People v. Flagg*, 5 Abb. Pr. 232.

<sup>5</sup> *Smith v. Mayor etc. of New York*, 21 How. Pr. 1.

council to award in good faith and the city, having been denied in respect: *Moore v.*

**Lowest Bidder.**—The officers of the city are to let to the lowest bidder, unless, it seems, the method would be for the corporation only to let the goods relet for furnishing (on) is not within the supplies, etc., to the bidder; for the relet, depending on the character of the manufacture to professional preparing a map. employed, the contract with reference to advertisement is relet for carriage hire and in public duties.<sup>5</sup> work done for the lowest bidder, and due care of letting such

person making the lowest bid have the contract awarded. It does not apply to estimates for articles or modes of work: *11 N. H. 331*. *v. Mayor etc. of New Hampshire*, 65 Barb. 331.

*Flagg*, 5 Abb. Pr. 232. *Mayor etc. of New Hampshire*, 65 Barb. 331.

contracts, bidders should be informed, either by the notice of the letting or by the specifications in the proper office referred to in such notice, of the amount of work intended to be included in each contract, whenever it can be specified, the time within which it is to be finished, the manner in which it is to be done, and the quality of the materials, if any, which are to be furnished.<sup>1</sup> Where the charter requires that all work for the city shall be let to the lowest bidder, after a prescribed notice of the time and place of letting shall have been given, and requires that similar notice shall be given where work is relet, an assessment upon a lot for work done is void, if the contract was let or relet without notice.<sup>2</sup> A public officer, required by statute to advertise for bids for constructing a sewer or other work, cannot therein fix an arbitrary price to be paid for specified kinds of work.<sup>3</sup> A bid for work under an advertisement reserving the right "to reject any or all bids" is an implied assent to that reservation.<sup>4</sup> A municipal corporation will not be enjoined against awarding a contract to a bidder higher than the complainant, when the complainant has violated the terms of the ordinance inviting the bids.<sup>5</sup> If the law requires that contracts shall be made by advertising for proposals for the work to be done, and by giving the contract to the lowest bidder, the city officers have no authority, after the bids have been opened, to alter the contract materially, and then award it to one of the original bidders, without a new advertisement.<sup>6</sup> The officers have no power to permit one bid for county bonds to be privately amended so as to make it better than another.<sup>7</sup> A bid to furnish articles "at what it cost to lay them down" is too indefinite, and no award can be made on it;

<sup>1</sup> *Kneeland v. Furlong*, 20 Wis. 437.

<sup>2</sup> *Mitchell v. Milwaukee*, 18 Wis. 444.

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<sup>3</sup> *In re Mahan*, 20 Hun. 301.

<sup>4</sup> *Keogh v. Wilmington*, 4 Del. Ch. 491.

<sup>5</sup> *Wiggins v. Philadelphia*, 2 Brewst. 444.

<sup>6</sup> *Dickinson v. Poughkeepsie*, 14 N. Y. Sup. Ct. 1.

<sup>7</sup> *State v. Douglas County Comm'rs*, 11 Neb. 484.

but the omission of two articles of insignificant value will not invalidate a bid otherwise in proper form.<sup>1</sup> In the absence of statutory requirements, a city is not bound to let public work to contractors, but may do it itself under the supervision of its officers.<sup>2</sup> A board of commissioners charged with the duty of contracting for a public work need not call for bids or proposals, unless expressly required. But if they choose to invite competition, they may, after accepting a bid, alter the specifications furnished by the bidder, before executing the contract, and this without the knowledge of competing bidders.<sup>3</sup>

ILLUSTRATIONS. — A statute only empowered the water commissioners of Poughkeepsie to let the contract for building a reservoir "to the lowest bidder, who shall give due security," upon public notice of proposals, etc. The engineer to whom the proposals were referred for calculation and comparison permitted D., a competitor, to alter his bid so as to make it appear lower than the others. After the bid was accepted, the contract was made with D. at higher prices, with a material clause for D.'s benefit, not contemplated by the other bidders. *Held*, that the contract was void, and D. could not recover upon the *quantum meruit*: *Dickinson v. Poughkeepsie*, 75 N. Y. 65. An advertisement for proposals for street improvements stated that bids would be received up to a certain hour on Saturday, September 19, 1875, which was a mistake, the 19th being Sunday. *Held*, that the mistake was of no importance, the notice being otherwise sufficient as to time: *Case v. Fowler*, 65 Ind. 29. A contract for grading a certain avenue contained the clause that "in case the grade should be changed in the adjoining streets during the progress of the work, the contractor is to conform to the altered grade at the prices established." *Held*, not to violate the city regulations requiring contracts to be let to the lowest bidder: *In re Blodgett*, 27 Hun, 12. Under a city charter all contracts for work and materials were required to be publicly advertised, and awarded to that responsible bidder offering the most advantageous terms to the city, a contract for the erection of a police-station was awarded for a certain sum, and the contract provided that all alterations or additions should be specified in writing, and approved by the committee on public

<sup>1</sup> *State v. Comm'rs*, 13 Neb. 57.

<sup>2</sup> *Kingsley v. Brooklyn*, 5 Abb. N.

<sup>3</sup> *Cummins v. Seymour*, 79 Ind. 491; C. 1.

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buildings. Held, that extra work, which was, in effect, additions and alterations, not being specified in writing, could not be recovered for: *Condon v. Jersey City*, 43 N. J. L. 452. The common council of a city, having advertised for bids for paving a specified distance, subsequently entered into a contract with the lowest bidders to pave a portion only of the distance, "or further, if ordered," and after that was completed, ordered the remainder to be done by the same contractors. Held, that the whole work was done by the original contract, and it was not necessary to advertise for proposals a second time for the completion of the latter portion of the work: *Brevoort v. Detroit*, 24 Mich. 322. A city charter provided that certain public works should be let to the lowest responsible bidder, with sureties, and that the same should be advertised. Held, that the following provision in the advertisement for the work by the comptroller, viz.: "Builders are required to file a satisfactory bond with the comptroller before the proposals are opened, conditioned that they, should they be found to be the lowest bidders, will enter into a contract with good and sufficient securities to perform the work,"—was warranted by the charter, and that a party bidding, though the lowest bidder, had no right to insist upon the acceptance of his bid without first filing such a bond: *May v. Detroit*, 2 Mich. N. P. 235. A, by sealed proposals, offered to supply the materials and perform the "cast and wrought iron work" for a court-house for twenty-three thousand nine hundred dollars, and B for thirty-two thousand eight hundred dollars, both sums being within the preliminary estimate of the architect. The commissioners awarded the contract to A, as the lowest and best bidder, and upon his failure to enter into the contract and execute the bond required by statute, they refused to award the contract to B as the next lowest and best bidder, although demand was duly made therefor, and a good and sufficient bond tendered, but readvertised for further proposals for supplying the materials and performing the work. Held, that *mandamus* would not lie to compel the commissioners to award the contract to B: *State v. Shelby County Comm'rs*, 36 Ohio St. 326. A statute provided that before any contract for street improvements should be let, the city engineer should make and submit to the council an estimate of the cost thereof, and that in advertising for bids such estimate should be published. Held, that the city was not precluded from making a valid contract without any advertisement for bids, and was not compelled, in case of an advertisement, to let the contract to the lowest bidder: *Yarnold v. City of Lawrence*, 15 Kan. 126.

### § 3955. Implied Contracts of Municipal Corporations.

—And it is held that corporations may be bound by



implied contracts within the scope of their powers, without a writing, a resolution, or an ordinance.<sup>1</sup>

ILLUSTRATIONS. — Gas is furnished to a city with the knowledge of the authorities, but no resolution was passed authorizing it. *Held*, an implied liability on the city to pay for it: *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

§ 3956. **Contracts Ultra Vires not Binding.** — The officers of a municipal corporation cannot bind it by a contract beyond the scope of its powers, or foreign to the purposes for which the corporation is organized.<sup>2</sup> "It results from their doctrine," says Dillon, "that contracts not authorized by the charter or by other legislative act, that is, not within the scope of the powers of the corpo-

<sup>1</sup> 1 Dillon on Municipal Corporations, sec. 383; *Seagraves v. Alton*, 13 Ill. 371; *Wheeler v. Chicago*, 24 Ill. 105; 76 Am. Dec. 736. In *Argenti v. San Francisco*, 16 Cal. 255, Field, C. J., says: The doctrine of implied municipal liability "applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it, — not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not in fact make any promise on the subject, but the law, which always intends justice, implies one; and her liability thus arising is said to be a liability upon an implied contract. . . . In reference to money or other property, it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury or been appropriated by her, and when it is property other

than money, it must have been used by her, or be under her control. But in reference to services rendered, the case is different. Their acceptance must be evidenced by ordinance to that effect. Their acceptance by the city without the consequent obligation to pay for them cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance upon which alone the obligation to pay could arise would be wanting. . . . As a general rule, undoubtedly a city corporation is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money or other property which does not belong to her, and to liabilities springing from neglect of duties imposed by the charter, from which injuries to parties are produced. There are limitations even to these exceptions in many instances, as where property or money is received in disregard of positive prohibitions; as, for example, she would not be liable for moneys received upon the issuance of bills of credit, as this would be in effect to support a proceeding in direct contravention of the inhibition of the charter."

<sup>2</sup> 1 Dillon on Municipal Corporations, sec. 381; *McDonald v. Mayor*, 68 N. Y. 23; 23 Am. Rep. 144.

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ration under any circumstances, are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter or constituent statute to enter into the contract. In favor of *bona fide* holders of negotiable securities, the corporation may be estopped to avail itself of irregularities in the exercise of power conferred; but it may always show that under no circumstances had the corporation power to make a contract of the character in question."<sup>1</sup> Any acts a city council may assume to perform, not fairly within the powers conferred on it by statute, are *ultra vires*.<sup>2</sup> Where a municipal corporation dealing with individuals assumes powers upon which the validity of its acts depends, and it turns out that it does not possess the specific powers relied on, it is not thereby excused from performance of its obligations, if they can be performed through the agency of other powers which it does possess.<sup>3</sup> A city cannot be held liable under a contract made by the municipal officers in violation of law.<sup>4</sup>

### § 3957. Ratification of Unauthorized Contracts. — The corporation may ratify the unauthorized acts or

<sup>1</sup> Dillon on Municipal Corporations, sec. 381; *Marsh v. Fulton County*, 10 Wall. 676; *Thomas v. Richmond*, 12 Wall. 349; *Bridgeport v. R. R. Co.*, 15 Conn. 475; *Burrill v. Boston*, 2 Cliff. 590; *Martin v. Mayor etc.*, 1 Hill, 545; *Overseers etc. v. Overseers etc.*, 18 Johns. 382; *Donovan v. New York*, 33 N. Y. 291; *Seibrech v. New Orleans*, 12 La. Ann. 496; *Clark v. Des Moines*, 19 Iowa, 199; *Loker v. Brookline*, 13 Pick. 343; *Philadelphia v. Flanigen*, 47 Pa. St. 21; *Trustees v. Cherry*, 8 Ohio St. 564; *Hague v. Philadelphia*, 48 Pa. St. 527; *Albany v. Cunliff*, 2 N. Y. 165; reversing 2 Barb. 190; *Cuyler v. Rochester*, 12 Wend. 165; *Hodges v. Buffalo*, 2 Denio, 110; *Halstead v. Mayor*, 3 N. Y. 430; *Boom v. Utica*, 2 Barb. 104; *Cornell v. Guilford*, 1 Denio, 510; *Boyland v.*

*Mayor etc. of New York*, 1 Sand. 27; *Dill v. Wareham*, 7 Met. 438; *Vincent v. Nantucket*, 12 Cush. 103; *Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *Parsons v. Inhabitants of Goshen*, 11 Pick. 396; *Wood v. Lynn*, 1 Allen, 108; *Spalding v. Lowell*, 23 Pick. 71; *Mitchell v. Rockland*, 45 Me. 496; 41 Me. 363; *Commissioners v. Cox*, 6 Ind. 403; *Inhabitants v. Weir*, 9 Ind. 224; *Smead v. R. R. Co.*, 11 Ind. 104; *Brady v. Mayor*, 20 N. Y. 312; *Appleby v. Mayor etc.*, 15 How. Pr. 428; *Estep v. Keokuk County*, 18 Iowa, 199; *Clark v. Polk County*, 19 Iowa, 248; *Perry v. Superior City*, 23 Wis. 64.

<sup>2</sup> *Alton v. Aetna Ins. Co.*, 82 Ill. 45.

<sup>3</sup> *Maher v. Chicago*, 38 Ill. 266.

<sup>4</sup> *Fox v. New Orleans*, 12 La. Ann. 154.

contracts of its agents, if within the corporate powers.<sup>1</sup> The ratification may be, as in the case of individuals,<sup>2</sup> express or implied.<sup>3</sup> But it must be made with knowledge of the facts, and by the proper officers.<sup>4</sup> An offer of reward made by the mayor in behalf of a city, and subsequently ratified by the city council, is binding on the city, although not so ratified until after the performance of the service for which the reward is claimed.<sup>5</sup> But no subsequent act of the officers of a municipal corporation can render effective any contract not made in strict compliance with the express requirements of the charter.<sup>6</sup> A city cannot, by ratification, make itself liable for the acts of its public officers in enforcing its police regulations.<sup>7</sup> A ratification of an illegal public sale is in effect making a private sale, and does not cure the illegality.<sup>8</sup> The legislature has power to ratify a contract entered into by a municipal corporation for a public purpose which is *ultra vires*, and when thus ratified, the act will be valid and binding.<sup>9</sup> But a contract of a municipal corporation void for want of authority to make it cannot be made valid by subsequent legislative ratification or recognition, without proof that this was obtained at the request or with the assent of the corporation, or was afterwards acted

<sup>1</sup> 1 Dillon on Municipal Corporations, sec. 385; *Backman v. Charlestown*, 42 N. H. 125; *Harris v. School District*, 28 N. H. 65; *Wilson v. School District*, 32 N. H. 118; *Keyser v. School District*, 35 N. H. 477; *Episcopal Society v. Episcopal Church*, 1 Pick. 372; *Bank v. Patterson*, 7 Cranch, 299; *Randall v. Van Vechten*, 19 Johns. 60; 10 Am. Dec. 193; *Trott v. Warren*, 11 Me. 227; *Topsham v. Rogers*, 42 Vt. 199; *People v. Swift*, 31 Cal. 26.

<sup>2</sup> See *ante*, Title Agency.

<sup>3</sup> 1 Dillon on Municipal Corporations, sec. 386.

<sup>4</sup> In *Peterson v. Mayor*, 17 N. Y. 449, the court say: "No sort of ratification can make good an act without the scope of the corporate authority. So where the charter or a statute binding upon the corporation has commit-

ted a class of acts to particular officers or agents, other than the general governing body, or where it has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects."

<sup>5</sup> *Crawshaw v. Roxbury*, 7 Gray, 374.

<sup>6</sup> *Smith v. Newburgh*, 77 N. Y. 130.

<sup>7</sup> *Calwell v. Boone*, 51 Iowa, 687; 33 Am. Rep. 154.

<sup>8</sup> *Pimental v. San Francisco*, 21 Cal. 251.

<sup>9</sup> *Brown v. Mayor etc. of New York*, 63 N. Y. 239; *Belo v. Commrs*, 76 N. C. 489.

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upon or confirmed by them.<sup>1</sup> Where a city bond was issued without authority of law, merely because the act authorizing its issue had not been published at the time, so as to take effect, it was held that the legislature might subsequently, with the consent of the municipal authorities, ratify the issue and give validity to the bond.<sup>2</sup>

§ 3958. **Dissolution of Municipal Corporations.**—In England it is laid down that a municipal corporation may be dissolved by an act of Parliament, by a loss of a majority of its members, by a surrender of its franchise to the crown, by a forfeiture of its franchise by an abuse of it.<sup>3</sup> But in the United States, according to a learned writer on the subject, the only manner in which a municipal corporation can be dissolved is by an act of the legislature.<sup>4</sup> When the charter of a municipal corporation is repealed, and the same people and the same territory are reincorporated as a municipality under a new name, although with different powers and different officers, a suit pending against the old corporation at the date of the repeal may be revived against the new corporation.<sup>5</sup> Where a public corporation is abolished by law, and several new ones are created in its stead, without any provision being made for the payment of existing debts, each of the new corporations is liable upon them all, and bound by a judgment obtained against the former corporation.<sup>6</sup>

§ 3959. **The Corporation Name.**—The name of a corporation may be given it by statute, or it may be acquired by usage.<sup>7</sup> Where the name is given by statute, it cannot be changed by the corporation.<sup>8</sup> A legislative grant of

<sup>1</sup> Hasbrouck v. Milwaukee, 13 Wis. 37; 80 Am. Dec. 718.

<sup>2</sup> Knapp v. Grant, 27 Wis. 147.

<sup>3</sup> 1 Dillon on Municipal Corporations, sec. 109.

<sup>4</sup> 1 Dillon on Municipal Corporations, sec. 110 et seq.

<sup>5</sup> O'Connor v. Memphis, 6 Lea, 730.

<sup>6</sup> Hughes v. School District, 72 Mo. 643.

<sup>7</sup> Johnson v. Indianapolis, 16 Ind. 227; School District v. Blakeslee, 13 Conn. 227.

<sup>8</sup> 1 Dillon on Municipal Corporations, sec. 120.

authority to a city by its generally received though not its corporate name is good.<sup>1</sup>

§ 3960. **Boundaries of Corporations.**—The boundaries of a municipal corporation are usually fixed in its charter, and the legislature has power to change them.<sup>2</sup> In the absence of express constitutional limitation, legislative power over the boundaries of municipal corporations is unlimited.<sup>3</sup> The legislature has power to divide counties and towns, and to apportion the common property and burdens as to it seems reasonable and equitable.<sup>4</sup> The legislature has power to enlarge the limits of a city, and thereby to render subject to the city ordinances the persons dwelling upon the land so added.<sup>5</sup> And it may do so without the consent of the inhabitants of the territory proposed to be added.<sup>6</sup> To extend the boundaries of a city does not take private property for public purposes without compensation, although tax-payers of the added territory, by the act, are subjected to liability for the city debt and taxes, and the tax-payers of the county from which the addition to the city was taken lose the contributions of those withdrawn by the act.<sup>7</sup> It is constitutionally competent for the legislature to erect, out of a portion of the territory of an existing town, a new municipal corporation, without making any provision for the debts and liabilities of such town previously incurred. In such case, the old town remains solely responsible for such debts and liabilities, and no claim can be enforced against the new corporation in respect thereto, either in favor of the town or its creditors. Such legislation impairs no contract rights or obligations, though the taxable resources

<sup>1</sup> *Pittsburgh v. Craft*, 1 Pittsb. Rep. 158.

<sup>2</sup> 1 *Dillon on Municipal Corporations*, c. 8; *Dare County Comm'rs v. Cunituck*, 95 N. C. 189.

<sup>3</sup> *Martin v. Dix*, 52 Miss. 53; 24 Am. Rep. 661.

<sup>4</sup> *Morrow Co. v. Hendryx*, 14 Or. 397.

<sup>5</sup> *Milwaukee v. Milwaukee*, 12 Wis. 93; *McCallie v. Chattanooga*, 3 Head, 317.

<sup>6</sup> *City of St. Louis v. Allen*, 13 Mo. 400.

<sup>7</sup> *Wade v. Richmond*, 18 Gratt. 583.

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of the town may be thereby largely diminished, and though such debts may have been incurred upon the faith of a statutory pledge that the town would provide a sufficient sinking fund, by taxation, to pay the same at maturity, it is not appealing that its power so to do has been rendered ineffectual for that purpose.<sup>1</sup> Where a city contracts a debt, and is afterwards deprived of a part of its territory, from which a new city is made, the old city continues liable for the debt, and although, should necessity require, equity would compel payment by the new city, yet the old city, being able to pay, must be proceeded against alone, unless the law provides otherwise.<sup>2</sup> Residents of an incorporated borough are not individually responsible for any portion of the existing indebtedness of the corporation, after they are thrown out by a change of its limits under an act of the legislature, and made citizens of an adjoining township.<sup>3</sup> The right of a city to take possession of and improve as a public park lands lying outside of its limits comes only by sovereign grant, and, so far as concerns the city, is a public franchise.<sup>4</sup> A municipal corporation has inherent authority, unless expressly prohibited by its charter, to make contracts and construct works beyond the corporate limits for the discharge of sewage, where such discharge is necessary or manifestly desirable.<sup>5</sup> After the public has acquiesced for nearly twenty years in a county board's attaching certain territory to a town, it is too late to question the jurisdiction of the town over such territory, though there were irregularities in the proceedings, which, in an action begun within a short time thereafter, would have justified the court in holding them void.<sup>6</sup>

ILLUSTRATIONS. — A statute extended the boundaries of a city so as to include farming land. *Held*, constitutional, although

<sup>1</sup> *State v. Lake City*, 25 Minn. 404.

<sup>2</sup> *Brewis v. Duluth*, 3 McCrary, 219.

<sup>3</sup> *North Lebanon v. Arnold*, 47 Pa. St. 488.

<sup>4</sup> *Thompson v. Moran*, 44 Mich. 602.

<sup>5</sup> *City of Coldwater v. Tucker*, 36 Mich. 474; 24 Am. Rep. 601.

<sup>6</sup> *Sherry v. Gilmore*, 58 Wis. 324.

the extension was wholly unnecessary and unreasonable, and made only to enable the city to tax the owner of the land covered by the extension: *Martin v. Dix*, 52 Miss. 53; 24 Am. Rep. 661. A town ordinance prohibiting the sale of intoxicating liquors "within the limits of said town" was passed before the act of the legislature extending the jurisdiction of towns two miles beyond their limits. *Held*, to apply to the extension: *Toledo v. Edens*, 59 Iowa, 352.

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## CHAPTER CCIV.

## OFFICERS OF CORPORATIONS.

- § 3961. Appointment of officers.
- § 3962. Term of office.
- § 3963. Resignation of office.
- § 3964. Compensation of officer.
- § 3965. Liability of officer to corporation.
- § 3966. Powers of officers — To sue.
- § 3967. Keeping money.
- § 3968. Personal liability on contracts.
- § 3969. Acts of subordinates.
- § 3970. Judicial acts.
- § 3971. The removal of officers.
- § 3972. Corporate meetings — The town meetings — The elective council.
- § 3973. What is a quorum — What number may act.
- § 3974. Regular and special meetings.
- § 3975. Procedure in corporate meetings.
- § 3976. The mayor.
- § 3977. The council or governing body.

§ 3961. **Appointment of Officers.** — The officers of a corporation are usually enumerated in the charter, and the corporation has no implied power to create other offices.<sup>1</sup> The provisions of the charter as to the qualifications, duties, etc., of municipal officers must be strictly followed.<sup>2</sup> The appointment of one to an office, for the term of one year, at a salary settled by a city ordinance, and his acceptance of the office, do not constitute a contract between him and the city that precludes him from resigning or the city from abolishing the office before the expiration of the term.<sup>3</sup> A provision in a city charter that the "common council shall be the judge of the elec-

<sup>1</sup> *Hoboken v. Harrison*, 30 N. J. L. 73; *White v. Tallman*, 26 N. J. L. 67. The legislature may prescribe the qualifications of officers: *State v. Van Baumbach*, 12 Wis. 310. The powers of a city in respect to the appointment of charter officers are statutory powers simply, and the officers upon

whom they are conferred take nothing whatever beyond the powers which the charter affirmatively gives them: *People v. Ransom*, 56 Barb. 514.

<sup>2</sup> *Stadler v. Detroit*, 13 Mich. 346.  
<sup>3</sup> *Frimm v. City of Carondelet*, 23 Mo. 22.



tion and qualifications of its own members, and shall have the power to determine contested elections," is conclusive, and not subject to review.<sup>1</sup>

ILLUSTRATIONS.—The mayor's power of nomination of inspectors of weights and measures for New York City existed to the extent of two officers. *Held*, that the selection of four persons did not invalidate the exercise thereof: *People v. Kneissel*, 58 How. Pr. 404. A statute provided that officers who are elected shall serve two years, and all officers who are appointed shall serve one year. *Held*, that a city clerk holding his office by the votes of the common council was "elected": *State v. Squire*, 39 Ohio St. 197. At the election of a city treasurer, five only of the eight councilors were present, and a majority of these voted for defendant. On approving the bond of defendant, eight were present, four voting to approve, and four refusing to vote. The mayor gave his casting vote for approval. *Held*, that the same rule applied to the vote on the bond as to the election; that a majority of those voting was enough, though a majority of those present refused to vote; and that under the circumstances a tie existed, and the mayor could rightfully use his casting vote: *Launtz v. People*, 113 Ill. 137; 55 Am. Rep. 405. A city council was empowered to appoint, in joint convention, a prosecuting attorney. No mode was prescribed, and there was no power of removal. The convention balloted, and A received a majority of the votes cast. *Held*, that A's title to the office was not affected by the fact that a resolution delaring him elected was lost, and that a resolution declared the ballot void by reason of errors which did not in fact exist, and that another resolution declared another person elected: *State v. Barbour*, 53 Conn. 76; 55 Am. Rep. 65.

§ 3962. **Term of Office.**—The officers of a municipal corporation are elected or appointed for a fixed term. Generally, at the end of the term, the officer will hold over until his successor is selected.<sup>2</sup> Though officers of a municipal corporation should be elected annually, if an election is not seasonably held, the acting officers hold over.<sup>3</sup> "Where, in the charter of incorporation, there is an express or implied restriction upon the time of holding office, as that the officers shall be annually elected on a

<sup>1</sup> *People v. Harshaw*, 60 Mich. 200; *Overseers v. Sears*, 22 Pick. 122; *McCall v. Byam Mfg. Co.*, 6 Conn. 428.

<sup>2</sup> *Chandler v. Bradish*, 23 Vt. 416;

<sup>3</sup> *State v. Wilson*, 12 Lea, 246.

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ears, 22 Pick. 122; *Mc-*  
*Mfg. Co.*, 6 Conn. 428.  
*Wilson*, 12 Lea, 246.

particular day, and that they shall hold from one charter  
(election) day till the next, or that they shall be elected  
'for the year ensuing only,' in such case they cannot  
hold over beyond the next election day or the end of the  
year. But where, by the constitution of the corporation,  
the officers are elected for a term, and until their succes-  
sors are elected and qualified, or where they are elected  
'for the year ensuing,' and the charter contains no re-  
strictive clause, the officers may continue to hold and ex-  
ercise their offices, after the expiration of the year, until  
they are superseded by the election of other persons in  
their places."<sup>1</sup> Ward clerks in cities hold their offices  
until their successors are chosen.<sup>2</sup> A policeman's com-  
mission remains in force until revoked.<sup>3</sup> Where a corpo-  
ration under its charter has power to create by ordinance  
an office and fill the same, it also has power to abolish it.<sup>4</sup>

§ 3963. **Resignation of Office.** — An office may be either  
expressly or impliedly resigned.<sup>5</sup> A resignation is not  
consummated until it is accepted, and may be withdrawn  
until then.<sup>6</sup> But in the absence of a statutory provision  
to that effect, the acceptance of the resignation of a mu-  
nicipal office by the authorities to whom it is tendered  
is not necessary to make the resignation effective. Their  
refusal even to accept it would not have the effect to com-  
pel one to retain the office against his will.<sup>7</sup> An officer  
who abandons his office creates a vacancy.<sup>8</sup> Thus where  
one who had been elected alderman failed for five months  
to attend the meetings of the city council, or perform the

<sup>1</sup> *Tuley v. State*, 1 Ind. 500.

<sup>2</sup> *Rounds v. Smart*, 71 Me. 380.

<sup>3</sup> *Corbett v. Sullivan*, 54 Vt. 619.

<sup>4</sup> *Waldraven v. Memphis*, 4 Cold.

<sup>5</sup> *Regents v. Williams*, 9 Gill & J.

<sup>6</sup> *Regents v. Williams*, 9 Gill & J.

<sup>7</sup> *Dillon on Municipal Corporations*,  
sec. 163. Under provisions of a char-  
ter which direct that an alderman or

other officer may resign by giving  
written notice to the city clerk, and  
publishing a copy of such notice in  
the corporation papers, held, that a  
simple communication to the mayor  
and common council, tendering a res-  
ignation, was ineffectual: *Lewis v.*  
*Oliver*, 4 Abb. Pr. 121.

<sup>8</sup> *State v. Mayor*, 4 Neb. 260.

<sup>9</sup> *People v. Hanifan*, 96 Ill. 420.

duties of his office, he was considered as having impliedly resigned his position, so as to authorize an election to fill his place.<sup>1</sup> Accepting an incompatible office is an implied resignation of an office already held.<sup>2</sup> Incompatibility of this kind exists where the nature and duties of the two offices is such as to render it improper, for the public good, for one officer to hold both.<sup>3</sup>

§ 3964. **Compensation of Officer.** — The officers of a municipal corporation can only claim such compensation as is given to them by law, ordinance, or express contract with them. "Officers of a municipal corporation are deemed to have accepted their office with knowledge of and with reference to the provisions of the charter or incorporating statute relating to the services which they may be called upon to render and the compensation provided therefor. Aside from these, or some proper by-law, there is no implied *assumpsit* on the part of the corporation with respect to the services of its officers. In the absence of express contract, these regulate the right of recovery, and the amount."<sup>4</sup> The term "salary" imports

<sup>1</sup> *People v. Hanifan*, 96 Ill. 420.

<sup>2</sup> *Rex v. Pattison*, 4 Barn. & Adol. 9; *People v. Hanifan*, 96 Ill. 420.

<sup>3</sup> *Bryan v. Cattell*, 15 Iowa, 538; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659.

<sup>4</sup> 1 Dillon on Municipal Corporations, sec. 169; *City of Hoboken v. Gear*, 27 N. J. L. 278; *Edgecome v. Lewiston*, 71 Me. 343; *Locke v. City of Central*, 4 Col. 65; 34 Am. Rep. 66; the court saying: "His general duties were prescribed by ordinance, which also provided that he should 'perform such other duties as might be enjoined upon him by ordinance or resolution of the city council.' The same ordinance prescribed the compensation he should receive for surveying, subdividing, or giving the grade of any lot or piece of ground within the city, and furnishing a certificate thereof, which compensation was to be paid by the parties at whose request such work was done. The ordinance is silent as

to fees to be paid the city surveyor for all other services. It was admitted at the trial that he had received full compensation for such work as the ordinance prescribed fees. The suit was instituted to recover for the performance of various duties imposed upon him by ordinance or resolution for which no fees were fixed. The plaintiff proceeded upon the notion that upon an implied *assumpsit* he was entitled to recover from the municipal corporation whatever his services were reasonably worth for the discharge of all duties for which the ordinance allowed no compensation. It is competent for the city council to increase or diminish the fees pertaining to the office of city surveyor, or abolish them altogether. Its incumbent, if the fees be diminished or entirely taken away, may at once resign. As the relation between himself and the city does not rest upon contract, he is not legally bound to continue his

having impliedly an election to fill office is an implied.<sup>2</sup> Incompatibility and duties of improper, for the

The officers of a such compensation r express contract corporation are with knowledge of the charter or in- vices which they compensation pro- me proper by-law, rt of the corpora- officers. In the late the right of "salary" imports

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a compensation for personal services, and not the repay- ment of moneys expended in the discharge of the duties of an office.<sup>1</sup> One who accepts a municipal office, under an agreement with the city to accept a certain sum as compensation, cannot, after settling with the city on the basis agreed upon, demand more.<sup>2</sup> A *de facto* officer cannot maintain an action against the municipality for the salary or compensation attached to the office.<sup>3</sup> The employment by the board of health of a city of one of its members to vaccinate pupils in a public school is void as against the city, where the members of the board are by statute only authorized to receive an annual salary to be fixed by the common council.<sup>4</sup> Plaintiff performed the duties of assistant janitor in a county court-house without receiving an appointment. Thereafter the county supervisors passed a resolution recognizing the performance of such services, and appointing him assistant janitor, the appointment to date back to the time when he began to perform the duties of such position. It was held that plaintiff could recover the reasonable value of his services rendered before his appointment.<sup>5</sup> The corporation may reduce or regulate the salaries or fees of its officers,<sup>6</sup> unless the employment is in the nature of a contract for a fixed

services until the expiration of his term. But having accepted the office, as long as he performs its duties the measure of his compensation must be determined by the city authorities. Where the relation of employer and employee exists, both parties are bound by the terms of the contract. If either party violates his agreement with the other, he may sue for breach of contract. If the employer discharges the employee before the expiration of his term of service, he can be made to respond in damages. But between a municipal corporation and its officers, a very different relation exists. If an officer neglects to perform his duties, the municipality has no remedy against him for breach of contract. At his pleasure he may re-

linquish his office. His remuneration for services to be rendered may, in the absence of any charter restriction, be changed from time to time at the will of the city council."

<sup>1</sup> *Sniffen v. City of New York*, 4 Sand. 193.

<sup>2</sup> *Hobbs v. Yonkers*, 32 Hun, 454.

<sup>3</sup> *Matthews v. Supervisors of Copiah County*, 53 Miss. 715; 24 Am. Rep. 715.

<sup>4</sup> *Fort Wayne v. Rosenthal*, 75 Ind. 156; 39 Am. Rep. 127.

<sup>5</sup> *Conway v. New York*, 8 Daly, 306.

<sup>6</sup> *Barker v. Pittsburg*, 4 Pa. St. 49; *Iowa City v. Foster*, 10 Iowa, 189; *Com. v. Bacon*, 6 Serg. & R. 322; *Love v. Jersey City*, 40 N. J. L. 456; *People v. Detroit*, 38 Mich. 636. See *ante*, Title Constitutional Law.

term.<sup>1</sup> Merely appropriating for the payment of a municipal salary a less amount than had been paid before does not fix the salary at the smaller sum, if the body making the appropriation continues to allow salary bills at the former rate.<sup>2</sup> A city charter forbidding any change in the mayor's salary during the term of his office is infringed by an ordinance providing that after the expiration of the term of the then mayor, the mayor should serve without compensation; and a mayor is not estopped from claiming compensation by his declarations during the canvass for the office, that if elected he would not claim compensation.<sup>3</sup>

A salaried officer of a public corporation has no claim for compensation extra his salary on the ground that the duties of his office have been increased or new duties added since the salary was fixed,<sup>4</sup> except, perhaps, where

<sup>1</sup> *Chase v. Lowell*, 7 Gray, 33. After a salary has been fixed and recorded by a board of county auditors, they cannot change it by parol: *People v. Wayne County Auditors*, 41 Mich. 4. Where a municipal charter provides that the compensation of the superintendent of the board of public works shall be fixed by the board and approved by the common council, the council alone cannot reduce it: *Fountain v. Jackson*, 50 Mich. 15. A city having a treasurer duly appointed and qualified under the general act of incorporation cannot defeat his right to commissions for disbursement of the municipal funds by placing them in the hands of the mayor for disbursement: *Board v. Decatur*, 64 Tex. 7; 53 Am. Rep. 735.

<sup>2</sup> *Fountain v. Jackson*, 50 Mich. 260.  
<sup>3</sup> *State v. Nashville*, 15 Lea, 697; 54 Am. Rep. 427.

<sup>4</sup> *People v. Supervisors*, 1 Hill, 362; *Wendell v. Brooklyn*, 29 Barb. 204; *Palmer v. Mayor etc. of New York*, 2 Sand. 318; *Heslep v. Sacramento*, 2 Cal. 580; *Gilmore v. Lewis*, 12 Ohio, 281; *Halch v. Mann*, 15 Wend. 44; *Bussier v. Pray*, 7 Serg. & R. 447; *Covington v. Mayberry*, 9 Bush, 304. In *Evans v. City of Trenton*, 24 N. J.

L. 766, the court say: "It is a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for these services. Nor does it alter the case that, by subsequent statutes or ordinances, his duties are increased, and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from time to time, during his continuance in office, for the compensation stipulated, whether these duties are diminished or increased. Whenever he considers the compensation inadequate, he is at liberty to resign: *Andrews v. United States*, 2 Story, 202; *People v. Supervisors*, 1 Hill, 362; *Bussier v. Pray*, 7 Serg. & R. 447; *Angell and Ames on Corporations*, sec. 317. This rule is of importance to the public. The successful effort to obtain office is not unfrequently speedily followed by efforts to increase its emoluments while the incessant changes which the progressive spirit of the times is introducing effects almost every year changes in the

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he has been obliged to perform some onerous duty out-  
side of his regular official duty.<sup>1</sup> An officer removed for  
cause cannot recover his salary for the remainder of the  
term.<sup>2</sup> But the right to impose fines for misconduct gives  
no right to impose a forfeiture of salary.<sup>3</sup> So where a  
policeman was imprisoned on the charge of burglary and  
subsequently acquitted, it was held that he was entitled to  
his regular salary during the time of his imprisonment.<sup>4</sup>  
Therefore where an officer is improperly removed by the  
municipal authorities before the end of his term, he may  
recover from the corporation his salary and other per-  
quisites for the unexpired part of his term.<sup>5</sup>

ILLUSTRATIONS.—A resolution of a board of health provided  
that "on and after June 1, 1871, the office of engineer to this  
board be honorary, and that no salary be attached to that office  
or paid to that officer after that date," whereof the engineer was  
duly notified. *Held*, to prevent his maintaining any action for  
services rendered after that date: *Haswell v. New York*, 81  
N. Y. 255. A was appointed an assistant engineer of the New  
York fire department, and after serving for a time, he was or-  
dered to duty as a machinist at a lower rate of pay. *Held*, that

character and additions to the amount  
of duty in almost every official station;  
and to allow these changes and addi-  
tions to lay the foundation of claims  
for extra services would soon introduce  
intolerable mischief. The rule, too,  
should be very rigidly enforced. The  
statutes of the legislature and the  
ordinances of our municipal corpora-  
tions seldom prescribe with much  
detail and particularity the duties  
annexed to public offices; and it re-  
quires but little ingenuity to run nice  
distinctions between what duties may  
and what may not be considered  
strictly official; and if these distinc-  
tions are much favored by courts of  
justice, it may lead to great abuse."

<sup>1</sup> *People v. Supervisors*, 12 Wend.  
257; *Bright v. Supervisors*, 18 Johns.  
242; *Mallory v. Supervisors*, 2 Cow.  
531, 533; *Detroit v. Redfield*, 19 Mich.  
376; *White v. Polk County*, 17 Iowa,  
413.

<sup>2</sup> *Westburg v. Kansas*, 64 Mo. 493.  
A city policeman who has been found

guilty of immoral conduct and dis-  
charged from his office by a board of  
police commissioners having jurisdic-  
tion cannot recover from the city his  
salary for the remainder of his term.  
It makes no difference that the com-  
missioners may have erred in their  
judgment on the evidence, no appeal  
having been taken: *Queen v. Atlanta*,  
59 Ga. 318. F., a city treasurer, being  
indicted for forgery, the mayor and  
council elected another in his stead for  
the balance of his term. Upon his  
acquittal, held, that he could not re-  
cover the salary for such balance of  
his term. If the prosecution was  
malicious, he could recover in tort  
from the wrong-doer: *Brunswick v.*  
*Fahen*, 60 Ga. 109.

<sup>3</sup> *Tyng v. Boston*, 133 Mass. 372.

<sup>4</sup> *People v. New York Police Com-  
missioners*, 27 Hun, 261.

<sup>5</sup> *Stadler v. Detroit*, 13 Mich. 346;  
*Shaw v. Mayor*, 19 Ga. 468; *Dorsey v.*  
*Smith*, 28 Cal. 21; *Meagher v. County*,  
5 Nev. 244.

by performing the duties of machinist without protest he precluded himself from claiming pay as an assistant engineer: *Reilly v. New York*, 48 N. Y. Sup. Ct. 274. The salary of a city clerk was fixed with the implied understanding that it should be in lieu of certain fees to which the clerk might have laid claim, and which for two years he turned into the city treasury without making claim thereto, drawing his salary in the mean time. *Held*, that he was estopped from afterwards claiming his fees: *McInery v. Galveston*, 58 Tex. 334. A city makes its clerk's salary a stated sum, and provides that he shall "account for all moneys received in his official capacity." *Held*, that he cannot retain above his salary fees for recording marriages and deaths: *Shepard v. Lawrence*, 141 Mass. 479. A was attorney for a city, and had a fixed salary for his services. He was employed by the mayor to attend to certain cases in court for the city. *Held*, that if these duties were part of his official duties, they were paid for in his salary; if they were not, the mayor had no power under the charter to bind the city: *Carroll v. St. Louis*, 12 Mo. 444.

§ 3965. **Liability of Officer to Corporation.**—Public officers are not liable to the corporation for negligence in their official duties.<sup>1</sup>

§ 3966. **Powers of Officers—To Sue.**—Public officers have, in general, a power to sue commensurate with their duties. If officers of a corporate body, suit should be brought in the name of the corporation, unless the statute direct otherwise.<sup>2</sup>

§ 3967. **Keeping Money.**—A public or municipal officer who is required to account for and pay over money that comes into his hands is liable, though it be stolen without his fault, unless relieved from this responsibility by statute.<sup>3</sup>

<sup>1</sup> *Parish v. Fiske*, 8 Cush. 264; *Palmer v. Carroll*, 24 N. H. 314.

<sup>2</sup> *Shook v. State*, 6 Ind. 113; *State v. Rush*, 7 Ind. 221; *Supervisors v. Stimpson*, 4 Hill, 136; *Todd v. Birdsell*, 1 Cow. 260; 13 Am. Dec. 522; *Jansen v. Ostrander*, 1 Cow. 670; *Correll v. Guilford*, 1 Denio, 510.

<sup>3</sup> *Halbert v. State*, 22 Ind. 125; *Muzzy v. Shattuck*, 1 Denio, 233; *Morbeck v. State*, 28 Ind. 86; *Hancock v. Hazzard*, 12 Cush. 112; *United States v. Prescott*, 3 How. 578; *Commonwealth v. Comeley*, 4 Pa. St. 372; *State v. Harper*, 6 Ohio St. 707; 67 Am. Dec. 363.

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§ 3968. **Personal Liability on Contracts.**—Public officers and officers of municipal corporations are not personally liable on contracts made by them for the corporation within the scope of their authority, unless it is clear that they intended to bind themselves personally.<sup>1</sup> They are personally liable, however, where they contract without authority.<sup>2</sup>

§ 3969. **Acts of Subordinates.**—Public officers are not liable for the misconduct or malfeasance of such persons as they are obliged to employ. Here the maxim of *respondeat superior* has no application, there being no freedom of choice as to the selection and control of agents.<sup>3</sup> A city marshal who, to enforce an ordinance under the mayor's proclamation, employs an agent to destroy all dogs found running at large not properly muzzled is not liable for the wanton, willful, or negligent act of such agent in killing a dog not within the terms of the ordinance and proclamation.<sup>4</sup>

§ 3970. **Judicial Acts.**—And officers are not liable for errors or mistakes where they act judicially; malice or corruption must be shown.<sup>5</sup>

§ 3971. **The Removal of Officers.**—The removal of an officer from his office is called amotion. The power to

<sup>1</sup> *Hodgeson v. Dexter*, 1 Cranch, 345; *Olney v. Wickes*, 18 Johns. 122; *Randall v. Van Vechten*, 19 Johns. 60; 10 Am. Dec. 193; *Andrews v. Estes*, 11 Me. 267; 26 Am. Dec. 521; *Parr v. Greenbush*, 72 N. Y. 463. But see *City of Providence v. Miller*, 11 R. I. 372; 23 Am. Rep. 453.

<sup>2</sup> *Underhill v. Gibson*, 2 N. H. 352; 9 Am. Dec. 82.

<sup>3</sup> *Bailey v. Mayor etc.*, 3 Hill, 531; 38 Am. Dec. 669; 2 Denio, 433; *Hall v. Smith*, 2 Bing. 156; *Pritchard v. Keefer*, 53 Ill. 117; *Humphreys v. Mears*, 1 Man. & R. 187; *Bolton v. Crowther*, 2 Dowl. & R. 195; *Harris v. Baker*, 4 Maule & S. 27. But see

*Van Schaick v. Sigel*, 58 How. Pr. 211.

<sup>4</sup> *Pritchard v. Keefer*, 53 Ill. 117.

<sup>5</sup> *Wilkes v. Dinsman*, 7 How. 89; *Ramsey v. Riley*, 13 Ohio, 157; *Stewart v. Southard*, 17 Ohio, 402; 49 Am. Dec. 463; *Conwell v. Emrie*, 4 Ind. 209; *Bartlett v. Crozier*, 17 Johns. 439; 8 Am. Dec. 428; *Freeman v. Cornwall*, 10 Johns. 470; *Johnson v. Stanley*, 1 Root, 245; *Township v. Carey*, 27 N. J. L. 377; *Waters v. Waterman*, 26 N. J. L. 214; *Craig v. Burnett*, 32 Ala. 728; *State v. Dunnington*, 12 Md. 340; *Commissioners v. Nesbitt*, 11 Gill & J. 50; *Boardman v. Hayne*, 29 Iowa, 339.



remove an officer for cause is incident to the other powers of a corporation.<sup>1</sup> The terms upon which, by the charter or law, officers may be removed must be strictly followed.<sup>2</sup> Where express power to remove for certain causes is given, this has been held to limit the right of removal to these cases.<sup>3</sup> Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing. But where the appointment is during good behavior, or where the removal can only be for certain specified causes, the power of removal cannot be exercised, unless there be a charge against the officer, notice to him of the accusation, and a hearing of the evidence in support of the charges, and an opportunity given to the party of making defense.<sup>4</sup> The common council of a city, having the power to appoint certain officers by a mere majority, "for two years each, subject to removal by said city council at their pleasure," may remove such officers by the vote of a majority only, notwithstanding the fact that the officers in general of municipal corporations can be removed for an offense in office only by a two-thirds vote of the common council of such corporation.<sup>5</sup> In Virginia, the chief of police of a city is a state officer, and cannot be removed

<sup>1</sup> 1 Dillon on Municipal Corporations, sec. 179. See *ante*, Title Corporations, § 421. As to what is "cause," see *People v. Fire Comm'rs*, 49 N. Y. Sup. Ct. 367; *People v. French*, 32 Hun, 112; *People v. Jordan*, 90 N. Y. 53; *People v. New York*, 19 Hun, 441.

<sup>2</sup> *State v. Trustees*, 5 Ind. 77; *State v. Lingo*, 26 Mo. 496; *State v. Bryce*, 7 Ohio (part 2), 82. A change in the constitution of the board of police commissioners pending the trial of an officer does not invalidate a removal made by the new board: *People v. New York Police Comm'rs*, 23 Hun, 351.

<sup>3</sup> *State v. Jersey City*, 25 N. J. L. 536; *Mayor v. Shaw*, 16 Ga. 172. A board of police commissioners is not guilty of an arbitrary and unwarrantable exercise of authority in suspending an officer pending a trial before the

board on charges which, if true, would involve his dismissal: *State v. St. Louis Police Comm'rs*, 16 Mo. App. 48.

<sup>4</sup> 1 Dillon on Municipal Corporations, sec. 188; *Field v. Commonwealth*, 32 Pa. St. 478; *In re Ramshay*, 83 Eng. Com. L. 174; *Ex parte Hennen*, 13 Pet. 230; *Queen v. Governors etc.*, 8 Ad. & E. 632; *Bagg's Case*, 11 Coke, 93 b; *Rex v. Coventry*, 1 Ld. Raym. 391; *Dr. Gaskin's Case*, 8 Term Rep. 209; *Rex v. Oxford*, 2 Salk. 428; *Rex v. Mayor etc.*, 1 Lev. 291; 2 Kyd, 58, 59; *Willc.* 253, 254; *Grant*, 244; *Rex v. Andover*, 1 Ld. Raym. 710; *Page v. Hardin*, 8 B. Mon. 648; *Hoboken v. Gear*, 27 N. J. L. 265; *Madison v. Korbly*, 32 Ind. 74; *Stadler v. Detroit*, 13 Mich. 346.

<sup>5</sup> *Madison v. Korbly*, 32 Ind. 74; *Madison v. Kelso*, 32 Ind. 79.

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by the mayor.<sup>1</sup> An office created by a municipal corporation may be abolished by the same authority, so as to deprive the incumbent of his salary for the unexpired term for which he was elected.<sup>2</sup> A charter providing that no clerk be removed until he has been informed of the cause, etc., does not apply where one is discharged because the clerkship is abolished, or no funds provided for his payment.<sup>3</sup>

**§ 3972. Corporate Meetings — The Town Meetings — The Elective Council.** — The affairs of a municipal corporation must be transacted at a corporate meeting. In some of the states — notably in New England — all the inhabitants of the town meet in what is called town-meeting, and act and vote in person. But in most of the states the affairs of the corporation are transacted by a representative body, called the council, which body is elected by the inhabitants of the town to represent them.<sup>4</sup> Due notice of the time and place of a corporate meeting must be given.<sup>5</sup> A town-meeting must be held at the place appointed in the notice.<sup>6</sup>

**§ 3973. What is a Quorum — What Number may Act.** — In the New England town-meeting any act is valid if passed by a majority of those present, no matter how few in number those present may be, or how small a proportion of the inhabitants.<sup>7</sup> So in the case of a town council, where the matter is not regulated by statute or charter, a majority of the members of the body constitutes a quorum,

<sup>1</sup> *Burch v. Hardwicke*, 30 Gratt. 24; 32 Am. Rep. 640.

<sup>2</sup> *City Council of Augusta v. Sweeney*, 44 Ga. 463; 9 Am. Rep. 172.

<sup>3</sup> *Phillips v. New York*, 88 N. Y. 245.

<sup>4</sup> *Dillon on Municipal Corporations*, secs. 197 et seq.

<sup>5</sup> *Dillon on Municipal Corporations*, sec. 200; *Ford v. Clough*, 8 Me. 334; 23 Am. Dec. 513; *Chamberlain*

*v. Dover*, 13 Me. 466; 29 Am. Dec. 517.

<sup>6</sup> *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517.

<sup>7</sup> *Damon v. Granby*, 2 Pick. 345; *Commonwealth v. Ipswich*, 2 Pick. 70; *Williams v. Lunenburg*, 21 Pick. 75; *Church's Case*, 5 Rob. (N. Y.) 649; *State v. Binder*, 38 Mo. 450; *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517.

and a majority of these may pass an ordinance or do other acts.<sup>1</sup> Under the power of a city council to settle its rules of procedure, it cannot declare that two thirds shall constitute a quorum.<sup>2</sup> Acts done when less than a legal quorum is present, or which were not concurred in by the requisite number, are void.<sup>3</sup> A majority of those present must concur, in order to do a valid act.<sup>4</sup>

<sup>1</sup> 1 Dillon on Municipal Corporations, sec. 217; Buell v. Buckingham, 16 Iowa, 284; 85 Am. Dec. 516; State v. Delieasseline, 1 McCord, 52. Power of motion was conferred upon a city council to be exercised "by a vote of two thirds of that body." Held to give the power of removal to two thirds of a legal quorum. Two thirds of the whole number of members composing the council were not required: Warnock v. La Fayette, 4 La. Ann. 419.

<sup>2</sup> Heiskell v. Baltimore, 65 Md. 125; 57 Am. Rep. 308.

<sup>3</sup> Logansport v. Legg, 20 Ind. 315; Ferguson v. Chittenden Co., 7 Ark. Rep. 479; Price v. R. R. Co., 13 Ind. 58; McCracken v. San Francisco, 16 Cal. 591; Piemental v. San Francisco, 21 Cal. 351; State v. Wilkesville, 20 Ohio St. 288.

<sup>4</sup> San Francisco v. Hazen, 5 Cal. 169; Labourdette v. Municipality, 2 La. Ann. 527. "As a general rule, it may be stated that not only where the corporate power resides in a select body, as a city council, but where it has been delegated to a committee or to agents, then, in the absence of special provisions otherwise, a minority of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee or if all of the agents are assembled, or if all have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such case, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quo-

rum, the power of the minority to act is, in general, considered to cease. But where the duties are purely ministerial, and not judicial, or are of such a nature as to exclude the idea of action as a body or board, and where they are devolved on public officers or agents rather than on the agents of corporations, the rule above stated has been relaxed, and in some instances deemed to be wholly inapplicable": 1 Dillon on Municipal Corporations, sec. 221; citing Kingsbury v. School District, 12 Met. 99; Day v. Green, 4 Cush. 438; Fisher v. School District, 4 Cush. 494; Coffin v. Nantucket, 5 Cush. 269; 11 Cush. 433; Damon v. Granby, 2 Pick. 345, 355; State v. Jersey City, 27 N. J. L. 493; Charles v. Hoboken, 27 N. J. L. 203; Dey v. Jersey City, 19 N. J. Eq. 412; Baltimore v. Poultney, 25 Md. 18. With respect to persons or officers appointed by law to act judicially in a public matter, it is generally held, there being no provision of statute to the contrary, that where all meet and act, a majority may decide and bind the rest, and this notwithstanding the express dissent of the minority, or their wrongful withdrawal before the act is consummated: Ex parte Rogers, 7 Cow. 526 (appraisal of damages by canal appraisers.) See, further, Ex parte Willcocks, 7 Cow. 402; 17 Am. Dec. 525; Young v. Buckingham, 5 Ohio, 485, 489; Charles v. Hoboken, 27 N. J. L. 203; Martin v. Lemon, 26 Conn. 192. The statute authorized the appointment of three levee inspectors, and prescribed their duties, which involved the exercise of judgment. Held, that all must meet and act, and that the action of a majority in the absence of the third was void: Ballard v. Davis, 31 Miss. 525. See Title Agency—Joint Agents.

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§ 3974. **Regular and Special Meetings.**—The time and place of holding regular or stated meetings is presumed to be known to the members, and no notice is required to be given.<sup>1</sup> The regular meeting may be adjourned to a future day; and at the adjourned meeting any act that might have been done at the first meeting may be done at the adjourned one.<sup>2</sup> Notice of the time and place of a special meeting must be given to all the members.<sup>3</sup> An ordinance which cannot be passed at the same meeting at which it is introduced cannot be passed at an adjourned meeting thereof.<sup>4</sup> Where a city council at a regular session adjourned to a particular time for the purpose of considering certain remonstrances against granting liquor licenses, it was held that it had power to act on any matter proper to come before it on a regular session.<sup>5</sup>

§ 3975. **Procedure in Corporate Meetings.**—Where the charter requires that the ayes and nays shall be called and published when any vote is taken, this is mandatory, and must be done, to render the vote legal.<sup>6</sup> The council may rescind previous notes and orders at any time before rights under the orders have attached.<sup>7</sup> But a corporate act which can only be taken by a two-thirds vote cannot be rescinded by a bare majority.<sup>8</sup> An organized corporate meeting possesses the right to adjourn.<sup>9</sup> A charter provision that "the vote of the common council shall in all cases be taken by ayes and nays, and every

<sup>1</sup> People v. Batchelor, 22 N. Y. 128.

<sup>2</sup> Smith v. Law, 21 N. Y. 296; People v. Batchelor, 22 N. Y. 128; Warner v. Mowat, 11 Vt. 385.

<sup>3</sup> People v. Batchelor, 22 N. Y. 128; Ex parte Rogers, 7 Cow. 526.

<sup>4</sup> Staates v. Washington, 44 N. J. L. 605; 43 Am. Rep. 402.

<sup>5</sup> Ex parte Wolf, 14 Neb. 24.

<sup>6</sup> Steckert v. East Saginaw, 22 Mich. 104; Spangler v. Jacoby, 14 Ill. 297;

58 Am. Dec. 571; Supervisors v. People, 25 Ill. 297; McCormack v. Bay City, 23 Mich. 457. *Contra*, Striker v. Kelley, 7 Hill, 9.

<sup>7</sup> Stoddard v. Gilman, 22 Vt. 568; Bigelow v. Hillman, 37 Me. 58; Locke v. Rochester, 5 Lans. 11; Esty v. Starr, 56 Vt. 690.

<sup>8</sup> Stockdale v. Wayland School District, 47 Mich. 226.

<sup>9</sup> Chamberlain v. Dover, 13 Me. 466; 29 Am. Dec. 517.

vote shall be entered at length upon the journal, does not apply to votes upon motions to adjourn.<sup>1</sup> The clerk of a municipal corporation may amend its records according to his own knowledge of the truth, so long as he has the custody of them.<sup>2</sup>

**§ 3976. The Mayor.**—The mayor is the head executive officer, elected, according to the charter, either by the people or by the council, and sometimes the presiding officer at meetings, having power to vote in case of a tie.<sup>3</sup> The approval of the mayor of the proceedings of a city council is essential only when required by the city charter.<sup>4</sup> Where the power to legislate for the corporation is vested in "the mayor and councilmen," the council by itself cannot legislate, but must act in conjunction with the mayor.<sup>5</sup> A mayor had no authority, unless expressly conferred by the city charter or ordinances, to employ counsel in behalf of the city.<sup>6</sup> A mayor may be authorized to arrest and fine lewd and disorderly women; in so doing he but exercises the police power, which, in this respect, has always been well distinguished from the judicial power, both here and in England.<sup>7</sup>

**§ 3977. The Council or Governing Body.**—Who shall compose the council or governing body of the corporation is generally to be determined by the charter or act of incorporation.<sup>8</sup> It is generally the sole judge of the elec-

<sup>1</sup> *Green Bay v. Brauns*, 50 Wis. 204.

<sup>2</sup> *Mott v. Reynolds*, 27 Vt. 206.

<sup>3</sup> 1 *Dillon on Municipal Corporations*, sec. 208. A statute gives a casting vote to the mayor when the council is equally divided, and elsewhere says that he shall appoint by and with the assent of the council. Held, that on the question of the confirmation of an appointment he has the casting vote: *Carroll v. Wall*, 35 Kan. 36.

<sup>4</sup> *Burlington v. Dennison*, 42 N. J. L. 165.

<sup>5</sup> *Saxton v. Beach*, 50 Mo. 488.

<sup>6</sup> *Fletcher v. Lowell*, 15 Gray, 103. The mayor of a city, who was a lawyer by profession, was, without collusion or fraud, employed under a resolution of the common council to appear for the city and defend a suit against it. Held, that the employment was valid, and that he could recover the value of his services: *Mayor etc. of Niles v. Muzzy*, 33 Mich. 61; 20 Am. Rep. 670.

<sup>7</sup> *Shafer v. Mumma*, 17 Md. 331; 79 Am. Dec. 656.

<sup>8</sup> 1 *Dillon on Municipal Corporations*, sec. 211; *Cochran v. McCleary*, 22 Iowa, 75.

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tion of its members.<sup>1</sup> A city council, having exclusive power to judge of the election and qualification of its members, having once seated a member after an investigation, cannot order a second investigation.<sup>2</sup> Where the charter of a city provides that the common council of a city shall "judge of the qualifications, elections, and returns of their own members," the council possesses the exclusive authority to pass on the subject, and courts have no jurisdiction to inquire into the qualifications, elections, or returns of members thereof.<sup>3</sup> A board of aldermen cannot deprive one of their number of his seat for causes affecting his eligibility existing at the time of his election.<sup>4</sup> The mayor and city council are but trustees of the public; the tenure of their office impresses their ordinances with liability to change. They cannot pass an irrevocable ordinance.<sup>5</sup> Where a city charter does not prescribe the number of votes necessary to an election of a presiding officer by the council, the votes of a majority of a quorum elect.<sup>6</sup> It is improper and illegal for any member of the city council to vote upon any question brought before the council in which he is personally interested.<sup>7</sup> But it seems the fact that a certain alderman would be benefited, together with the general public, by the widening of a certain street, does not make his vote upon the matter of such widening void.<sup>8</sup>

<sup>1</sup> Mayor v. Morgan, 7 Martin, N. S., 18 Am. Dec. 233.

<sup>2</sup> Kendall v. Camden, 47 N. J. L. 64; 54 Am. Rep. 117.

<sup>3</sup> People v. Metzker, 47 Cal. 524.

<sup>4</sup> Ellison v. Raleigh, 89 N. C. 125.

<sup>5</sup> State v. Graves, 19 Md. 351.

<sup>6</sup> State v. Farr, 47 N. J. L. 208.

<sup>7</sup> Daly v. R. R. Co., 80 Ga. 793; 12 Am. St. Rep. 286.

<sup>8</sup> Goff v. Nolan, 62 How. Pr. 323. A city council was composed of nine

members. It required a vote of two thirds to pass an ordinance. A rule of the council forbade members to vote upon questions in which they were directly interested. A certain ordinance received six votes only, and one of these was the vote of a member directly interested in the passage of the ordinance. Held, that it was not legally passed, and was invalid: *Buffington Wheel Co. v. Burnham*, 60 Iowa, 493.

## CHAPTER CCV.

## ORDINANCES AND BY-LAWS.

- § 3978. Ordinances, by-laws, and resolutions.
- § 3979. Power to pass ordinances.
- § 3980. Power, how construed.
- § 3981. Requisites to the validity of ordinances.
- § 3982. Methods of passing ordinances — Charter formalities essential.
- § 3983. Power to impose fines and penalties.
- § 3984. Power of forfeiture must be expressly conferred.
- § 3985. Power to imprison.
- § 3986. Who bound by ordinances — Territorial extent.
- § 3987. Ordinances as to public health — In general.
- § 3988. Public safety — In general.
- § 3989. Burials and cemeteries.
- § 3990. Nuisances generally.
- § 3991. Bawdy-houses.
- § 3992. Markets.
- § 3993. Regulating trade.
- § 3994. Streets and sidewalks.
- § 3995. Wharves.
- § 3996. Modes of enforcing ordinances.
- § 3997. Proceedings — Civil or criminal.

§ 3978. **Ordinances, By-laws, and Resolutions.** — An ordinance, as applied to the laws passed by municipal corporations, is a local law of the municipality; in other words, a by-law.<sup>1</sup> A resolution is an order of the council of a special and temporary character; an ordinance prescribes a permanent rule of conduct or government.<sup>2</sup> Where the charter commits the decision of a matter to the council, and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance.<sup>3</sup> A resolution has ordinarily the same effect as an ordinance, as both are legislative acts.<sup>4</sup> Where a common council is authorized to do an act, but the

<sup>1</sup> *Com. v. Turner*, 1 Cush. 493.

<sup>2</sup> *Blanchard v. Bissell*, 11 Ohio St. 231; 96, 103.

<sup>3</sup> *State v. Jersey City*, 27 N. J. L. 493.

<sup>4</sup> *Sower v. Philadelphia*, 35 Pa. St.

231; *Gas Co. v. San Francisco*, 6 Cal. 190.

mode of doing it is not prescribed, it may be done by resolution as well as by ordinance.<sup>1</sup> An ordinance which occupies the entire field of a former one will, as a general rule, repeal such former one by implication.<sup>2</sup> Where the charter of a city required the city authorities to publish a digest of its ordinances within one year after the grant of the charter, and every five years thereafter, it was held, in a suit by the city for the violation of an ordinance, that this requirement was only directory, and a neglect to observe it presented no ground for defeating a recovery.<sup>3</sup>

**§ 3979. Power to Pass Ordinances.**—The power to pass ordinances is conferred by the legislature, — a delegation of the law-making power which is constitutional.<sup>4</sup> The power to enact city ordinances must be vested in the governing body by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation, and not simply convenient. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.<sup>5</sup> A grant by the legislature to a municipal corporation of power to legislate by ordinance on enumerated subjects connected with its municipal affairs is an addition to that power of making by-laws which is incidental to the creation of a corporation.<sup>6</sup> City ordinances enacted under the general authority given by

<sup>1</sup> *State v. Passaic*, 44 N. J. L. 171; *Burlington v. Dennison*, 42 N. J. L. 165.

<sup>2</sup> *Burlington v. Estlow*, 43 N. J. L. 13.

<sup>3</sup> *Whalin v. Macomb*, 76 Ill. 49.

<sup>4</sup> *Perdue v. Ellis*, 18 Ga. 586; *St. Paul v. Coulter*, 12 Minn. 41; 90 Am. Dec. 278; *Commonwealth v. Duquet*, 2 Yeates, 493; *Hill v. Decatur*, 22 Ga. 203; *State v. Clark*, 28 N. H. 176; 61 Am. Dec. 611; *Milne v. Davidson*, 5

*Mart.*, N. S., 586; 16 Am. Dec. 189; *Marble v. Akron*, 14 Ohio, 586; *Mayor etc. v. Morgan*, 7 Mart., O. S., 1; *Triggally v. Memphis*, 6 Cold. 382; *Metcalf v. St. Louis*, 11 Mo. 103; *Tanner v. Trustees*, 5 Hill, 121; 40 Am. Dec. 337. See *ante*, Title Constitutional Law.

<sup>5</sup> *Anderson v. City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175.

<sup>6</sup> *State v. Morristown*, 33 N. J. L. 57.



the city charter, or by the direct authority of an act of the state legislature, are binding upon all the inhabitants of the city, and have all the force and effect of laws.<sup>1</sup> But a city has no power to pass ordinances to preserve private property from encroachment. That protection must be enforced under the laws of the state.<sup>2</sup>

**§ 3980. Power, how Construed.** — Where the charter is silent as to the power to pass ordinances, the corporation has an implied power to pass such laws as are necessary to the exercise of its functions as a corporation.<sup>3</sup> Where, however, power to pass laws in special cases named is given in the charter, this is held to exclude the implied power, if such appear to have been the intention of the legislature.<sup>4</sup> A contemporaneous construction of a city ordinance, adopted by all the parties interested in its enforcement, although not controlling, is, in doubtful cases, entitled to great weight.<sup>5</sup>

**ILLUSTRATIONS.** — The charter of a city, in express terms, gave the city power to prohibit the sale of beer, without defining its

<sup>1</sup> *Jones v. Fireman's Ins. Co.*, 2 Daly, 307; affirmed, 51 N. J. 318.

<sup>2</sup> *Horn v. People*, 26 Mich. 221.

<sup>3</sup> *State v. Ferguson*, 33 N. H. 424. In *Methodist Ch. v. Baltimore*, 6 Gill, 391, 48 Am. Dec. 540, the court say: "It is not essential to the validity of an ordinance executing powers conferred by the legislature that it should state or indicate the power in execution of which the ordinance was passed. If it state no particular power as its basis, judicial courtesy requires that we should regard it as emanating from that power which would have warranted its passage. If two such powers exist, it may be imputed to either; in conformity to which its provisions and prerequisites show that it has been adopted. If in these respects, in accordance with both, no incongruity or injustice can result, in regarding it as the offspring of both or either of the powers. It is therefore no fatal objection to the proceedings of the city commissioners that they do not there-

in distinctly unfold under what act of assembly or ordinance their powers were exerted. If sustainable on either, their proceedings cannot be invalidated on that ground in a court of equity."

<sup>4</sup> *Heisembrittle v. Charleston*, 2 Me. Mull. 233; *Wadleigh v. Gilman*, 12 Me. 408; *State v. Clark*, 28 N. H. 176; 61 Am. Dec. 611; and comments in 33 N. H. 432; *State v. Freeman*, 33 N. H. 426; *Commonwealth v. Turner*, 1 Cush. 493; *Collins v. Hatch*, 18 Ohio, 523; 51 Am. Dec. 465. In *State v. Ferguson*, 33 N. H. 424, it is said: "The power to make by-laws, when not expressly given, is implied as an incident to the very existence of a corporation, but in the case of an express grant of the power to enact by-laws limited to certain specified cases, and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication."

<sup>5</sup> *State v. Severance*, 49 Mo. 401.

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quality or character. The ordinance followed the language of the charter, and did not confine the prohibition to beer of an intoxicating quality. *Held*, that the court could not interpolate such a qualification, or adjudge that the legislature intended to confine its grant of power to the prohibition of beer of an intoxicating character: *Kettering v. Jacksonville*, 50 Ill. 39. The corporation of a city had a right under their charter to establish by ordinance a tribunal, before whom contested elections should be tried, and provide the forms of such trial. *Held*, that such ordinance might be passed after an election had taken place, and that the tribunal could take cognizance of the previous election: *State v. Johnson*, 17 Ark. 407. A city was authorized by its charter to provide by ordinance for "licensing, taxing, and regulating hacks, drays, wagons, and other vehicles used within the city for pay." *Held*, that an ordinance licensing and taxing vehicles used in hauling into and out of the city was void, as not being authorized by the charter: *City of St. Charles v. Nolle*, 51 Mo. 122; 11 Am. Rep. 440.

### § 3981. Requisites to the Validity of Ordinances.—

Under power to pass an ordinance if found necessary, the necessity for its enactment, being implied from its mere passage, need not be recited in the ordinance, nor averred in proceedings to enforce it.<sup>1</sup> But the charter may be imperative in requiring the necessity to be expressed by ordinance or resolution.<sup>2</sup> The ordinance must be reasonable.<sup>3</sup> The reasonableness of an ordinance is for the court, and not for the jury.<sup>4</sup> The right of property or business cannot be invaded under the guise of police regulations for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the

<sup>1</sup> *Stuyvesant v. Mayor etc. of New York*, 7 Cow. 588; *Young v. St. Louis*, 47 Mo. 492.

<sup>2</sup> *Hoyt v. East Saginaw*, 19 Mich. 39.

<sup>3</sup> *Kip v. Paterson*, 26 N. J. L. 298; *Commissioners v. Gas. Co.*, 12 Pa. St. 318; *Fisher v. Harrisburg*, 2 Grant Cas. 281; *Commonwealth v. Robertson*, 5 Cush. 438; *Waters v. Leech*, 3 Ark. 140; *Mayor v. Winfield*, 8 Humph. 767; *Commonwealth v. Steffee*, 7 Bush, 161; *People v. Throop*, 12 Wend. 183; *Mayor v. Beasley*, 1 Humph. 232; 34 Am. Dec. 646; *State v. Freeman*, 38 N.

H. 426; *White v. Mayor*, 2 Swan, 364; *Pedrick v. Bailey*, 12 Gray, 161; *Dunham v. Rochester*, 5 Cow. 462; *Clason v. Milwaukee*, 30 Wis. 316; *Baltimore v. Radacke*, 49 Md. 217; *Kirkham v. Russell*, 76 Va. 956.

<sup>4</sup> *Dillon on Municipal Corporations*, sec. 261; *Commonwealth v. Robertson*, 5 Cush. 438. But see *Clason v. Milwaukee*, 30 Wis. 316, where it is held that where the reasonableness of the ordinance depends on certain facts to be found, it must be left to the jury.

enactment or ordinance.<sup>1</sup> What the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable. But where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.<sup>2</sup>

The following ordinances and by-laws have been declared unreasonable: Levying a tax for a sidewalk in an uninhabited part of the city not near any other sidewalk;<sup>3</sup> compelling the removal from the city limits of a steam-engine;<sup>4</sup> requiring a railroad to keep at a crossing not dangerous a watchman and lantern day and night;<sup>5</sup> prohibiting hotel-runners from approaching within twenty feet of a depot, except on the request of a passenger;<sup>6</sup> forbidding the running of any steamboat without a spark-arrester to prevent the escape of sparks, "as effectually as the same can be prevented by any means known or in use";<sup>7</sup> expelling a child from school who will not study book-keeping;<sup>8</sup> excluding a child from a high-school who does not pass in grammar, though it passes in all other branches;<sup>9</sup> refusing to supply a tenant with water because a former tenant is in arrears;<sup>10</sup> prohibiting a gas company from opening paved streets to make connection with mains;<sup>11</sup> prohibiting licensed sellers to sell liquors between six, P. M., and six, A. M.;<sup>12</sup> prohibiting sales without license at temporary stands of refreshments;<sup>13</sup> requiring druggists to return quarterly a statement by affidavit of quantity

<sup>1</sup> Chaddock v. Day, 75 Mich. 527; 13 Am. St. Rep. 468.

<sup>2</sup> 1 Dillon on Municipal Corporations, sec. 262; citing Peoria v. Calhoun, 29 Ill. 317; St. Paul v. Coulter, 12 Minn. 41; 90 Am. Dec. 278.

<sup>3</sup> Corrigan v. Gage, 68 Mo. 541.

<sup>4</sup> Baltimore v. Radecke, 49 Md. 217; 33 Am. Rep. 239.

<sup>5</sup> Toledo etc. R. R. Co. v. Jacksonville, 67 Ill. 38; 16 Am. Rep. 611.

<sup>6</sup> Napman v. People, 19 Mich. 352.

<sup>7</sup> Atkinson v. Goodrich Trans. Co., 60 Wis. 141; 50 Am. Rep. 352.

<sup>8</sup> Ruleson v. Post, 79 Ill. 567.

<sup>9</sup> Trustees v. People, 87 Ill. 303; 29 Am. Rep. 55.

<sup>10</sup> Dayton v. Quigley, 29 N. J. Eq. 77.

<sup>11</sup> Comm'rs v. Gas Co., 12 Pa. St. 318.

<sup>12</sup> Ward v. Greeneville, 8 Baxt. 228; 35 Am. Rep. 700.

<sup>13</sup> Barling v. West, 29 Wis. 307; 9 Am. Rep. 576.

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v. Goodrich Trans. Co.,  
50 Am. Rep. 352.  
v. Post, 79 Ill. 567.  
v. People, 87 Ill. 303; 29  
5.  
v. Quigley, 29 N. J. Eq.  
s v. Gas Co., 12 Pa. St. 318.  
Greenville, 8 Baxt. 228;  
. 700.  
v. West, 29 Wis. 307; 9  
76.

and kind of intoxicants sold;<sup>1</sup> imposing a license fee on  
hucksters;<sup>2</sup> forbidding sale of goods on Sunday except by  
Jews;<sup>3</sup> taxing every sale of hay and produce five cents;<sup>4</sup>  
requiring exhibitors at theaters to pay for services of city  
constable at each exhibition;<sup>5</sup> prohibiting the vending of  
vegetables in the streets without a license costing twenty-  
five dollars a year;<sup>6</sup> prohibiting auctioneers from selling  
except to the highest bidder;<sup>7</sup> prohibiting one person and  
permitting another to carry on a dangerous business;<sup>8</sup>  
prescribing a penalty for every hour a person shall keep  
his wagon within the limits of the market;<sup>9</sup> prohibiting  
the slaughtering of animals on one's premises, unless it is  
a slaughter-house;<sup>10</sup> authorizing the sale, without notice to  
the owner, of property left on the levee of the city beyond  
a certain time;<sup>11</sup> limiting the speed of railroad trains to  
four miles an hour, as to a portion of a railroad, which,  
although within the city limits, runs for several miles  
through fenced agricultural lands not thickly inhabited;<sup>12</sup>  
ordering negroes found out after ten, P. M., to be arrested,  
fined, and imprisoned;<sup>13</sup> prohibiting any licensed auc-  
tioneer from selling at auction after sunset;<sup>14</sup> making it  
punishable to use a Babcock fire extinguisher at any fire;<sup>15</sup>  
prohibiting the sale of fresh meat on the street in less  
quantities than one quarter of an animal, without first  
paying a license fee of ten dollars per month;<sup>16</sup> an ordi-  
nance the effect of which is to deprive the producers of  
market articles of their own raising from selling their  
produce at first hands to consumers in the principal city

<sup>1</sup> Clinton v. Phillips, 58 Ill. 102; 11  
Am. Rep. 52.

<sup>2</sup> Dunham v. Trustees, 5 Cow. 462.

<sup>3</sup> Shreveport v. Levy, 26 La. Ann.  
671; 21 Am. Rep. 553.

<sup>4</sup> Kip v. Paterson, 26 N. J. L. 298.

<sup>5</sup> Waters v. Leech, 3 Ark. 110.

<sup>6</sup> St. Paul v. Traeger, 25 Minn. 248;  
33 Am. Rep. 462.

<sup>7</sup> In re Martin, 27 Ark. 467.

<sup>8</sup> Mayor v. Thorne, 7 Paige, 261.

<sup>9</sup> Com. v. Wilkins, 121 Mass. 356.

<sup>10</sup> Wreford v. People, 14 Mich. 41.

<sup>11</sup> Lanfear v. Mayor, 4 La. 97; 23  
Am. Dec. 477.

<sup>12</sup> Meyers v. R. R. Co., 57 Iowa, 555;  
42 Am. Rep. 50.

<sup>13</sup> Mayor v. Winfield, 8 Humph.  
707.

<sup>14</sup> Hayes v. Appleton, 24 Wis. 542.

<sup>15</sup> Teutonia Ins. Co. v. O'Connor, 27  
La. Ann. 371.

<sup>16</sup> Chaddock v. Day, 75 Mich. 527; 13  
Am. St. Rep. 468.

market, and to compel them to be sold by holders of stalls at second hand, driving the producers away from the chief market to remote places.<sup>1</sup>

The ordinance must be general. It must not make an act done by one person penal, and by another innocent. It must be fair and impartial.<sup>2</sup> Thus in exercising its power to require adjacent lot-owners to make local improvements, the corporation, it has been held in Tennessee, must not act in a partial and oppressive manner; therefore it cannot select particular individuals by name, and require them to construct pavements or local improvements in front of their lots, and omit others in the same improvement district, if this be done without good cause or reason for the distinction.<sup>3</sup> And an ordinance forbidding the sale of goods on Sunday, but excepted from its operation those keeping their business places closed on Saturday, is unconstitutional, as giving to Jews a privilege denied to others.<sup>4</sup> It must not contravene common right.<sup>5</sup> Thus in Connecticut, it is held that every one has, presumptively, a common-law right to fish in navigable rivers, and that though every town may, by statute, have the power to make by-laws to regulate fisheries of clams and oysters within its limits, yet this power does not authorize a by-law prohibiting all persons, except its own inhabitants, from taking shell-fish in a navigable river, within the limits of such town; such a by-law, being in contravention of a common right, is void.<sup>6</sup> And thus the

<sup>1</sup> *Hughes v. Recorder's Court*, 75 Mich. 574; 13 Am. St. Rep. 475.

<sup>2</sup> *White v. Mayor*, 2 Swan, 364; *Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196; *Mayor v. Thorne*, 7 Paige, 261; *Municipality v. Blineau*, 3 La. Ann. 688; *Commonwealth v. Stodder*, 2 Cush. 562; 48 Am. Dec. 679.

<sup>3</sup> *White v. Mayor*, 2 Swan, 364.

<sup>4</sup> *Shreveport v. Levy*, 26 La. Ann. 671; 21 Am. Rep. 553.

<sup>5</sup> *Taylor v. Griswold*, 14 N. J. L. 222; *Burlington v. R. R. Co.*, 49 Iowa, 144;

*Slack v. East St. Louis*, 85 Ill. 377; 23 Am. Rep. 619.

<sup>6</sup> *Hayden v. Noyes*, 5 Conn. 391. But there is no common right to do that which, by a valid law or ordinance, is prohibited; and hence courts will not declare an authorized ordinance void because it prohibits what otherwise might lawfully be done. In discussing the subject, Mr. Justice Evans illustrates it in this wise: "If there was no law interfering, the butcher might kill his bees and hogs in the street. If

following ordinances have been held void: Authorizing the sale of property left by the owner on the levee after a certain time without notice to him;<sup>1</sup> taxing wagons of outside residents engaged in hauling in and out of the city;<sup>2</sup> authorizing an arrest without a warrant;<sup>3</sup> authorizing any person refusing, at a fire, to obey any order given by a person empowered to give directions to be arrested and detained until the fire is extinguished.<sup>4</sup> It must be certain both in its definition of the offense and the penalty attached.<sup>5</sup> But a by-law is not uncertain because the penalty is discretionary within certain limits.<sup>6</sup> The ordinance must not conflict with the constitution or the laws of the state.<sup>7</sup> A by-law imposing a fine for a municipal offense is not invalid because such act is also punished by statute.<sup>8</sup>

**§ 3982. Methods of Passing Ordinances — Charter Formalities Essential.** — The charter method of passing an

the butcher could do it, any man might, and it might, therefore, be said to be a common right; but when the law prohibited it, it was no longer a common right: *City Council v. Ahrens*, 4 Strob. 241.

<sup>1</sup> *Lanfear v. Mayor*, 4 La. 97; 23 Am. Dec. 477.

<sup>2</sup> *St. Charles v. Nolle*, 51 Mo. 122; 11 Am. Rep. 440; *Memphis v. Battaile*, 8 Heisk. 254.

<sup>3</sup> *Knoxville v. Vickers*, 3 Cold. 205; *Judson v. Reardon*, 16 Minn. 431.

<sup>4</sup> *Judson v. Reardon*, 16 Minn. 431.

<sup>5</sup> *McConnell v. Jersey City*, 39 N. J. L. 42; *Mayor of Mobile v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441.

<sup>6</sup> *Huntsville v. Phelps*, 27 Ala. 55. An ordinance provided for the construction of a sewer named, in its description of the course of the sewer, three several curves between two given points, without giving the radii of the curves. Held, that the ordinance was not void for uncertainty, as the curves were only for very short distances, and could be located without difficulty: *Hyde Park v. Borden*, 94 Ill. 26.

<sup>7</sup> *Marietta v. Fearing*, 3 Ohio, 427;

*Collins v. Hatch*, 18 Ohio, 523; 51 Am. Dec. 465; *Canton v. Nist*, 9 Ohio St. 439; *Mayor v. Nicholls*, 4 Hill, 209; *Robinson v. Mayor*, 1 Humph. 156; 34 Am. Dec. 625; *Burlington v. Kellar*, 18 Iowa, 65; *Mayor v. Vickers*, 3 Cold. 205; *Indianapolis v. Gas Co.*, 66 Ind. 396; *Livingston v. Albany*, 41 Ga. 22; *Mayor v. Hussey*, 21 Ga. 80; 68 Am. Dec. 452; *Ill. Cent. R. R. Co. v. Bloomington*, 76 Ill. 447; *Hospital v. Luzerne*, 84 Pa. St. 59; *Wood v. Brooklyn*, 14 Barb. 425; *State v. Hardy*, 7 Neb. 377; *Judson v. Reardon*, 16 Minn. 435; *Vance v. Little Rock*, 30 Ark. 435. But a corporation may, in some cases, consistently with general law, further regulate by ordinance subjects already regulated by statute: *Huddleson v. Ruffin*, 6 Ohio St. 604; *Rogers v. Jones*, 1 Wend. 237; *State v. Welch*, 36 Conn. 215. The statutes of the state license certain persons within a town to sell intoxicating liquors. The by-law of the town prohibits the sale of liquors. The ordinance is void: *Robinson v. Mayor*, 1 Humph. 156; 34 Am. Dec. 625.

<sup>8</sup> *Rogers v. Jones*, 1 Wend. 237; 19 Am. Dec. 493.

ordinance must be followed.<sup>1</sup> Where it is required to be published before it goes into effect, no penalty can be enforced under it until so published.<sup>2</sup> Where the legislature directs the manner of publishing the proceedings of a city council, they can be published in no other way.<sup>3</sup>

**§ 3983. Power to Impose Fines and Penalties.** — The corporation has an implied power to enforce its ordinances by imposing fines on those who break them.<sup>4</sup> It may make the amount of the fine discretionary; as, for example, "not exceeding fifty dollars";<sup>5</sup> or it may increase the penalty for a second or third offense.<sup>6</sup> But where the charter prescribes the manner of enforcing ordinances, the corporation cannot inflict other punishments.<sup>7</sup> A penalty cannot be recovered for the violation of a city ordinance without proof to the jury of the existence of the ordinance.<sup>8</sup>

**§ 3984. Power of Forfeiture must be Expressly Conferred.** — A corporation under a general power to make by-laws cannot make a by-law ordaining a forfeiture of property. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that such authority must be expressly conferred by the legislature.<sup>9</sup> And where this

<sup>1</sup> *City of Louisville v. Hyatt*, 2 B. Mon. 177; 36 Am. Dec. 594; *People v. Schroeder*, 76 N. Y. 160; *Danville v. Shelton*, 76 Va. 325; *State v. Jersey City*, 25 N. J. L. 307; *Sanes v. King*, 40 Conn. 298; *State v. Carr*, 1 Mo. App. 490.

<sup>2</sup> *Blanchard v. Bissell*, 11 Ohio St. 96; *Striker v. Kelly*, 7 Hill, 9; *Elmendorf v. Mayor*, 25 Wend. 693; *Waln v. Philadelphia*, 90 Pa. St. 330.

<sup>3</sup> *State v. Mayor etc. of Hoboken*, 38 N. J. L. 110.

<sup>4</sup> *State v. Cleveland*, 3 R. I. 117; *Fisher v. Harrisburg*, 3 Grant Cas. 291; *Triggally v. Memphis*, 6 Cold. 382; *Mayor of Mobile v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441. *Contra*, *Farnsworth v. Pawtucket*, 13 R. I. 83.

<sup>5</sup> *Mayor v. Phelps*, 27 Ala. 55.

<sup>6</sup> *Butchers' Co. v. Bullock*, 3 Bos. & P. 434.

<sup>7</sup> *Kirk v. Nowill*, 1 Term Rep. 118; *Hart v. Mayor*, 9 Wend. 571; 24 Am. Dec. 165; *Bolte v. New Orleans*, 10 La. Ann. 321; *Grand Rapids v. Hughes*, 15 Mich. 54.

<sup>8</sup> *Stevens v. Chicago*, 48 Ill. 498.

<sup>9</sup> 1 Dillon on Municipal Corporations, sec. 279; citing *Kirk v. Nowill*, 1 Term Rep. 118, 124; *Hart v. Mayor etc. of Albany*, 9 Wend. 571; 24 Am. Dec. 165; 2 Kyd on Corporations, 110; Willcock on Municipal Corporations, 180, pl. 449; Angell and Ames on Corporations, sec. 360; *Cotter v. Doty*, 5 Ohio, 394; *White v. Tallman*, 26 N. J. L. 67; *Phillips v. Allen*, 41 Pa. St. 481; 82 Am. Dec. 486; *Rost v. Mayor*, 15 La. 129; 35 Am. Dec. 186.

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Dec. 486; Rost v. Mayor,  
35 Am. Dec. 186.

power is expressly given, it can only be exercised after due notice and hearing.<sup>1</sup> A by-law directing a penalty to be levied by distress and sale or forfeiture of goods is void.<sup>2</sup> The power to fine does not include a power to forfeit.<sup>3</sup>

§ 3985. **Power to Imprison.** — "In this country it is not unusual to provide, in the organic act of municipal corporations, that if fines for violation of by-laws or ordinances are not paid, the offender may be committed to prison for a limited period. And, in respect to some offenses public in their character, the power to imprison in the first instance is often conferred. It is scarcely necessary to add that unless the authority be plainly given it does not exist, and when given, before it can be exercised, there must be a judicial ascertainment by a competent tribunal or magistrate of the guilt of the party."<sup>4</sup> Power conferred upon a municipal corporation to punish offenders against its ordinances, by fine or imprisonment, does not include authority to coerce the payment of a fine by imprisonment.<sup>5</sup> A city ordinance prescribing a term of imprisonment which may but does not necessarily exceed that authorized by the constitution may be enforced within the constitutional limit.<sup>6</sup> Under a constitutional provision against imprisonment for debt, "except for non-payment of fines and penalties imposed for violation of law," a city may imprison an offender for failure to pay a fine imposed for violation of a city ordinance.<sup>7</sup> An ordinance providing for a fine and imprisonment is not

<sup>1</sup> Cotter v. Doty, 5 Ohio, 384; Rosebaugh v. Saffin, 10 Ohio, 32; Lanfear v. Mayor, 4 La. 97; 23 Am. Dec. 477; Donovan v. Vicksburg, 29 Miss. 247.

<sup>2</sup> White v. Tallman, 26 N. J. L. 67.

<sup>3</sup> Heise v. Town Council, 6 Rich. 404.

<sup>4</sup> 1 Dillon on Municipal Corporations, sec. 287; Barter v. Common-

wealth, 3 Penn. & W. 253; New Orleans v. Costello, 14 La. Ann. 37; Burlington v. Kella, 18 Iowa, 59; Ex parte Burnett, 30 Ala. 461; Huddleson v. Ruffin, 6 Ohio St. 604.

<sup>5</sup> Brieswick v. Mayor etc. of Brunswick, 51 Ga. 639; 21 Am. Rep. 240.

<sup>6</sup> Keokuk v. Dressell, 47 Iowa, 597.

<sup>7</sup> Ex parte Kiburg, 10 Mo. App. 442.



to be deemed wholly void because that part providing for imprisonment is unlawful.<sup>1</sup>

**§ 3986. Who Bound by Ordinances — Territorial Extent.** — Municipal ordinances bind both inhabitants strangers or non-residents coming within the municipality.<sup>2</sup> A city ordinance designed for the city at large

<sup>1</sup> Cooper v. District of Columbia, 4 McAr. 250.

<sup>2</sup> Heland v. Lowell, 3 Allen, 407; 81 Am. Dec. 670; Whitfield v. Longest, 6 Ired. 268; approving Pierce v. Bart-ram, Cowp. 269. In Vandine, Petitioner, 6 Pick. 189, 17 Am. Dec. 351, the court said: "Some by-laws are binding upon strangers as well as upon the inhabitants or members of the corporation, and some are not. The distinction is between corporations united as a fraternity for the purposes of business, having no local jurisdiction, and corporations having a territorial jurisdiction; the former have not, but the latter have, power to make by-laws binding upon strangers. For example, a by-law of the corporation of Trinity House 'that every mariner, within twenty-four hours after anchorage in the Thames, put his gunpowder on shore, does not bind, because the corporation has no jurisdiction upon the Thames': Com. Dig., tit. By-law, c. 2. In the case of Dodwell v. Univ. of Oxford, 2 Vent. 33, the chancellor's court of the university made a by-law that whoever, privileged or not privileged, should be taken walking in the streets at nine o'clock at night, having no reasonable excuse, by the proctor, etc., should forfeit, etc. And it was held that the corporation could not make a by-law binding upon any who were not of their body. They went beyond their jurisdiction, which could not be considered as extending to the inhabitants of Oxford who were not scholars. Regard is to be had to the nature of the incorporation; if it is a banking incorporation, for example, their by-laws must be confined to the proper mode of conducting their affairs. Where the corporation has a local jurisdiction, their by-laws affect all who come within it; for example, the

by-law of the city of London, that no citizen, freeman, or stranger should expose any broadcloth to sale within the city before it should be brought to Blackwell Hall to be examined whether it were salable or not, was held binding upon strangers as well as citizens; 5 Co. 63. So in Pierce v. Bartrum, Cowp. 269, a by-law of the mayor and common council of the city of Exeter, that no person should slaughter beasts or keep swine within the walls of the city, was held good against the defendant, who was not free of the city, but only resided there. He was considered as habitant *pro hac vice*. So wh corporation has jurisdiction over all of the same trade or profession within certain limits, as the College of Physicians has for seven miles round London, whose by-laws regulating the practice of physics are binding upon all within those limits. The by-laws which are made by corporations having a local jurisdiction are to be observed and obeyed by all who come within it, in the same manner as aliens and strangers within the commonwealth are bound to know and obey the laws of the land, notwithstanding they may not know the language in which they are written. They receive the benefits arising from the municipal arrangements, and are presumed to assent to them, upon the same principle which requires from them a temporary allegiance to the state for the protection it affords to them during their residence." One who lived half a mile from Knoxville let his hogs run at large. He knew of the existence of a city ordinance under which the hogs were taken up and impounded. Held, that the ordinance was valid, and was applicable to the case: Knoxville v. King, 7 Lea, 441.

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operates throughout its actual boundaries, and is not affected by the fact that these are enlarged from time to time.<sup>1</sup> One part of the city may be exempted from the operation of a by-law without affecting its validity as to the remainder.<sup>2</sup>

### § 3987. Ordinances as to Public Health — In General.

— Ordinances to preserve the public health and safety are within the implied powers of a municipal corporation.<sup>3</sup> And power to legislate on this subject is generally granted to them in express words. Thus an ordinance prohibiting any but licensed persons from removing the house dirt and offal from the city was sustained as a law for the public health.<sup>4</sup> So ordinances are valid prohibiting the erection and maintenance of private hospitals;<sup>5</sup> punishing the selling of milk without a license;<sup>6</sup> compelling boats with vegetables or putrid substances coming from diseased

<sup>1</sup> *St. Louis Gas-light Co. v. St. Louis*, 46 Mo. 121.

<sup>2</sup> *Goddard, Petitioner*, 16 Pick. 504; 28 Am. Dec. 259.

<sup>3</sup> *Zulstra v. Corporation*, 1 Bay, 382.

<sup>4</sup> *Vandine, Petitioner*, 6 Pick. 190; 17 Am. Dec. 351; the court saying: "The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expense which is deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Every one will see that if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight, and poisoning the air with their effluvia. It is obvious that the object and interest of the city, and those of the carmen, in this concern, are extremely different. But it is contended that the city authorities may regulate strangers and unlicensed persons, in

regard to the number of horses and kind of carts to be employed, just as well as they can carts and the conduct of the licensed persons. It seems, to us, however, that the city authority has judged well in this matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able from habit to do this work in the best possible way and time. Practically we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements, nor annoy the inhabitants. We are all satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city."

<sup>5</sup> *Milne v. Davidson*, 5 Mart., N. S., 410; 16 Am. Dec. 189.

<sup>6</sup> *People v. Mulholland*, 82 N. Y. 324; 37 Am. Rep. 568.

places to anchor in the river until examined by the city physician;<sup>1</sup> prohibiting the keeping of swine within the city limits;<sup>2</sup> prohibiting the removal of the contents of privies except by licensed persons;<sup>3</sup> abolishing wells in its streets, without compensation to lot-owners;<sup>4</sup> prohibiting the boiling, rendering, or steaming of the carcasses of dead animals within certain limits in the city.<sup>5</sup>

Power to enact ordinances for the "well regulation, interest, health, cleanliness, convenience, and advantage of the corporation," and to compel the abatement of nuisances, does not authorize an ordinance prohibiting swine, cattle, horses, etc., from running at large.<sup>6</sup> A charter authority to make ordinances to "secure the health, peace, and improvement" of a city does not warrant an ordinance enjoining the closing of stores on Sunday, that act being forbidden by the general law.<sup>7</sup> Under a charter authorizing a city to pass ordinances "necessary and proper to preserve the health and comfort of the town," it has no authority to prohibit or punish a breach of the peace.<sup>8</sup>

**§ 3988. Public Safety—In General.**—The corporation, to guard the public safety, may pass ordinances requiring gunpowder to be stored in quantities only in the public magazine;<sup>9</sup> prohibiting the erection of wooden buildings within certain limits,<sup>10</sup> and the throwing of heavy articles from the upper stories of buildings into the streets;<sup>11</sup> requiring hoistways in buildings to be inclosed;<sup>12</sup> requiring a creek or watercourse to be filled

<sup>1</sup> *Dubois v. Augusta*, Dud. (Ga.) 30.

<sup>2</sup> *Commonwealth v. Patch*, 97 Mass. 221.

<sup>3</sup> *Boehm v. Baltimore*, 61 Md. 259.

<sup>4</sup> *Ferrenbach v. Turner*, 86 Mo. 416; 56 Am. Rep. 437.

<sup>5</sup> *Missouri v. Fisher*, 52 Mo. 174.

<sup>6</sup> *Collins v. Hatch*, 18 Ohio, 523; 51 Am. Dec. 465.

<sup>7</sup> *Corvallis v. Carlile*, 10 Or. 139; 45 Am. Rep. 134.

<sup>8</sup> *Raleigh v. Dougherty*, 3 Humph. 11; 39 Am. Dec. 149.

<sup>9</sup> *Williams v. Augusta*, 4 Ga. 509.

<sup>10</sup> *City Council v. Elford*, 1 McMull. 234; *Wadleigh v. Gilman*, 12 Me. 403; 28 Am. Dec. 188.

<sup>11</sup> 1 *Dillon on Municipal Corporations*, sec. 338.

<sup>12</sup> *Mayor etc. of New York v. Williams*, 15 N. Y. 502; *Johnson, J.*, saying: "The danger is not confined

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5 N. Y. 502; Johnson, J.,  
the danger is not confined

up;<sup>1</sup> providing that the owner of a vicious dog which should bite any person shall be fined one hundred dollars;<sup>2</sup> requiring a flag-man at railroad crossing and lamp at night;<sup>3</sup> prohibiting cattle from running at large;<sup>4</sup> forbidding the keeping of gunpowder over certain quantities, and then only in copper canisters;<sup>5</sup> regulating the opening and closing of draw-bridges;<sup>6</sup> punishing a person obstructing the running of street-cars by standing teams;<sup>7</sup> requiring hackmen at railroad depots to obey the orders of police-officers;<sup>8</sup> ordering the closing of places where intoxicating liquors are sold at 10 or 10:30, P. M.,<sup>9</sup> or at 9, P. M.;<sup>10</sup> punishing vagrants;<sup>11</sup> prohibiting the building of awnings;<sup>12</sup> ordering the arrest and punishment of persons found intoxicated;<sup>13</sup> regulating the moving of trains in city streets;<sup>14</sup> requiring a railroad corporation to keep a flag-man to give warning to travelers at the crossing of its railroad track on a designated street, and to have gates erected at such crossing;<sup>15</sup> annexing a penalty to the offense of persons other than passengers getting on or off of engines and cars;<sup>16</sup> prohibiting the driving of horses in carts, wagons, etc., on a trot or gallop, in the streets;<sup>17</sup> prescribing the manner in which buildings used as laundries shall be constructed.<sup>18</sup>

to the owner and ordinary occupants of the building. The ordinance in that respect stands on the same footing as a regulation prohibiting a well or cistern in a man's yard unprotected by curb or cover, the reasonableness of which could not be doubted. In case of fire, these openings would tend directly and powerfully to allow the fire to extend through all parts of the building, and if left uncovered, would also tend to endanger those whom duty might require to enter to effect the extinguishment of the fire."

<sup>1</sup> Baker v. Boston, 12 Pick. 184; 22 Am. Dec. 421.

<sup>2</sup> Com. v. Steffee, 7 Bush, 161.

<sup>3</sup> Delaware etc. R. R. Co. v. East Orange, 41 N. J. L. 127.

<sup>4</sup> Commonwealth v. Bean, 14 Gray, 52.

<sup>5</sup> Williams v. Augusta, 4 Ga. 509.

<sup>6</sup> Chicago v. McGinn, 51 Ill. 266; 2 Am. Rep. 295.

<sup>7</sup> State v. Foley, 31 Iowa, 527; 7 Am. Rep. 166.

<sup>8</sup> St. Paul v. Smith, 27 Minn. 364.

<sup>9</sup> State v. Welch, 36 Conn. 215; Staates v. Washington, 44 N. J. L. 605; 43 Am. Rep. 402.

<sup>10</sup> Smith v. Mayor, 3 Head, 245. Or a restaurant after ten, P. M.: State v. Freeman, 38 N. H. 426.

<sup>11</sup> St. Louis v. Bentz, 11 Mo. 61.

<sup>12</sup> Pedrick v. Bailey, 12 Gray, 161.

<sup>13</sup> Bloomfield v. Trimble, 54 Iowa, 399; 37 Am. Rep. 212.

<sup>14</sup> Pennsylvania R. R. Co. v. Jersey City, 47 N. J. L. 286.

<sup>15</sup> Pennsylvania Co. v. Stegemeier, 118 Ind. 305; 10 Am. St. Rep. 136.

<sup>16</sup> Bearden v. Madison, 73 Ga. 184.

<sup>17</sup> Com. v. Worcester, 3 Pick. 462.

<sup>18</sup> Ex parte White, 67 Cal. 102.

Under a power to "regulate and license," and "to preserve peace and good order, and prevent vice and immorality," a city may not prohibit the sale of intoxicants on Sunday, when the legislature has prohibited such sale generally.<sup>1</sup> A city charter granting "full power and authority over all matters of police," and to establish ordinances for "the good government, welfare, and harmony of said city," does not warrant the punishment by the city of an offense which is a crime against the state.<sup>2</sup> A city charter creating a department for the preservation and promotion of the health of the city, with power to regulate and control the manner of erecting buildings, but conferring no general police powers, nor any power concerning the general welfare, does not justify an ordinance requiring the outer walls of buildings to be of a specified thickness.<sup>3</sup>

**§ 3989. Burials and Cemeteries.**—The city may, by ordinance, regulate the burial of the dead, and prevent the establishment of burial-grounds within its limits,<sup>4</sup> provided the restraint is reasonable.<sup>5</sup> The authorities of a city have no power to prohibit the establishment of cemeteries or burying-grounds outside of the city limits, nor have they any control over them when so established.<sup>6</sup> It is the duty of a municipal corporation to maintain public burial-grounds and to bury paupers, and the expense attendant on the discharge of this duty should be apportioned among all the corporators.<sup>7</sup>

**§ 3990. Nuisances Generally.**—The corporation has a wide power to prevent and abate nuisances.<sup>8</sup> The corpo-

<sup>1</sup> *Loeb v. Attica*, 82 Ind. 175; 42 Am. Rep. 494.

<sup>2</sup> *Ex parte Bourgeois*, 60 Miss. 663; 45 Am. Rep. 420.

<sup>3</sup> *State etc. v. Paterson*, 45 N. J. L. 310; 46 Am. Rep. 772.

<sup>4</sup> *City Council v. Baptist Church*, 4 Strob. 306; *Bogert v. Indianapolis*, 13 Ind. 134; *Coates v. Mayor*, 7 Cow. 555; *Com. v. Goodrich*, 13 Allen, 546;

*Com. v. Fahey*, 5 Cush. 408; *Presbyterian Church v. Mayor*, 5 Cow. 533. See *ante*, Title Personal Property—Dead Bodies—Burial.

<sup>5</sup> *Austin v. Murray*, 16 Pick. 121.

<sup>6</sup> *Begein v. Anderson*, 28 Ind. 79.

<sup>7</sup> *Beroujohn v. Mobile*, 27 Ala. 58.

<sup>8</sup> *Kennedy v. Phelps*, 10 La. Ann. 227; *Gregory v. R. R. Co.*, 40 N. Y. 273; *Tanner v. Trustees*, 5 Hill, 121;

," and "to prevent vice and immorality of intoxicants on prohibited sale full power and and to establish welfare, and harsh punishment by against the state." the preservation y, with power to erecting buildings, s, nor any power t justify an ordinance to be of a

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*v. Phelps*, 10 La. Ann.  
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*v. Trustees*, 5 Hill, 121;

ration of a city may abate a public nuisance erected within its jurisdiction, though no authority for that purpose is expressly given by the charter.<sup>1</sup> Ordinances have been sustained by the courts pronouncing steamboats emitting dense smoke to be a nuisance;<sup>2</sup> prohibiting the erection of a livery-stable on any block of the city without the consent of the owners of one half of the ground in any such block;<sup>3</sup> prohibiting the delivering of a discourse on Boston Common without leave of the committee of the council in charge of the public grounds;<sup>4</sup> regulating and restraining itinerant musicians in the streets and public places of the city;<sup>5</sup> prohibiting the use, in cities and towns of a certain size, of any building not then so in use for carrying on the "business of slaughtering cattle," sheep, or other animals, or for melting or rendering establishments, or for other noxious and offensive trades or occupations," without the permission of the mayor;<sup>6</sup> declaring to be nuisances "all steam grist-mills, saw-mills, or other machinery run by steam, contained . . . in buildings . . . wholly or in part of wood, which establishment, by reason of the defect or dilapidation of the buildings, the defective construction of the machinery, the worn-out condition of the boiler, or any other cause, are, or shall hereafter become, dangerous to persons or property."<sup>7</sup> But it cannot declare that a nuisance which is not a nuisance.<sup>8</sup> Thus an ordinance declaring "all

40 Am. Dec. 337; *Goddard v. Jacksonville*, 15 Ill. 588; 60 Am. Dec. 773.

<sup>1</sup> *Hart v. Mayor of Albany*, 9 Wend. 571; 24 Am. Dec. 165; *Coe v. Shultz*, 47 Barb. 64.

<sup>2</sup> *Harmon v. Chicago*, 110 Ill. 400; 51 Am. Rep. 698.

<sup>3</sup> *State v. Beattie*, 16 Mo. App. 131.

<sup>4</sup> *Commonwealth v. Davis*, 140 Mass. 485.

<sup>5</sup> *Commonwealth v. Plaisted*, 148 Mass. 375; 12 Am. St. Rep. 566.

<sup>6</sup> *Watertown v. Mayo*, 109 Mass. 315; 12 Am. Rep. 694.

<sup>7</sup> *Green v. Lake*, 60 Miss. 451.

<sup>8</sup> *Roberts v. Ogle*, 30 Ill. 459; 83 Am. Dec. 201; *Crosby v. Warren*, 1 Rich. 385; *Salem v. R. R. Co.*, 98 Mass. 431; 96 Am. Dec. 650; *Dingley v. Boston*, 100 Mass. 544; *Mextford v. People*, 14 Mich. 41; see *Chicago v. Laflin*, 49 Ill. 172; *Yates v. Milwaukee*, 10 Wall. 497; Mr. Justice Miller saying: "But the mere declaration by the city council that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal

public picnics and open-air dances" within its limits to be nuisances is void.<sup>1</sup> So is a city ordinance forbidding the working of convicts upon the streets and declaring it a nuisance.<sup>2</sup> So is a village ordinance forbidding the erection of any wooden buildings within certain limits.<sup>3</sup> Obstructions in a street, necessitated by the erection of a building, and not unreasonably prolonged, are not a nuisance.<sup>4</sup> Under a power to prevent and remove nuisances and regulate the places where offensive trades are carried on, a city may not prohibit the operation of lime-kilns.<sup>5</sup> The charter of a town which confers upon the authorities the power of "removing nuisances" does not authorize them to demolish a building where the nuisance is not caused by the building itself, but by the persons who resort there.<sup>6</sup>

ILLUSTRATIONS. — A city charter authorized the council "to prevent and suppress opium-smoking, and houses or places kept therefor, and to punish any keeper of such house or place, or person who smokes therein or frequents the same." *Held*, that opium-smoking, to be punishable, must be done in a house or place kept for that purpose: *Ex parte Ah Lit*, 26 Fed. Rep. 512. A power was given to a common council to make ordinances for the suppression of gambling-houses, "and such other by-laws and ordinances for the peace and good order of said town, as they may deem expedient," not repugnant to the constitution and laws. *Held*, that an "ordinance for the suppression of gambling" prohibiting the keeping of a room "in which playing at billiards or other game is permitted for hire, ardent spirits," etc., was invalid: *Breninger v. Belvidere*, 44 N. J. L. 350.

corporation, without any general laws, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."

<sup>1</sup> *Poyer v. Des Plaines*, 18 Ill. App. 225.

<sup>2</sup> *Ward v. Little Rock*, 41 Ark. 526; 48 Am. Rep. 46.

<sup>3</sup> *Waupun v. Moore*, 34 Wis. 450; 17 Am. Rep. 446.

<sup>4</sup> *State v. Omaha*, 14 Neb. 265; 45 Am. Rep. 103.

<sup>5</sup> *State v. Mott*, 61 Md. 297; 48 Am. Rep. 105.

<sup>6</sup> *Miller v. Burch*, 32 Tex. 209; 5 Am. Rep. 242.

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 v. Moore, 34 Wis. 450;  
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§ 3991. **Bawdy-houses.** — Power "to suppress bawdy-houses" gives the corporation authority to adopt by ordinance, the proper means to accomplish the end; and among the methods which may be adopted is one forbidding the owners of houses from renting or letting the same for this purpose, or with knowledge that they are to be thus used.<sup>1</sup> But power to the common council of a city "to make all such by-laws and ordinances as it may deem expedient for the purpose of preventing and suppressing houses of ill-fame" does not authorize the council to decide that a given house is kept for that purpose; nor if kept for that purpose, does it authorize the council to order it to be demolished.<sup>2</sup> An ordinance against keeping a bawdy-house is within the powers conferred upon a municipal corporation whose charter authorizes "by-laws and regulations . . . for preserving peace, order, and good government."<sup>3</sup> Under powers to "suppress and restrain" disorderly houses, and to enact ordinances to "improve the morals and order" of the community, a city cannot enact an ordinance declaring the keeping of a disorderly house a misdemeanor punishable by fine and imprisonment.<sup>4</sup> A penal ordinance absolutely forbidding any prostitute or lewd woman to reside in, stay at or in, or inhabit any room, house, or place in a city, and forbidding the renting of any such premises to such persons, is void.<sup>5</sup> So is an ordinance punishing as a crime the mere presence in or return to the corporate limits of a public prostitute, although the statute authorizes such corporation to pass ordinances to punish persons for lewd and lascivious behavior in the streets or other public places, and to suppress bawdy and assignation houses, and indecent and disorderly conduct.<sup>6</sup>

<sup>1</sup> 1 Dillon on Municipal Corporations, sec. 310; *Childress v. Mayor*, 3 Sneed, 347; or imposing penalties on the keepers of such: *McAlister v. Clark*, 33 Conn. 91.

<sup>2</sup> *Welch v. Stowell*, 2 Doug. (Mich.) 332.

<sup>3</sup> *State v. Williams*, 11 S. C. 288.

<sup>4</sup> *Chariton v. Barber*, 54 Iowa, 360; 37 Am. Rep. 209.

<sup>5</sup> *Milliken v. City Council*, 54 Tex. 388; 38 Am. Rep. 629.

<sup>6</sup> *Paralee v. Camden*, 49 Ark. 165; 4 Am. St. Rep. 35.



ILLUSTRATIONS. — A city by-law provided that the owner of any house used, with his knowledge, as a house of ill-fame, or to his knowledge reputed to be such, should be subject to a penalty of fifty dollars, and should also be deemed guilty of causing, committing, or, as the case may be, maintaining a nuisance. *Held*, that the by-law was valid under a clause of the charter giving the city power to make by-laws relative to nuisances: *McAlister v. Clark*, 33 Conn. 91. A statute made the keeping of a "bawdy-house or brothel" a misdemeanor. A municipal charter, subsequently granted, authorized the city council "by ordinance, not inconsistent with any law of the state, . . . to regulate or suppress bawdy-houses." *Held*, that the charter operated as a repeal *pro tanto* of the statute, and that an ordinance licensing bawdy-houses was valid: *State v. Clarke*, 54 Mo. 17; 14 Am. Rep. 471.

§ 3992. **Markets.** — The corporation may establish and regulate markets, and may forbid sales or purchases of marketable articles except at certain market-places.<sup>1</sup> It may do this without an express grant of such power.<sup>2</sup> It is clearly within the power of the legislature to delegate

<sup>1</sup> *Cincinnati v. Buckingham*, 10 Ohio, 257.

<sup>2</sup> *Spaulding v. Lowell*, 23 Pick. 71; *Wartman v. Philadelphia*, 33 Pa. St. 202; the court saying: "The necessity of a public market, where the producers and consumers of fresh provisions can be brought together at stated times for the purchase and sale of these commodities, is very apparent. There is nothing which more imperatively requires the constant supervision of some authority which can regulate and control it. Such authority in this country is seldom, if ever, vested in individuals. It can never be so well placed as when it is put into the hands of the corporate officers, who represent the people immediately interested. A municipal corporation comprising a town of any considerable magnitude without a public market subject to the regulation of its own local authorities would be an anomaly which at present has no existence among us. The state might undoubtedly withhold from a town or a city the right to regulate its markets, but to do so would be an act of mere tyranny, and a gross violation of the principle, universally conceded to be just, that every community,

whether large or small, should be permitted to control, in their own way, all those things which concern nobody but themselves. The daily supply of food to the people of a city is emphatically their own affair. It is true that the persons who bring provisions to the market have also a sort of interest in it, but not such an interest as entitles them to a voice in its regulation. The laws of a market (I am now using the word in its larger sense) are always made by the persons who reside at the place, and that whether they be buyers or sellers. It is therefore the common law of Pennsylvania that every municipal corporation which has power to make by-laws and establish ordinances to promote the general welfare and preserve the peace of a town or city may fix the time or places of holding public markets for the sale of food, and make such other regulations concerning them as may conduce to the public interest. We take this to be the true rule, because it is necessary and proper, in harmony with the sentiments of the people, universally practiced by the towns, and universally submitted to by the residents in the country."

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to a municipal corporation the power to establish public markets, and to confine the sale of commodities which, in consideration of public health, require police inspection and supervision to such markets, even if a result of the exercise of this power should be the destruction of an existing and long-established business.<sup>1</sup> A by-law prohibiting inhabitants of the city or of the town in the vicinity, who offer for sale the produce of their own farms, etc., from occupying any stand for the purpose of vending, etc., in certain streets, which are, by the by-law, a part of the market, is valid.<sup>2</sup> A city has the right to establish a public market, although incidentally the neighboring streets are somewhat obstructed. It may also collect fees for the use of the market privileges, and for allowing parties to sell market produce from wagons. No action lies on behalf of a citizen because of annoyance caused by such obstruction.<sup>3</sup> But a grant to a city of the right to establish and keep up a market, with power to make and enforce market regulations, and with a proviso that the mayor may license private markets, does not give the right to prohibit sales elsewhere.<sup>4</sup> In the regulation of public markets, the following by-laws have been sustained, viz.: Forbidding the hawking or selling of meat, except at the public market, or a certain distance from it;<sup>5</sup> fixing the times and places at which markets shall be kept open;<sup>6</sup>

<sup>1</sup> Ex parte Byrd, 84 Ala. 17; 5 Am. St. Rep. 328.

<sup>2</sup> Nightingale's Case, 11 Pick. 168; Buffalo v. Webster, 10 Wend. 99.

<sup>3</sup> Henkel v. Detroit, 49 Mich. 249; 43 Am. Rep. 464.

<sup>4</sup> Bethune v. Hughes, 28 Ga. 560; 73 Am. Dec. 789; Caldwell v. Alton, 33 Ill. 416; 85 Am. Dec. 282; Bloomington v. Wahl, 46 Ill. 489. Contra, Davenport v. Kelley, 7 Iowa, 102.

<sup>5</sup> Buffalo v. Webster, 10 Wend. 100; Winsboro v. Smart, 11 Rich. 551; City of St. Louis v. Jackson, 25 Mo. 37.

<sup>6</sup> Bowling Green v. Carson, 10 Bush,

64. "The fixing the place and times at which markets shall be held and kept open," says the supreme court of New York in Bush v. Seabury, 8 Johns. 418, "and the prohibition to sell at other places and times, are among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass by-laws relative to the public markets. If the corporation had not the power in question, it is difficult to see what useful purpose could be effected, or what object was intended, by the grant of power to pass laws 'relative to the public markets.'"

regulating the killing and bleeding of meats;<sup>1</sup> prohibiting the occupation of stands in the street for the vending of commodities;<sup>2</sup> requiring oysters to be sold only at certain stands;<sup>3</sup> forbidding wagons loaded with perishable produce to stand in market for longer than twenty minutes within certain hours;<sup>4</sup> prohibiting persons not lessees of butchers' stalls from selling meat in less quantities than one quarter.<sup>5</sup> On the other hand, in Illinois, where a city by its charter had power "to establish and regulate markets," and under the power passed an ordinance forbidding, during market hours, the sale of vegetables outside the limits of the market, it was held that the city could not restrain a regular dealer or merchant from vending vegetables at his place of business outside of market limits, during any part of the day, such a restraint of trade being unreasonable.<sup>6</sup> So in Georgia it has been held that power by the charter to the corporation "to establish and keep up a public market in the city for the sale of," etc., does not confer upon the city power to pass an ordinance prohibiting the sale of marketable articles elsewhere than at the market-place.<sup>7</sup>

Power to "establish and regulate markets" gives authority to purchase ground on which to erect a market-building.<sup>8</sup> Under its power "to regulate the erection, use, and continuance of market-houses," a city may prohibit the sale of fresh beef within market hours elsewhere than at the public market-house, and may exact thirty dollars a year from the occupants of stands.<sup>9</sup> Power to "appoint market-places and regulate the same" gives power to build and repair a market-house.<sup>10</sup> But the

<sup>1</sup> *Brooklyn v. Cleves*, Hill & D. 231.

<sup>2</sup> *Nightingale*, Petitioner, 11 Pick. 168; *Com. v. Rice*, 9 Met. 283.

<sup>3</sup> *First Municipality v. Cutting*, 4 La. Ann. 335.

<sup>4</sup> *Com. v. Brooks*, 109 Mass. 355.

<sup>5</sup> *St. Louis v. Weber*, 44 Mo. 547.

<sup>6</sup> *Caldwell v. Alton*, 33 Ill. 416; 75 Am. Dec. 282.

<sup>7</sup> *Bethune v. Hughes*, 28 Ga. 560; 73 Am. Dec. 789.

<sup>8</sup> *Ketchum v. Buffalo*, 14 N. Y. 356;

*People v. Lowther*, 28 Barb. 65.

<sup>9</sup> *Ex parte Canto*, 21 Tex. App. 61;

57 Am. Rep. 609.

<sup>10</sup> *Smith v. City of Newbern*, 70 N. C. 14; 16 Am. Rep. 766.

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charter of a village which authorizes the president and trustees "to construct and regulate markets, the vending of poultry," etc., does not confer upon such officers the power to lease a market with the stipulation that no other market shall be allowed within the village for a term of years.<sup>1</sup> The corporation has no authority to build markets on the public streets,<sup>2</sup> nor can such power be given by the legislature without providing compensation to the proprietors of the contiguous lands fronting on such street.<sup>3</sup> But a city having established a public market in a portion of a public street duly condemned for that purpose, no action can be maintained by a citizen against the city for injury to his adjoining property by the incidental obstruction of the street by the collecting of wagons in the neighborhood, and the selling of produce therefrom, where the same is under police regulation.<sup>4</sup> A power conferred in general terms upon the authorities of a city to establish and regulate markets is construed as a continuing power. The fact that the city council have, at one time, exercised it by establishing a market-place and erecting a market-house in a particular locality will not prevent them from afterwards abandoning that site, and removing the market to another. And such an order of removal, if made in the reasonable exercise of the discretion vested in the city by law, will not be restrained by injunction at the suit of a tax-payer.<sup>5</sup>

The purchase of stalls in a public market confers on the purchaser a qualified right only. Such easement is limited to the existence of the market, and is subject to such changes in the market as the public needs may require. The purchase confers an exclusive right to occupy the particular stalls, with their appendages, for the purposes

<sup>1</sup> Gale v. Kalamazoo, 1 Mich. N. P. 5; 23 Mich. 344; 9 Am. Rep. 80.

<sup>2</sup> Wartman v. Philadelphia, 33 Pa. St. 202.

<sup>3</sup> State v. Laverack, 34 N. J. L. 201.

<sup>4</sup> Henkel v. Detroit, 49 Mich. 249; 43 Am. Rep. 464.

<sup>5</sup> Gall v. Cincinnati, 18 Ohio St. 563.

of the market. If the owner be disturbed in the possession of the stalls, he may maintain case or trespass against the wrong-doer. But he cannot convert them to any other use than that for which they were sold, and in this use of them he is required to conform to the regulations of the market as prescribed by the ordinances of the city.<sup>1</sup>

ILLUSTRATIONS. — Under a general power to lease, sell, or dispose of market-stalls for any term it might think proper, a municipal corporation sold a stall in one of the public markets, without limitation of term, and without any special ordinance authorizing the sale and prescribing the term. *Held*, that such sale conferred no absolute property, but only the right of exclusive possession and enjoyment for market purposes, during the existence of the market, and was therefore not in excess of its powers, and estopped the city and the purchaser from denying the validity of the sale: *Rose v. Baltimore*, 51 Md. 256; 34 Am. Rep. 307.

§ 3993. **Regulating Trade.** — A municipal corporation may regulate the manner of carrying on trade within a municipality, so far as to insure proper conduct in those who practice it within its jurisdiction.<sup>2</sup> Under this branch, ordinances have been sustained requiring oats, hay, etc., to be weighed by the public weigh-master before being offered for sale;<sup>3</sup> providing for the inspection of flour intended to be made into bread;<sup>4</sup> requiring gunpowder brought into the city for sale to be stored at the public magazine and retailed only in canisters;<sup>5</sup> prohibiting the hawking and peddling in the streets of meat, game, and poultry;<sup>6</sup> prohibiting the keeping open of shops on Sunday;<sup>7</sup> or the keeping open of saloons,

<sup>1</sup> *Rose v. Baltimore*, 51 Md. 256; 34 Am. Rep. 307.

<sup>2</sup> Willcock on Corporations, sec. 142; *Mayor of Mobile v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441.

<sup>3</sup> *Raleigh v. Sorrell*, 1 Jones, 49.

<sup>4</sup> *Guillotte v. New Orleans*, 12 La. Ann. 432.

<sup>5</sup> *Williams v. Augusta*, 4 Ga. 509.

<sup>6</sup> *Shelton v. Mobile*, 30 Ala. 540; 68 Am. Dec. 143.

<sup>7</sup> *St. Louis v. Cafferata*, 24 Mo. 94. See *State v. Cowan*, 29 Mo. 330; *State v. Ams*, 20 Mo. 214; *Frolichshtein v. Mobile*, 40 Ala. 725; *Hudson v. Geary*, 4 R. I. 485; *Specht v. Commonwealth*, 8 Pa. St. 312; 49 Am. Dec. 518; *Cincinnati v. Rice*, 15 Ohio, 225; *Karwisch v. Atlanta*, 44 Ga. 204; *City Council v. Benjamin*, 2 Strob. 508; 49 Am. Dec. 608.

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restaurants, or places of entertainment after a certain  
hour at night;<sup>1</sup> or prohibiting the keeping therein of any  
tippling-house, dram-shop, or bar-room;<sup>2</sup> restraining ped-  
dling within the city limits, and punishing a violation;<sup>3</sup>  
requiring every owner of a hack to take out a license at  
eight dollars per annum, and pay the cost of numbering  
the hack, not exceeding twenty-five cents;<sup>4</sup> requiring  
every licensed pawn-broker to make out and deliver to the  
superintendent of police, every day, before noon, a legible  
and correct copy from a book to be kept by him of all  
things received on deposit or purchased during the pre-  
ceding day, together with the hour when received or  
purchased, and a description of the pledgor or seller;<sup>5</sup> re-  
quiring sales of coal to be by weights and measures, and  
imposing a payment of five cents a load for the weighing  
thereof and the use of the borough scales;<sup>6</sup> regulating the  
weight of bread.<sup>7</sup> But an ordinance in restraint of trade is  
void.<sup>8</sup> So is an ordinance void which grants a monopoly,

<sup>1</sup> State v. Freeman, 38 N. H. 426; Ex parte Wolf, 14 Neb. 24.

<sup>2</sup> Ex parte Campbell, 74 Cal. 20; 5 Am. St. Rep. 418.

<sup>3</sup> Huntington v. Cheesbro, 57 Ind. 74.

<sup>4</sup> Ex parte Gregory, 20 Tex. App. 210; 54 Am. Rep. 516.

<sup>5</sup> Launder v. Chicago, 111 Ill. 291; 53 Am. Rep. 625.

<sup>6</sup> O'Maley v. Freeport, 96 Pa. St. 24; 42 Am. Rep. 527.

<sup>7</sup> Paige v. Fazackerey, 36 Barb. 392.

<sup>8</sup> St. Paul v. Thayer, 25 Minn. 248; Nashville v. Althorp, 5 Cold. 554; Hayes v. Appleton, 24 Wis. 543; St. Louis v. Grone, 46 Mo. 574; State v. Fisher, 52 Mo. 174. An ordinance fixed one rate of license for selling goods within the city or going to it, and another rate, much larger, for selling goods not within the city or going to it. *Held* void: Ex parte Frank, 52 Cal. 606; 28 Am. Rep. 642. The court said: "It is flagrantly unjust, oppressive, unequal, and partial. It discriminates between merchants in the same place dealing in the same kinds of merchandise, for no better reason than that one deals in goods either actually

in the corporate limits or *in transitu* under a bill of lading, while the other deals in goods outside the corporate limits, and not *in transitu* under a bill of lading. If this kind of discrimination be legitimate and valid, there is no reason why a merchant having his goods in a warehouse on a particular street might not be required to pay a license fee of ten thousand dollars, while another merchant doing the same kind of business in the same city, and with his goods stored in another street, would be required to pay only ten dollars. It also contravenes the public policy of the state, in that it obstructs commercial intercourse between the principal seaport city of the state and the interior; the policy being to foster and encourage commercial intercourse, and a free interchange of commodities between the several sections. It is in restraint of trade in that it exacts a heavy tribute from the owner of goods outside the corporate limits, and not *in transitu*, as a condition on which he will be allowed to offer them for sale in the principal city and seaport of the state." With-

and gives to certain persons the sole right to carry on a business.<sup>1</sup> It does not follow that because the charter of a city confers upon the common council authority to appoint weigh-masters no person other than such weigh-masters can weigh and measure in such city. Therefore an ordinance of the common council of such city imposing a penalty upon any person who, without having been duly appointed, shall exercise the office of weigh-master applies only to persons assuming to weigh and measure in an official capacity, and not to persons who weigh and measure in a private capacity under a private contract.<sup>2</sup> One who sells his own goods at public auction, as well as one who sells another's, is an "auctioneer," within a statute allowing the common council of any municipality to require a license, etc.<sup>3</sup>

**ILLUSTRATIONS.**—A municipal corporation was authorized by its charter to make by-laws regulating the erection of buildings. *Held*, that a by-law requiring a building license and imposing a license fee was valid: *Welch v. Hotchkiss*, 39 Conn. 140; 12 Am. Rep. 383. A municipal ordinance prohibited livery-stable keepers running drays for hire. They were permitted to let out horses, mules, carriages, buggies, and "other vehicles." Another section of the ordinance prohibited the running of "drays, carts, or other carriages for the purpose of hauling, for the public, goods, produce, wares, or merchandise of any description," without a license. *Held*, that a licensed livery-stable keeper might hire out a two-horse wagon by the day to haul lumber, without a license to run a dray: *Griffin v. Powell*, 64 Ga. 625. Under an ordinance "to prohibit, suppress, or exclude from certain limits . . . all occupations . . . against good morals or contrary to public order and decency," *held*, that a city had no authority to exclude from nearly half its limits the laundry business, said business being in no sense repugnant to good morals, public order, or decency: *In re Cheong Woo*, 7 Saw. 526. An ordinance restrained a merchant or dealer in groceries

out special legislative authority, a city cannot by ordinance require cotton merchants to keep, for the inspection of the police, a record of the names of purchasers and the quantities purchased: *Long v. Taxing District*, 7 Lea, 134; 40 Am. Rep. 55.

<sup>1</sup> *Gale v. Kalamazoo*, 23 Mich. 344;

9 Am. Rep. 80; *Logan v. Pyne*, 43 Iowa, 524; 22 Am. Rep. 261; *Chicago v. Rumpf*, 45 Ill. 90; 92 Am. Dec. 196; *Tugman v. Chicago*, 78 Ill. 405.

<sup>2</sup> *Hoffman v. Jersey City*, 34 N. J. L. 172.

<sup>3</sup> *Goshen v. Kern*, 63 Ind. 468; 30 Am. Rep. 234.

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from selling vegetables at his place of business during certain hours. *Held*, void; *Caldwell v. Alton*, 33 Ill. 416; 85 Am. Dec. 282. City ordinance prohibited "drumming" or soliciting patronage for hotels, boarding-houses, bath-houses, physicians, quacks, and vendors of nostrums. *Held*, void as to competent physicians; and so, it seems, as to hotels, boarding-houses, and bath-houses; *Thomas v. Hot Springs*, 34 Ark. 553, 36 Am. Rep. 24. A license law provided that "every person whose business it is to buy and sell produce, fish, meats, and fruits from wagons and carts shall be regarded as a produce dealer," and that "no additional license shall be required from produce dealers for selling meat." *Held*, that butter and eggs are "produce," within the statute, but one who sells meats alone is not a produce dealer; *District of Columbia v. Oyster*, 4 Mackey, 285, 54 Am. Rep. 275. A village charter empowered the trustees to enact and enforce ordinances "for the government and good order of the village, for the suppression of vice, for the benefit of trade and commerce, and for the good health thereof." The trustees enacted an ordinance prohibiting the sale, without license, at temporary stands or tables, "of any lemonade," etc. Plaintiff was arrested for a violation of the ordinance. *Held*, that the ordinance was void, as an unreasonable restraint of trade; *Barling v. West*, 29 Wis. 307; 9 Am. Rep. 576.

§ 3994. **Streets and Sidewalks.**—The authority to grade and pave streets is among the implied powers of a municipal corporation.<sup>1</sup> So it has power to regrade a street whenever it deems it necessary,<sup>2</sup> and to make common sewers under the highways.<sup>3</sup> It has no implied power to narrow or widen streets, or to erect obstructions in them.<sup>4</sup> It may apply its land to a different use from that for which it was originally designated; e. g., land set apart for a public promenade may be appropriated for a steam-boat landing.<sup>5</sup> A city ordinance requiring the owners of lots on streets which have been graded, paved, and guttered to pave the sidewalks adjoining their lots is valid, and if the owners do not comply, the city may do the work, and collect the expense from the owners.<sup>6</sup> So is an ordinance

<sup>1</sup> *White v. McKeesport*, 101 Pa. St. 394.

<sup>2</sup> *Keasy v. City of Louisville*, 4 Dana, 154; 29 Am. Dec. 395.

<sup>3</sup> *Cone v. Hartford*, 28 Conn. 363; *Keasy v. King*, 32 Barb. 410.

<sup>4</sup> *State v. Mayor*, 5 Port. 279; 30 Am. Dec. 564.

<sup>5</sup> *Mayor v. Wright*, 6 Yerg. 497; 27 Am. Dec. 489.

<sup>6</sup> *Sands v. Richmond*, 31 Gratt. 571; 31 Am. Rep. 742.



requiring the owner of every lot on a certain section of a certain street to fix curb-stones and make a brick-way in front of his lot.<sup>1</sup> Where property owners are given the right to choose the material with which a street shall be paved, but no mode is prescribed for ascertaining their wishes, they must move in the matter. If they do not, the city authorities may assume that they have waived their right.<sup>2</sup> The word "lot," in a charter authorizing a city to require "owners of lots to pave," etc., is applicable to a piece of land not platted and recorded.<sup>3</sup> The construction of "a good and substantial sidewalk or foot-pavement," within the meaning of a municipal ordinance, does not include the filling necessary to bring the walk to the grade of the street.<sup>4</sup> A city may permit the use of its streets for poles and wires necessary in electric lighting.<sup>5</sup> A local municipal corporation cannot give a valid permission to any one to occupy the streets or sidewalks with continuing erections, or other obstructions, without express power conferred by statute.<sup>6</sup> A city has no power by ordinance to prohibit door-steps lawfully established in a street, under an authority to "make such rules and regulations for the erection and maintenance of balustrades and other projections upon the roofs or sides of buildings as the safety of the public requires," and to make "all salutary and needful by-laws."<sup>7</sup> A city may impose conditions on an abutter's excavating an area under a sidewalk, and forbid the same until they be complied with.<sup>8</sup> The owner of a town lot may not maintain hay-scales in the street in front of his premises when the fee of the streets is in the town.<sup>9</sup> The general authority to make and enforce all ordinances needful to effectuate

<sup>1</sup> Paxson v. Sweet, 13 N. J. L. 196.

<sup>2</sup> Moale v. Baltimore, 61 Md. 224.

<sup>3</sup> Buell v. Ball, 20 Iowa, 282.

<sup>4</sup> Smith v. St. Louis Mut. Life Ins. Co., 3 Tenn. Ch. 631.

<sup>5</sup> Tuttle v. Brush Electric Illuminating Co., 50 N. Y. Sup. Ct. 464.

<sup>6</sup> Ely v. Campbell, 59 How. Pr. 333.

<sup>7</sup> Cushing v. Boston, 128 Mass. 330; 35 Am. Rep. 333.

<sup>8</sup> Davies v. Clinton, 50 Iowa, 585.

<sup>9</sup> Emerson v. Babcock, 66 Iowa, 257; 55 Am. Rep. 273.

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the powers conferred, and the special authority to "open, widen, extend, improve, vacate, or abolish streets," does not authorize the city to compel the citizens to work the streets, subject to fine for default.<sup>1</sup> The authority to make and establish ordinances and regulations for regulating streets and sidewalks, granted to a municipal corporation by its charter, includes the power of determining the respective widths of the street and sidewalks, and how the space appropriated to both shall be apportioned between the two.<sup>2</sup> A town having control of its streets, with power to improve them, may allow property holders to adorn the same by setting out and caring for shade-trees along their premises; and by so doing will not lose its control over the trees so planted, and may protect the same as against such parties.<sup>3</sup> Alleys are not primarily designed as streets, but simply as a means of local convenience to a limited neighborhood, and a roof twelve or fifteen feet over and above an alley is not necessarily an obstruction.<sup>4</sup>

Municipal corporations have also the power, either express or implied, from their power as to the public safety, to regulate travel in the streets.<sup>5</sup> Under this head, ordinances have been sustained prescribing the streets over only which omnibuses may run;<sup>6</sup> prohibiting the pro-

<sup>1</sup> Ex parte Grace, 9 Tex. App. 381.

<sup>2</sup> Taintor v. Morristown, 33 N. J. L. 57.

<sup>3</sup> Baker v. Town of Normal, 81 Ill. 108.

<sup>4</sup> Beecher v. People, 38 Mich. 289; 31 Am. Rep. 316.

<sup>5</sup> 1 Dillon on Municipal Corporations, sec. 326.

<sup>6</sup> Commonwealth v. Stodder, 2 Cush. 562; 48 Am. Dec. 679; the court saying: "The public safety and convenience of travelers may require regulations of this character. If new and unusual modes of transporting persons over the public streets are introduced, which, from the methods made use of for propelling the carriage, or the size of the vehicle, or the number of horses

attached thereto, will obviously endanger the public safety, or so engross the whole width of the street as virtually to exclude all other vehicles, or greatly to obstruct them in their passing thereon, it would certainly be reasonable and proper, and within the legitimate powers of the mayor and aldermen, under the statute already cited, and the powers conferred by the city charter, to regulate the route of the streets over which such carriages were to run, and the rate of speed, and to interdict the stopping in the public streets unnecessarily, to the great hindrance and delay of those in the rear traveling on the same route. We perceive nothing objectionable in an ordinance, by the mayor and alder-

pulsion of cars by steam within certain limits;<sup>1</sup> prohibiting rapid driving in the streets;<sup>2</sup> regulating the use of the streets for the removal of buildings;<sup>3</sup> imposing a penalty for mutilating or destroying shade-trees in the streets;<sup>4</sup> prohibiting a railroad train from standing across a street longer than two minutes at a time;<sup>5</sup> prohibiting the driver of a hackney coach from standing his coach within thirty-five feet of the door of a place of public amusement;<sup>6</sup> prohibiting stopping with a vehicle more than twenty minutes in any street;<sup>7</sup> as to sidewalks, requiring the tenant or occupant, or if there be none, the

men, providing for the safety and convenience of the public generally, by prescribing, by a general by-law or ordinance, certain streets or portions of streets to be used for travel by vehicles exposing by their manner of use the lives and limbs of the public generally who may have occasion to use the public streets, if such vehicles are permitted to use the public streets indiscriminately; and such regulations and restrictions might be warranted even to affect the minor object, that of preventing the greatly obstructing the free and convenient use of the streets for general purposes, by interdicting carriages of unusual size or drawn by an unusual number of animals, or those of such character as would greatly interfere with the public convenience and safety. To take a strong case: Suppose the proprietor of the omnibuses from Roxbury should deem it expedient to propel his carriages by steam-power, passing through Washington Street at a rapid rate, would it not be a lawful and proper regulation for the mayor and aldermen to prohibit the using of Washington Street by vehicles propelled by steam-power? We cannot doubt that it would be. Acting upon this principle, various ordinances have been adopted by the city government regulating the rate of speed of travelers in the public streets, the hour of the day in which the public streets may be used for certain purposes, and excluding vehicles of all kinds from entering upon the sidewalks on the public

streets. So far as relates to the restriction of carriages to certain routes, there is nothing in the ordinance preventing any individual from running omnibuses in every direction. The proprietor of the Roxbury omnibuses, although those particular vehicles are restricted to certain streets, has also the free use of the various other streets, appropriated to other lines of omnibuses, if he chooses to set up and run an omnibus thereon, as to Charlestown, or Cambridge, or South Boston. We cannot doubt that a by-law, reasonably regulating the use of the public streets of the city as to carriages of an unusually large size, or as to those which from the mode of using them would greatly incommode, if not endanger, those having occasion to use such public streets, would be valid and legal; and that such regulations might prescribe certain streets as to the route of travel for such vehicles, and provide for their exclusion from certain other streets."

<sup>1</sup> *R. R. etc. Co. v. Buffalo*, 5 Hill, 209.

<sup>2</sup> *Commonwealth v. Worcester*, 3 Pick. 462; *Thacher's Crim. Cas.* 100.

<sup>3</sup> *Day v. Green*, 4 Cush. 433.

<sup>4</sup> *State v. Merrill*, 37 Me. 329.

<sup>5</sup> *Long v. Jersey City*, 37 N. J. L. 348.

<sup>6</sup> *Commonwealth v. Robertson*, 5 Cush. 438.

<sup>7</sup> *Commonwealth v. Brooks*, 99 Mass. 434. But such an ordinance cannot cover an involuntary stoppage: *Commonwealth v. Brooks*, 99 Mass. 434.

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owner of buildings, to clear the snow from the sidewalk adjoining;<sup>1</sup> or prohibiting any person from permitting swine under his care from going upon any sidewalk in the city, or otherwise occupying, obstructing, injuring, or encumbering such sidewalk, so as to interfere with the convenient use of the same by all passengers;<sup>2</sup> providing that no person shall maintain an awning before his door without the consent of the mayor and aldermen.<sup>3</sup>

ILLUSTRATIONS. — A city was authorized by its charter to "license, tax, and regulate" omnibuses. *Held*, that it had no power to grant an exclusive right to run omnibuses within its limits: *Logan v. Pyne*, 43 Iowa, 524; 22 Am. Rep. 261. A city ordinance prohibited the standing in certain places of "hacks, baggage-wagons, and public conveyances." *Held*, that an omnibus employed by a hotel to convey its guests to and fro free of charge was not a "public conveyance," within the ordinance: *Oswego v. Collins*, 38 Hun, 171. The charter of a city gave authority to the council to regulate the building of vaults, and the laying of water and gas pipes in and under the street, and to secure to the public the safe and convenient use of the streets and sidewalks for the purposes of which they were originally laid out. *Held*, that an ordinance directing that applicants should be assessed a certain amount for the privilege of building vaults in front of their dwellings was not within the authority granted, nor within the usual police powers given to the corporation for the maintenance of peace and good order of the city, and therefore void: *Benson v. Hoboken*, 33 N. J. L. 280.

§ 3995. **Wharves.** — Municipal corporations are usually given authority to erect wharves within their limits, and to charge wharfage as a compensation for their maintenance.<sup>4</sup> A city may establish a public wharf, where any duly dedicated street abuts upon a navigable stream, without regard to the question whether a riparian owner has title to land under water.<sup>5</sup> Where property within the limits of a municipal corporation and along the bank of a navi-

<sup>1</sup> Goldard, Petitioner, 16 Pick. 504;

28 Am. Dec. 259; Kirby v. Boylston Market Ass'n, 14 Gray, 252; 74 Am. Dec. 682.

<sup>2</sup> Commonwealth v. Curtis, 9 Allen, 266.

<sup>3</sup> Pedrick v. Bailey, 12 Gray, 161.

<sup>4</sup> 1 Dillon on Municipal Corporations, sec. 67.

<sup>5</sup> Backus v. Detroit, 49 Mich. 110; 43 Am. Rep. 447.

gable river is dedicated to the public for the use of a wharf, and where the municipal authorities are invested with the regulation and control of the uses of the property thus dedicated, they may, unless specially restricted, authorize, under an ordinance not otherwise objectionable, the erection of a grain-elevator thereon, to facilitate the handling of grain at the wharf.<sup>1</sup> Where a city is authorized by its charter to establish and regulate the use of wharves, fix the rates of wharfage, and regulate the anchorage and mooring of boats and rafts, it possesses and may by ordinance exercise the incidental power of prohibiting any and all persons, including those owning lots abutting on the stream navigated, from using any other place than the wharf as established by the city authorities, without permission of the city and payment of the ordinary wharfage fee. This grant of power necessarily confers the authority to fix the location and limits of the wharves and landings, and to prohibit the use of any other place for that purpose. The mere power to establish wharves and regulate them, and the boats and rafts choosing to land there instead of elsewhere, would be idle and useless. The power to prohibit the landing of boats or rafts at other places than the public wharves is necessary, in order to the full exercise of the power granted, and is necessary also in order to protect the city in its revenues granted by the charter.<sup>2</sup> A city authorized by its charter to erect, repair, and regulate public wharves, and to fix the rate of wharfage thereat, cannot lease its wharf or farm out its revenues, or empower any one else to fix the rates of wharfage.<sup>3</sup> A statute conferring on a city the power to establish dock and wharf lines, and to restrain encroachments and prevent obstructions to a navigable stream, does not authorize it to declare by special ordinance a

<sup>1</sup> *R. R. Co. v. Elevator Co.*, 2 Dill. 70.

<sup>2</sup> *Matthews v. Alexandria*, 68 Mo.

<sup>3</sup> *Dubuque v. Stout*, 32 Iowa, 80; 7 115; 30 Am. Rep. 776.  
Am. Rep. 171.

use of a wharf, erected with the property thus vested, authorize, enable, the erection the handling authorized by its wharves, fix the wharage and moorage by ordinance fixing any and all butting on the place than the wharves, without per-dinary wharfrage transfers the author-harves and land-er place for that harves and regu-ing to land there and useless. The or rafts at other ssary, in order to and is necessary revenues granted s charter to erect, to fix the rate of or farm out its fix the rates of city the power to restrain encroach-navigable stream, special ordinance a

private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when in point of fact it is no obstruction or hindrance to navigation.' A city keeping a wharf and charging for the anchorage of boats is bound to protect the boats against the dangers of ordinary floods.<sup>3</sup>

ILLUSTRATIONS.—The charter of a city authorized it to establish wharves and public landings, to fix the rate of wharfage, and to regulate the anchorage and mooring of all boats within the city. *Held*, that the city had the power to forbid a person owning a lot abutting upon a river, and upon which no wharf or public landing had been established, to use such lot as a wharf or landing, without permission of the city and the payment of wharfage: *City of Dubuque v. Stout*, 32 Iowa, 80; 7 Am. Rep. 171. A lessee of one of the defendant's piers on the Hudson River drove piles, and fastened them in front of and to the pier by bolts and chains. Some of these piles became separated from the pier, and their upper ends, under water except at low tide, projected into the river. A steam-tug navigating the river struck on these, and was injured. There was no proof of notice to the defendant of the defect. *Held*, that the city owed no duty concerning the piles, even if it had been notified: *Seaman v. New York*, 80 N. Y. 239; 36 Am. Rep. 612. A moored his vessel, temporarily, and not for the purpose of unloading, in the Appomattox River, at the city wharf of Petersburg, for the use of which the city was entitled and accustomed to charge wharfage. On the next low water the vessel struck upon a pile, two feet from the wharf, projecting two feet from the bed of the river, visible at low water, and which had been there at least two years, and was thereby sunk. *Held*, that an action would lie in favor of A. against the city for such injury: *Petersburg v. Applegarth*, 28 Gratt. 321; 26 Am. Rep. 357.

§ 3996. **Modes of Enforcing Ordinances.**—Where the mode of enforcement is prescribed by the charter, that mode must be pursued;<sup>3</sup> but if the mode or form of action is not prescribed, then the recovery of the penalty or fine for the violation of a municipal ordinance may be, as at common law, by an act of debt or *assumpsit*, or where

v. Alexandria, 68 Mo.  
Rep. 776.

<sup>1</sup> *Yates v. Milwaukee*, 10 Wall. 497.

<sup>1</sup> Shinkle v. Covington, 1 Bush, 617.

<sup>8</sup> *Weeks v. Forman*, 16 N. J. L. 237; *Ewbanks v. Ashley*, 36 Ill. 177; *Williamson v. Com.*, 4 B. Mon. 146.

these forms are abrogated, by a civil action in substance the same.<sup>1</sup> Where an ordinance of a city provided that the owner suffering horses to run at large in the streets should be subject to a penalty of five dollars for each horse, the fine so collected to be paid into the city treasury, it was held that the penalty could only be collected by an action at law, and that the city marshal had no right to detain the horses for the reason the penalty was not paid.<sup>2</sup> Unless otherwise provided in the repealing ordinance, the repeal of an ordinance pending a prosecution under it releases the defendant.<sup>3</sup>

§ 3997. **Proceedings Civil or Criminal.**—In some states the recovery of the penalty for the violation of a municipal ordinance is regarded as a criminal, or at least a *quasi* criminal, proceeding.<sup>4</sup> But generally the action is a civil one, and the rules of civil procedure apply.<sup>5</sup>

<sup>1</sup> *Ewbanks v. Ashley*, 36 Ill. 173; 533; *Quincy v. Ballance*, 30 Ill. 185; *Coates v. Mayor*, 7 Cow. 608. See *Davenport v. Bird*, 34 Iowa, 524; *Williamson v. Commonwealth*, 4 B. Mon. 146; *Muller v. O'Reilly*, 84 Ind. 168; *Jenkins v. Cheyenne*, 1 Wyo. 287. A city has no power to punish disobedience of its ordinances by fine, imprisonment, or other penalty, unless it is expressly granted by its charter: *State v. Bright*, 38 La. Ann. 1; 58 Am. Rep. 155.

<sup>2</sup> *Willis v. Legris*, 45 Ill. 289.

<sup>3</sup> *Kansas City v. Clark*, 65 Mo. 588. See *ante*, Title Statutes.

<sup>4</sup> *Goddard, Petitioner*, 16 Pick. 504; 28 Am. Dec. 259; *Santa Barbara v. Sherman*, 61 Cal. 57.

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## CHAPTER CCVI.

## LIABILITY FOR TORTS.

- § 3998. Legislature has paramount authority over streets — Delegation of, to municipal corporations.
- § 3999. Regulations as to use of streets.
- § 4000. Gas-pipes and water-pipes.
- § 4001. Telegraph-poles.
- § 4002. Use of streets by steam-railroads.
- § 4003. Use of streets by horse-railroads.
- § 4004. Use of streets by bridges.
- § 4005. What is a "bridge."
- § 4006. Municipal corporations not liable for judicial or discretionary act.
- § 4007. When liable for negligence.
- § 4008. Neglect to perform public duty — When not liable.
- § 4009. When liable.
- § 4010. Acts ultra vires — Corporation not liable.
- § 4011. Liable for maintaining or permitting nuisance.
- § 4012. Liable for trespasses.
- § 4013. Duty of corporation in executing public works — Degree of care re-  
quired.
- § 4014. Establishing and changing grade of streets.
- § 4015. Drains and sewers.
- § 4016. Liability for non-repair of highways.
- § 4017. Damage must be special to plaintiff.
- § 4018. Notice to corporation of defect necessary.
- § 4019. Duty to remove and repair obstructions in highway — Extent of.
- § 4020. Notice of defects must be posted.
- § 4021. Objects which frighten horses.
- § 4022. Liability for defective sidewalks.
- § 4023. Snow and ice on sidewalks and streets.
- § 4024. Actions against third persons causing defects.
- § 4025. Liability for torts of officers and agents.
- § 4026. When not liable -- Public officers.

§ 3998. **Legislature has Paramount Authority over Streets — Delegation of, to Municipal Corporations.** — The legislature of the state, representing the public at large, has full and paramount authority over all public places, streets, squares, and commons.<sup>1</sup> It may, however, and generally does, authorize this power to be exercised by the

<sup>1</sup> O'Connor v. Pittsburg, 18 Pa. St. 187.



municipal authorities.<sup>1</sup> The municipal corporation may vacate or discontinue streets once established, if so authorized by the legislature.<sup>2</sup>

§ 3999. **Regulations as to Use of Streets.**—The corporation has power to regulate the use of the streets.<sup>3</sup> Thus it may prohibit auction sales on the sidewalks;<sup>4</sup> regulate the weights which wagons shall carry through the streets;<sup>5</sup> prohibit the obstruction of the street by building material.<sup>6</sup>

§ 4000. **Gas-pipes and Water-pipes.**—The power to lay gas-pipes in the streets can only be granted by the legislature or delegated to the municipal corporation.<sup>7</sup> So, also, as to water-pipes.<sup>8</sup> A city's power to contract for the construction of water-works includes, as a necessary incident, the power to contract for use of the streets to lay water-pipes.<sup>9</sup> So a city may be empowered to place water-meters in any buildings of certain classes, not including private dwellings, at the expense of the owners of such buildings.<sup>10</sup> A board of public works of a city is not justified in refusing to supply water for the use of the engines, etc., of a railroad being operated by a receiver under the direction of the court on the ground that certain water-rents, which were due when the railroad was declared insolvent, are unpaid.<sup>11</sup>

**ILLUSTRATIONS.**—A municipal corporation laid water-pipes through the city, which any one might connect with his house and use on payment of a certain water-rent. The pipe with

<sup>1</sup> 2 Dillon on Municipal Corporations, secs. 519, 538 et seq.; *Sinton v. Ashbury*, 41 Cal. 525.

<sup>2</sup> *Gray v. Iowa Land Co.*, 26 Iowa, 387; *Baird v. Rice*, 63 Pa. St. 489.

<sup>3</sup> *Jackson v. People*, 9 Mich. 111; 77 Am. Dec. 491; *Philadelphia v. R. R. Co.*, 58 Pa. St. 253; *Korah v. Ottawa*, 32 Ill. 121; 83 Am. Dec. 255. See *post*, § 4023, Streets and Sidewalks.

<sup>4</sup> *White v. Kent*, 11 Ohio St. 550.

<sup>5</sup> *Nagle v. Augusta*, 5 Ga. 546.

<sup>6</sup> *Wood v. Mears*, 12 Ind. 515; 74 Am. Dec. 222; *Lowell v. Simpson*, 10 Allen, 88.

<sup>7</sup> *State v. Cincinnati Gas Co.*, 18 Ohio St. 262. See *ante*, Title Gas Companies.

<sup>8</sup> *Angell on Highways*, secs. 25, 213.

<sup>9</sup> *Quincy v. Bull*, 106 Ill. 337.

<sup>10</sup> *Hill v. Thompson*, 48 N. Y. Sup. Ct. 481.

<sup>11</sup> *Coe v. R. R. Co.*, 30 N. J. Eq. 440.

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which plaintiff's house was connected was so carelessly laid that it froze and burst, thereby depriving plaintiff's tenants of water, on which ground they abandoned the premises. *Held*, that plaintiff could recover of the city the water-rent paid while deprived of the use of the water, but not for damages in being deprived of the water, or for loss of tenants: *Smith v. Philadelphia*, 81 Pa. St. 38; 22 Am. Rep. 731. A city leased its water-works for fifteen years to a citizen, who contracted to keep the machinery, in order, to run the pumps in case of fire, and to keep the reservoir filled. The city was to pay him nothing, but gave him the privilege of supplying citizens with water for compensation, and he furnished security for faithful performance. The lessee became habitually drunken, neglected to keep a supply of water, and neglected the machinery, so that it became spoiled and had to be replaced by the city at heavy expense. *Held*, that the city was entitled to have the lease rescinded, although it contained no power of revocation or condition for forfeiture: *Mahon v. Columbus*, 58 Miss. 310; 38 Am. Rep. 327. A gas company in a town had obtained the consent of the town authorities to lay its pipes in the street upon agreeing to leave the streets in good condition, and not unnecessarily to allow ditches to be left open. In so laying pipe it allowed a ditch to remain open for several days. The plaintiff fell into the ditch at night and was hurt. *Held*, that an action would lie against the town: *Russell v. Columbia*, 74 Mo. 480; 41 Am. Rep. 325. The legislature, in granting a charter to a gas company, imposed upon the company, as one condition of the charter, the furnishing of a certain quantity of gas to the city. *Held*, that the law did not raise an implied promise on the part of the city to pay for that which the company was unconditionally required to furnish: *Virginia City Gas Co. v. Virginia City*, 3 Nev. 320.

§ 4001. **Telegraph-poles.** — Municipal authority is likewise necessary to allow the erection of telegraph-poles in streets.<sup>1</sup>

§ 4002. **Use of Streets by Steam-railroads.** — The legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power, or devolve it upon the local or municipal authorities.<sup>2</sup> A city has no inherent right to authorize

<sup>1</sup> *Commonwealth v. Boston*, 97 Mass. 555.

<sup>2</sup> *Dillon on Municipal Corporations*, sec. 555, citing *Mercer v. R.*

*Co.*, 36 Pa. St. 99; *Black v. R. R. Co.*, 58 Pa. St. 249; *Case of Philadelphia etc. R. R. Co.*, 6 Whart. 25; 36 Am. Dec. 202; *Commonwealth v. R.*

or permit the use of steam-motors upon railroads in its streets, where the fee of the streets is in the city, in trust, for public uses.<sup>1</sup> And under an authority to authorize the location of tracks for railroads and street-railroads on all streets, alleys, and public places, the city cannot authorize the location of a track for the private benefit simply of an individual.<sup>2</sup> A municipal corporation empowered to define, declare, prevent, and abate nuisances, and punish their promoters, may, by ordinance, prohibit the running of street-cars by steam under penalty for violation, in the absence of any legislative grant authorizing such use of the streets.<sup>3</sup> A city which has, under its charter, granted permission to a railroad company to construct its road along a street is not liable to the land-owners on said street for any interruption of their use of the street, where the road is properly built.<sup>4</sup> A city may recover from a railroad company all reasonable expenses incurred in restoring streets and sidewalks to their former condition of usefulness, after the company has constructed its road through the same, and neglected to make such restoration as required.<sup>5</sup> Where the fee of the street is in the public, the legislature may authorize it to be used by a railroad, without compensation to adjoining owners.<sup>6</sup> But where the public has only an easement in the street, it is held in most states that the use of the street by a steam-railroad is an additional burden, for which, under

R. Co., 27 Pa. St. 339; 67 Am. Dec. 471; *Green v. Reading*, 9 Watts, 382; *Henry v. Bridge Co.*, 8 Watts & S. 85; *O'Connor v. Pittsburg*, 18 Pa. St. 189; R. R. Co. v. Adams, 3 Head, 596; *Moses v. R. R. Co.*, 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; R. R. Co. v. Municipality, 1 La. Ann. 128; 9 La. Ann. 284; *Geiger v. Filor*, 8 Fla. 325; *Springfield v. R. R. Co.*, 4 Cush. 63; and other cases; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624.

<sup>1</sup> *Stanley v. Davenport*, 54 Iowa, 463; 37 Am. Rep. 216.

<sup>2</sup> *Heath v. R. R. Co.*, 61 Iowa, 11.

<sup>3</sup> *North Chicago City R. R. Co. v. Lakeview*, 105 Ill. 207; 44 Am. Rep. 788.

<sup>4</sup> *Swenson v. Lexington*, 69 Mo. 157.

<sup>5</sup> *Oconto v. R. R. Co.*, 44 Wis. 231.

<sup>6</sup> *Clinton v. R. R. Co.*, 24 Iowa, 453; *People v. Kerr*, 27 N. Y. 188; R. R. Co. v. Applegate, 8 Dana, 289; 33 Am. Dec. 497; *Moses v. R. R. Co.*, 21 Ill. 522; *Hinchman v. R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252; *Carson v. R. R. Co.*, 35 Cal. 325; *Transylvania R. R. Co. v. City of Lexington*, 3 B. Mon. 25; 38 Am. Dec. 173. See *ante*, Title Eminent Domain.

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the constitutional provision as to "taking property," the adjoining owner must be compensated.<sup>1</sup> The laying a railroad upon a highway without legislative or municipal authority and consent is a nuisance.<sup>2</sup> The municipality may regulate the rate of speed of trains over or across streets, and prohibit the use of steam,<sup>3</sup> or the obstruction of crossings by standing cars.<sup>4</sup>

§ 4003. **Use of Streets by Horse-railroads.** — Legislative authority is necessary to the placing of a horse-railroad in the streets. "The legislature may delegate to

<sup>1</sup> *Williams v. R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 65; *Wager v. R. R. Co.*, 25 N. Y. 526; *Mahon v. R. R. Co.*, 24 N. Y. 658; *Fletcher v. R. R. Co.*, 25 Wend. 462; *Bissell v. R. R. Co.*, 23 N. Y. 61; *Davis v. Mayor etc. of New York*, 14 N. Y. 526; 67 Am. Dec. 186; *Carpenter v. R. R. Co.*, 24 N. Y. 655; *Clarke v. Blackmar*, 47 N. Y. 150; *Southern Pacific R. R. Co. v. Reed*, 41 Cal. 256; *Harrington v. R. R. Co.*, 17 Minn. 215, 224; *Gray v. R. R. Co.*, 13 Minn. 315; *Williams v. Plank Road Co.*, 21 Mo. 580; *Ford v. R. R. Co.*, 14 Wis. 616; 80 Am. Dec. 791; *Pomeroy v. R. R. Co.*, 16 Wis. 640; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 625. In *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 625, it is said: "A distinction has been taken where the municipality granting the right to lay the track owns the fee in the streets and where the fee remains in the abutting land-owner, and it seems to us that it rests on sound principles, and is supported by the highest authority. Where the fee remains in the original proprietor, it is immaterial how the public acquired an easement over the lands, whether by condemnation or by dedication, it is only for the use of ordinary travel, such as we are accustomed to see on streets or highways. In case the proprietor dedicated the land, it was for no other purpose, and if it was condemned, his damages were assessed with no other view. A different use of the land from that for which it was

intended cannot be justified on the ground that a railroad is an improved highway. Railroad companies are only public corporations in a limited sense. The right of way, the road-bed, and the carriages propelled thereon, are owned by private individuals, and not by the public. Fares are charged for travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, but at the same time they are intended to subserve the public good. The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance, without paying tolls or fares. The uses are totally different, and even inconsistent. The one is exclusive, in favor of private interest, and the other is open and free to all. The doctrine most in consonance with our sense of justice is, where the fee of the street remains in the abutting land-owner, the corporation may grant the right to a railroad company to lay its track along or across any street, but the company avails of its privilege at its peril. If, in laying its track, it causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained."

<sup>2</sup> *Com. v. R. R. Co.*, 14 Gray, 93.

<sup>3</sup> *Donnaher v. State*, 8 Smedes & M. 649; *R. R. Co. v. Buffalo*, 5 Hill, 209.

<sup>4</sup> *Ill. Cent. R. R. Co. v. Galena*, 40 Ill. 344.

municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads, whose tracks are constructed in the usual manner and whose trains are propelled by steam. But it is otherwise as respects horse-railroads and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit, or refuse to permit, the use of streets within their limits for such purposes. But they cannot, by an implied power, confer corporate franchises or authorize the taking of tolls. This must come from the legislature."<sup>1</sup> But a municipal corporation cannot by contract confer upon individuals the exclusive right of constructing and operating street-railroads on the public streets for their own benefit and use,<sup>2</sup> or license an individual to lay a railroad track across a public street for his own private use.<sup>3</sup> A city has authority, under the police power, over its streets, to compel a street-railroad company so to lay its track that carriages can easily pass over it.<sup>4</sup> An act of incorporation which requires a street-railroad company to keep the street "in perpetual good repair" transfers from the city to the corporation the duty of removing a deposit of rocks and *débris* from an extraordinary rain.<sup>5</sup> A municipal corporation authorized to construct sewers cannot be restrained from the removal of a horse-railroad from the street, if such removal is necessary for that purpose.<sup>6</sup> But after a street-railroad company has availed itself of a city's permission to lay a double track in the streets,

<sup>1</sup> 2 Dillon on Municipal Corporations, sec. 575.

<sup>2</sup> Memphis City R. R. Co. v. Memphis, 4 Cold. 406.

<sup>3</sup> State v. Inhabitants of Trenton, 36 N. J. L. 79.

<sup>4</sup> North Chicago City R. R. Co. v. Lakeview, 105 Ill. 183.

<sup>5</sup> Pittsburg etc. R. R. Co. v. Pittsburg, 80 Pa. St. 72.

<sup>6</sup> Kirby v. R. R. Co., 48 Md. 168; 30 Am. Rep. 455.

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the city cannot, by amendment, restrict the company to a single track, it not being shown that injury will result.<sup>1</sup> Although the track of a horse-railroad in the streets of a city is, by the charter, required to be of the same width as the wagon-track established by law, and to be level with the surface of the street, and although the general public have a right to use the track for passage thereon with vehicles when not occupied by the railroad company, such right does not extend to carriers of passengers or property in competition with the railroad.<sup>2</sup> The use of a street for a horse-railroad is generally held not a new burden for which the adjoining land-owner may claim compensation.<sup>3</sup>

ILLUSTRATIONS. — A railroad was allowed to be located on a certain street by an ordinance of the city which required that "where the grade of said road shall be higher than such street, etc., the said company shall fill up on each side of their road to form a convenient passage over the same." *Held*, that the railroad company was bound to fill up, etc., without reference to the question whether the street, after the railroad was built, was as passable as it was before or not: *Indianapolis etc. R. R. Co. v. Lawrenceburg*, 34 Ind. 304. A street-railroad company was required by ordinance to keep the pavement between its rails in good repair, and it was made the duty of the city to furnish material. The company, being directed to repair, asked leave to repave with cobble-stones; the city refused to furnish materials, but made no objection to cobble-stone, and offered no suggestions. *Held*, in an action by the company to recover the cost of the materials, that it was not bound to show that the necessity for repairs did not arise from its own neglect; and that any fit material might be used and its value recovered from the city: *Fort Wayne etc. R. R. Co. v. Detroit*, 39 Mich. 543.

§ 4004. **Use of Streets by Bridges.** — "Bridges are usually part of the street or highway,<sup>4</sup> and in this country the

<sup>1</sup> *Burlington v. R. R. Co.*, 49 Iowa, 144; 31 Am. Rep. 145.

<sup>2</sup> *Camden Horse R. R. Co. v. Citizens' Coach Co.*, 28 N. J. Eq. 145.

<sup>3</sup> *Jersey City R. R. Co. v. R. R. Co.*, 20 N. J. Eq. 61; *Hinchman v. R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252; *Street R. R. Co. v. Cumminsville*, 14 Ohio St. 323; *Elliott v. R. R. Co.*, 32 Conn.

579; *Hobert v. R. R. Co.*, 27 Wis. 194. *Contra*, *Craig v. R. R. Co.*, 32 N. Y. 579; *Wager v. R. R. Co.*, 25 N. Y. 532. See *ante*, Title Eminent Domain.

<sup>4</sup> *Chicago v. Powers*, 42 Ill. 169; 89 Am. Dec. 418; *Manderschid v. Dubuque*, 29 Iowa, 73; 4 Am. Rep. 196.

power of municipal corporations to build them and their authority over them are wholly statutory, and their duties in respect to them are either prescribed by statute or spring from their powers. There is no common-law responsibility on municipal corporations in respect to the repair of bridges within their limits; but where bridges are part of the streets, and built by the municipal authorities under powers given to them by the legislature, they are liable for defects therein, on the same principles and to the same extent as for defective streets."<sup>1</sup> A city is liable to a citizen for an injury sustained in consequence of the defectiveness of a bridge forming part of a public street, although it was at the time in process of repair by an independent contractor.<sup>2</sup> A town is not bound to keep its bridges absolutely safe; and where a bridge breaks down under an unreasonable and extraordinary load, which reasonable care and prudence could not have anticipated, the town is not liable.<sup>3</sup> So a township is not bound so to build a bridge as to support a steam thrashing-machine of great weight, transported by means of a traction-engine.<sup>4</sup> A city is not bound to prevent access or guard the approaches to a bridge owned by the state, on lands of the state, crossing a state canal within the city boundaries, and constructed for canal purposes, but commonly used by the public as part of a public highway.<sup>5</sup> The fact that a bridge over a city street is of sufficient height to allow ordinary carriages to pass under it does not, of itself, discharge the municipality from liability to one injured while attempting to pass under it in a vehicle of unusual height, as, in this case, a circus wagon.<sup>6</sup> Where

<sup>1</sup> 2 Dillon on Municipal Corporations, sec. 579; *Brabham v. Hinds Co.*, 54 Miss. 363; 28 Am. Rep. 353; *Wood v. Tipton Co.*, 7 Baxt. 112; 32 Am. Rep. 561; *White v. Chowan*, 90 N. C. 437; 47 Am. Rep. 534. A township has power to contract for the building of a bridge, and may do so conjointly with the county: *Uhl v. Douglass*, 27 Kan. 80.

<sup>2</sup> *Jacksonville v. Drew*, 19 Fla. 106; 45 Am. Rep. 5.

<sup>3</sup> *Wilson v. Granby*, 47 Conn. 59; 36 Am. Rep. 51.

<sup>4</sup> *McCormick v. Washington*, 112 Pa. St. 185.

<sup>5</sup> *Carpenter v. Cohoes*, 81 N. Y. 21; 37 Am. Rep. 468.

<sup>6</sup> *Sewall v. Cohoes*, 75 N. Y. 45; 31 Am. Rep. 418.

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a town, or its officers, ratify and adopt a bridge built without its authority, or take possession of it as a public bridge and as part of its highway, or by other acts clearly indicate such intent, and that it is to be so regarded by the public, the town is estopped from denying that such is its true character, or from affirming that it had no lawful right to adopt or maintain it.<sup>1</sup> Where a draw over a bridge is managed and controlled by a town and village so negligently that an injury results therefrom to one navigating the river, a right of action accrues against town and village jointly and severally.<sup>2</sup> A city is not bound to construct and manage draw-bridges so as to render accidents impossible, but only to use reasonable care in the adoption of safeguards.<sup>3</sup> A municipal corporation maintaining a swing-bridge in one of its streets, keeping the same safe for persons using ordinary care, is not bound to erect barriers or station-watchmen for the protection of young children playing about the same without the knowledge of their parents.<sup>4</sup> A city bound by statute to maintain a draw-bridge as part of a public highway is not liable to the owner of a vessel for detention caused by the draw being narrower than the law prescribes, nor for the action of the superintendent of the bridge, resulting in delaying the vessel, in the absence of an express statutory liability.<sup>5</sup>

ILLUSTRATIONS. — A draw in a bridge in a city, being out of order, swung round and damaged a vessel about passing through. *Held*, that the city was liable: *Etheridge v. Philadelphia*, 26 Fed. Rep. 43. A slab bridge, raised two feet above a pond, and commonly used for travel, was out of repair. Plaintiff knew that it was defective, and drove carefully over it; but his horse put his foot through a hole and was injured. *Held*, that the bridge was such as the county was bound to keep in repair, and that plaintiff was not in fault in attempting to use it as he did: *Madison*

<sup>1</sup> Houfe v. Fulton, 34 Wis. 608; 17 Am. Rep. 463.

<sup>2</sup> Weisenberg v. Winneconne, 56 Wis. 667.

<sup>3</sup> Chicago v. Gavin, 1 Ill. App. 302.

<sup>4</sup> Gavin v. Chicago, 97 Ill. 66; 37 Am. Rep. 99.

<sup>5</sup> French v. Boston, 129 Mass. 592; 37 Am. Rep. 393.



*County Comm'rs v. Brown*, 89 Ind. 48. A city was authorized by statute not constitutionally passed to take possession of, widen, and construct the draws in certain bridges, and under such statute took possession of a bridge, and constructed the same in so negligent a manner that it broke and fell down. *Held*, that the corporation was not liable for an injury caused by the fall of the bridge to one then crossing it: *Cunliff v. Mayor etc. of Albany*, 2 N. Y. 165. A statute made it the duty of county commissioners to keep the county bridges in repair, and authorized them to make necessary appropriations from the county treasurer therefor. The commissioners negligently suffered a county bridge to remain out of repair, whereby the plaintiff was injured in person and property. *Held*, that an action therefor would lie against the board, although not expressly authorized by statute: *House v. Comm'rs of Montgomery County*, 60 Ind. 580; 28 Am. Rep. 657. In consideration of permission to cut a public highway with their canal, the duty of bridging the canal and keeping the bridge in repair was by law devolved upon the canal company. The duty of keeping public bridges in repair was by law primarily devolved on the county commissioners. The plaintiff was injured by a defect in the bridge. *Held*, that the county commissioners were liable to him therefor: *Eyler v. Comm'rs of Alleghany County*, 49 Md. 257; 33 Am. Rep. 249.

§ 4005. What is a "Bridge." — "The term 'bridge,'" says Mr. Angell,<sup>1</sup> "is a comprehensive one, and embraces every structure in the nature of a bridge, whether over a large stream or a mere culvert or sluice-way." The term "bridge" has been held to include the abutments<sup>2</sup> of the bridge, and that embankment of earth or other materials necessary to connect the abutments of the bridge with the level highway,<sup>3</sup> commonly called the "approach."<sup>4</sup>

§ 4006. Municipal Corporations not Liable for Judicial or Discretionary Act. — A municipal corporation is not civilly liable for injuries to others caused by its acts, when such acts are judicial or discretionary in their

<sup>1</sup> Angell on Highways, sec. 35.

<sup>2</sup> *Bardwell v. Jamaica*, 13 Vt. 438.

<sup>3</sup> *Freeholders v. Strader*, 18 N. J. L.

108, 112; *Daniels v. Athens*, 55 Ga.

609; *Albee v. Floyd County*, 46 Iowa,

177; *Moreland v. Mitchell County*, 40

Iowa, 394.

<sup>4</sup> 2 Thompson on Negligence, 792.

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Lloyd County, 46 Iowa,  
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on Negligence, 792.

nature.<sup>1</sup> On this principle it is held that a city is not liable for damages resulting from its failing to maintain a suitable fire department;<sup>2</sup> nor for failing to provide a sufficient supply of water to extinguish fires;<sup>3</sup> nor for the destruction of private property to prevent the spread of a fire;<sup>4</sup> nor for the loss of property destroyed by mobs;<sup>5</sup> nor for injuries by disorderly persons on its highways;<sup>6</sup> nor for failing to pass certain police ordinances, — such as an ordinance prohibiting swine from running at large;<sup>7</sup> nor for failing to execute such an ordinance;<sup>8</sup> nor for failing to execute an ordinance requiring it to plat and establish the grade of a city;<sup>9</sup> nor for failing to maintain a given number of officers in a particular department of its government;<sup>10</sup> nor for licensing an auctioneer without taking the bond required by law;<sup>11</sup> nor for the negligence of a physician for the poor, unless it is shown to have been negligent in his selection;<sup>12</sup> nor for an injury by fire-works discharged by citizens, in violation of an ordinance, although the council and officers and a majority of the citizens actively participated, and the town officers made no attempt to stop the discharge;<sup>13</sup> nor for injuries arising from the neglect and violation by private citizens of ordinances.<sup>14</sup> One who has served out in prison a fine imposed for the violation of an unconstitutional municipal ordinance has no right of action against the city for

<sup>1</sup> *Bennett v. New Orleans*, 14 La. Ann. 120; *O'Connor v. Pittsburg*, 18 Pa. St. 187; *Wilson v. New York*, 1 Denio, 595; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Lloyd v. Mayor*, 5 N. Y. 369; 55 Am. Dec. 347.

<sup>2</sup> *Wheeler v. Cincinnati*, 19 Ohio St. 20; 2 Am. Rep. 368.

<sup>3</sup> *Tainter v. Worcester*, 123 Mass. 311; 25 Am. Rep. 90; *Van Horn v. Des Moines*, 63 Iowa, 447; 50 Am. Rep. 750; *Black v. Columbia*, 19 S. C. 412; 45 Am. Rep. 785.

<sup>4</sup> *White v. Charleston*, 2 Hill (S. C.), 571.

<sup>5</sup> *Western College v. Cleveland*, 12 Ohio St. 375.

<sup>6</sup> *Campbell v. Montgomery*, 53 Ala. 527; 25 Am. Rep. 656.

<sup>7</sup> *Kelly v. Milwaukee*, 18 Wis. 83.

<sup>8</sup> *Levy v. New York*, 1 Sand. 465.

<sup>9</sup> *Schattner v. Kansas City*, 53 Mo. 162.

<sup>10</sup> *Griffin v. New York*, 9 N. Y. 456.

<sup>11</sup> *Fowle v. Alexandria*, 3 Pet. 398.

<sup>12</sup> *Summers v. Comm'rs*, 103 Ind. 262; 53 Am. Rep. 512.

<sup>13</sup> *Ball v. Woodbine*, 61 Iowa, 83; 47 Am. Rep. 805.

<sup>14</sup> *Levy v. Mayor etc. of New York*, 1 Sand. 465.

false imprisonment.<sup>1</sup> And thus a municipal corporation is not liable for damages caused by the defective planning of a public work,<sup>2</sup> though it is for its defective execution.<sup>3</sup> A city is not bound to keep all of its streets in good repair under all circumstances, but only such streets and parts of streets as are necessary for the convenience of the traveling public; and as streets are required for use, they must be placed in a reasonably safe condition. The city must be permitted to exercise its discretion as to whether the public interests require the improvement of the streets in the uninhabited or sparsely settled portions of it, and its decision is final. Hence it is not liable for injuries to a carriage and horses resulting from a failure to improve a street which was not needed for the use or convenience of the public.<sup>4</sup> But where a municipal corporation has resolved to condemn land for public use, and culpably or unreasonably delays the prosecution of the work, or abandons it to the damage of the landowner, he is entitled to indemnity, whether the delay occurred before or after the completion of the assessment of damages and benefits; but if he acquiesce in the delay, and fails to require the city to go on with the work, or repeal the ordinance, he is remediless.<sup>5</sup>

ILLUSTRATIONS.—A traveler on a city street was injured by persons coasting on the street. The coasting was carried on by a large crowd, in presence of the mayor, marshal, and police-officers. There was an ordinance prohibiting on the streets all sports tending to produce bodily injury. Held, that no action would lie against the city: *Faulkner v. Aurora*, 85 Ind. 130; 44 Am. Rep. 1. One of the powers conferred on the common council of a city was "to make, establish, and regulate public

<sup>1</sup> *Trescott v. Waterloo*, 26 Fed. Rep. 592.

<sup>2</sup> *Child v. Boston*, 4 Allen, 41; 81 Am. Dec. 680; *Darling v. Bangor*, 68 Me. 112; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *Marquette v. Cleary*, 37 Mich. 296; *Lansing v. Toolan*, 37 Mich. 152; *Detroit*

*v. Beckman*, 34 Mich. 125; 22 Am. Rep. 507.

<sup>3</sup> *Child v. Boston*, 4 Allen, 41; 81 Am. Dec. 680; *Comm'rs v. Wood*, 10 Pa. St. 93; 49 Am. Dec. 582.

<sup>4</sup> *City of Henderson v. Sandefur*, 11 Bush, 550.

<sup>5</sup> *Black v. Baltimore*, 50 Md. 235; 33 Am. Rep. 320.

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 Anderson v. Sandefur, 11  
 Baltimore, 50 Md. 235;  
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wells, cisterns, reservoirs, and pumps," and to organize and regulate a fire department. *Held*, that the city was not responsible for a loss by fire occasioned by the remoteness of the lost house from a proper supply of water: *Brinkmeyer v. Evansville*, 29 Ind. 187. Defendant's charter authorized its officers to blow up any building on fire, or any other building which it might deem hazardous, and gave the owners a right to damages therefor. The officers, to arrest a fire, blew up a building, and by reason of the explosion the plaintiff's building, on the opposite side of the street, was shattered. *Held*, that he had no cause of action, although the injury was the natural and probable result of the explosion: *People v. Buffalo*, 76 N. Y. 558; 32 Am. Rep. 337. A municipal corporation resolved upon a public improvement, and appointed commissioners to condemn property. The commissioners notified the plaintiff that his property was required, and that he must prepare to vacate it as soon as possible. He thereupon commenced closing out his business, and thus did only about half his ordinary business for six months, and none at all for a year after that. The improvement was then abandoned. No compensation was ever paid or tendered him. *Held*, that he could not maintain an action of damages against the corporation for such voluntary and unnecessary acquiescence in a notification not within the powers of the commissioners: *Mayor v. Musgrave*, 48 Md. 272; 30 Am. Rep. 458. By an act of the legislature, a city was empowered to make a sufficient number of reservoirs "to supply water in case of fire." Under this act a reservoir was constructed, but was afterwards partially destroyed by the city, so that when a fire occurred on plaintiff's premises, near by, there was no water in the reservoir to extinguish it. In an action against the city for damages, *held*, that plaintiff could not recover, on the ground that it was discretionary with the city to construct or maintain the reservoir: *Grant v. City of Erie*, 69 Pa. St. 420; 8 Am. Rep. 272. A city had, by ordinance, defined fire limits, within which the erection of wooden buildings was prohibited. While the ordinance was in force, the city council authorized F. to erect a wooden building in said limits, which, taking fire, caused the destruction of plaintiff's building. *Held*, that no action could be maintained against the city: *Forsyth v. Mayor etc. of Atlanta*, 45 Ga. 152; 12 Am. Rep. 576. A house in a city was destroyed by fire set by sparks from an engine which was, by an ordinance, a nuisance subject to abatement, but which the city had neglected to abate. *Held*, that the owner of the house could not maintain an action against the city: *Davis v. Montgomery*, 51 Ala. 139; 23 Am. Rep. 545. A municipal corporation, having power under its charter to make ordinances for the safety

of property in the city, suspended for a short time the operation of an ordinance forbidding the use of fire-works within the city. During such time, plaintiff's building was set on fire and destroyed by fire-works negligently used by boys. *Held*, that the corporation was not liable for such destruction: *Hill v. Charlotte*, 72 N. C. 55; 21 Am. Rep. 451. A, in driving through defendant's streets, ran off the end of a culvert, and was killed. In an action for damages, on the ground that defendant was negligent in building a culvert so short as to render the street dangerous, *held*, that the defendant was not liable, as the defect was in the plan of the culvert: *Detroit v. Tackman*, 34 Mich. 125; 22 Am. Rep. 507. A city accepted a statute authorizing it to make and maintain reservoirs and public hydrants "in such place as it may deem proper," and erected works by virtue thereof. The owner of a building having failed to pay his water-rates for water supplied to the building from such works, the city cut off the water from the building, and also from a hydrant in the neighboring street, although the water might have been cut off from the building alone. The building was destroyed by a fire, which might have been extinguished if there had been water in the hydrant. *Held*, that the owner could not recover from the city for the loss: *Tainter v. Worcester*, 123 Mass. 311; 25 Am. Rep. 90. A city was authorized by its charter to make by-laws relative to the public streets and nuisances therein, and made a by-law making an encumbrance or obstruction to travel in or over a street a nuisance. Plaintiff's intestate was killed by the falling of a sign carelessly suspended over a street. *Held*, that the city was not liable: *Hewison v. City of New Haven*, 37 Conn. 475; 9 Am. Rep. 342. An action was brought against a city to recover damages for injuries to the plaintiff's business and property, resulting from the construction by it of a tunnel under a navigable river along the line of a street, at a point where the plaintiff's warehouse and dock were located. *Held*, that the city, having been properly authorized by statute to construct the tunnel, and having proceeded with due care and skill, was not liable for consequential damages caused to persons specially injured, nor for a temporary obstruction to the access to the plaintiff's lot, caused by the erection of a cofferdam in the river, the same having been necessary to enable it to construct the tunnel, and having been maintained no longer than was necessary: *Northern Transp. Co. v. Chicago*, 99 U. S. 635. A city, to improve its sanitary condition, collected and deposited in one place all the carcasses, garbage, etc., and buried them there. *Held*, that it was not liable to an individual for sickness produced thereby: *Fort Worth v. Crawford*, 64 Tex. 202; 53 Am. Rep. 753. The brick walls of a burned

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building standing on private property on the line of a city street, and so unstable as to be dangerous to passers on the sidewalk, were blown upon and crushed a house on an adjoining lot, and killed a child visiting in the house at the time. The walls had been standing in that condition for several months. The mother of the child sued the city for damages: *Held*, not maintainable: *Kiley v. Kansas*, 87 Mo. 103; 56 Am. Rep. 443.

§ 4007. **When Liable for Negligence.**—But as to those duties which are devolved upon a corporation by law or by its charter, it is responsible for all damages which result either from its neglect to perform those duties, or from its performing them in a negligent manner.<sup>1</sup> "Stated in another way," says Judge Thompson,<sup>2</sup> "it is optional with such a corporation whether or not it will exercise its power to open, improve, or grade a certain street, highway, or sidewalk;<sup>3</sup> or dig a certain sewer;<sup>4</sup> or build a certain bridge, or construct a certain culvert;<sup>5</sup> or plant certain shade-trees;<sup>6</sup> or light a certain street or bridge;<sup>7</sup> or erect a certain public building, or certain water-works,<sup>8</sup> or a certain wharf, for the purpose of increasing its revenue by collecting tolls from vessels; or for failing to clear its harbor of obstructions.<sup>9</sup> And it is not liable to a private action for the non-exercise of such powers, however much private interests may suffer from

<sup>1</sup> *Stackhouse v. Lafayette*, 26 Ind. 17; 89 Am. Dec. 450; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Mills v. Brooklyn*, 32 N. Y. 489; *Cole v. Medina*, 27 Barb. 218; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Hutson v. New York*, 9 N. Y. 163; *Leavenworth v. Casey*, McCahon (Kan.), 124; *Child v. Boston*, 4 Allen, 41; 81 Am. Dec. 680; *Perry v. Worcester*, 6 Gray, 544; *Sprague v. Worcester*, 13 Gray, 193; *Emery v. Lowell*, 104 Mass. 13; *New York v. Furze*, 3 Hill, 612; *Lacour v. New York*, 3 Duer, 406; *Wilson v. Mayor*, 1 Denio, 595; 43 Am. Dec. 719; *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Anthony v. Adams*, 1 Met. 285; *Kobs v. Minne-*

*apolis*, 22 Minn. 159; *Simmer v. St. Paul*, 23 Minn. 408; *Jones v. New Haven*, 34 Conn. 1; *St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753; *City of Logansport v. Dick*, 70 Ind. 65; 36 Am. Rep. 166.

<sup>2</sup> 2 Thompson on Negligence, 732.

<sup>3</sup> *Hughes v. Baltimore*, Taney, 243.

<sup>4</sup> *Mills v. Brooklyn*, 32 N. Y. 489.

<sup>5</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316.

<sup>6</sup> See *Jones v. New Haven*, 34 Conn. 1.  
<sup>7</sup> *Freeport v. Isbell*, 83 Ill. 440; 25 Am. Rep. 409.

<sup>8</sup> *Bailey v. New York*, 3 Hill, 531; 38 Am. Dec. 669; 2 Denio, 433.

<sup>9</sup> *Goodrich v. Chicago*, 20 Ill. 445.

it.<sup>1</sup> But if it undertakes to open, improve, or grade the highway, street, or sidewalk,<sup>2</sup> dig the sewer<sup>3</sup> or drain,<sup>4</sup> build the bridge,<sup>5</sup> construct the culvert,<sup>6</sup> open the park, plant the shade-trees,<sup>7</sup> light the street or bridge,<sup>8</sup> erect the public building,<sup>9</sup> or water-works,<sup>10</sup> or wharf,<sup>11</sup> or pier,<sup>12</sup> or dock,<sup>13</sup> and its officers or agents do the work negligently or unskillfully, or negligently suffer it to get out of repair, and in consequence of such negligence or unskillfulness, and not in consequence of the mere fact that the work is done, damage accrues to a private person, he may maintain an action against the city therefor." A town carrying on a farm for the support of its poor is liable for an injury inflicted on a citizen by a ram owned by the town, and kept on the farm for the propagation of sheep, but negligently suffered to run at large.<sup>14</sup>

ILLUSTRATIONS. — An infant fell into a water-tank constructed by a city, and was drowned. In an action for damages against the city, *held*, that it was not sufficient for the city to show that the tank was secure for such persons as ordinarily make use of the streets of a city: *City of Chicago v. Major*, 18 Ill. 349. A city had by charter the exclusive control of its sewers. It assented to the construction of an underground railroad under one of its streets, reserving the right to supervise and control the necessary removal of any sewer. Through the railroad contractor's negligence in reconstructing a sewer which had been removed, a house was damaged. *Held*, that the city was liable, it being its duty to see that the work was carefully done: *Fink v. St. Louis*, 71 Mo. 52. A city ordinance directed the repairing of a street. M. contracted to do the work, and employed C. to superintend it. The street being made impassable, C. caused a rope to be stretched across it, and directed a lamp to be suspended from the rope. The lamp was suspended, but

<sup>1</sup> *Graff v. Baltimore*, 10 Md. 544.

<sup>2</sup> *Leavenworth v. Casey*, McCahon (Kan.), 124.

<sup>3</sup> *New York v. Furze*, 3 Hill, 612.

<sup>4</sup> *Kobs v. Minneapolis*, 22 Minn. 159.

<sup>5</sup> *Perry v. Worcester*, 6 Gray, 544.

<sup>6</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316.

<sup>7</sup> *Jones v. New Haven*, 34 Conn. 1.

<sup>8</sup> *Freeport v. Isbell*, 83 Ill. 440; 25 Am. Rep. 407.

<sup>9</sup> *Chicago v. O'Brennan*, 65 Ill. 160.

<sup>10</sup> *Wilson v. New Bedford*, 108 Mass. 261; 11 Am. Rep. 352.

<sup>11</sup> *Pittsburg v. Grier*, 22 Pa. St. 54.

<sup>12</sup> *Garrison v. New York*, 5 Bosw. 497.

<sup>13</sup> *Kennedy v. New York*, 73 N. Y. 365.

<sup>14</sup> *Moulton v. Scarborough*, 71 Me. 267; 36 Am. Rep. 308.

was broken and extinguished by boys. The person in charge took it to his home in the vicinity to repair it, but did not replace it that night. During his absence, the plaintiff, in attempting to pass up the street, driving his hack, came in contact with the rope, of which he had no warning, and received injuries. No officer of the city had notice of the rope being stretched across the street, and C. had no orders on the subject from any one. *Held*, that the city was liable: *Baltimore v. O'Donnell*, 53 Md. 110; 36 Am. Rep. 395.

**§ 4008. Neglect to Perform Public Duty—When not Liable.**—A municipal corporation is not liable for damages consequent on its neglect to perform a public or governmental duty.<sup>1</sup> Upon this principle, a town has been held not responsible for an injury sustained on account of the non-repair of the town-house;<sup>2</sup> for an injury to a child in consequence of a dangerous excavation in a school-house yard;<sup>3</sup> and in consequence of a defect in the construction of the school-house itself,<sup>4</sup> as, for example, a defect in the heating apparatus;<sup>5</sup> nor a county for the negligence of its employees in the construction of a court-house,<sup>6</sup> or the sidewalk appurtenant thereto.<sup>7</sup> It is not liable for injuries caused by a market-house being blown down by a cyclone;<sup>8</sup> nor for property injured by a mob;<sup>9</sup> nor, at the suit of a private party, for not obeying the provisions of its charter.<sup>10</sup> A municipal corporation is not bound to provide hitching-posts, and where it does so, is bound only to ordinary care in the selection and setting of them. Where a horse became frightened and ran

<sup>1</sup> *Sussex County v. Strader*, 18 N. J. L. 108; *Cooley v. Essex*, 27 N. J. L. 415; *Livermore v. Camden*, 31 N. J. L. 507; 29 N. J. L. 245; *Pray v. Jersey City*, 32 N. J. L. 394; *Union v. Durkes*, 38 N. J. L. 21; *Richmond v. Long*, 17 Cratt. 375.

<sup>2</sup> *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Hamilton County v. Mighels*, 7 Ohio St. 109.

<sup>3</sup> *Bigelow v. Randolph*, 14 Gray, 543.

<sup>4</sup> *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332.

<sup>5</sup> *Wixon v. Newport*, 13 R. I. 454; 43 Am. Rep. 35.

<sup>6</sup> *Hollenbeck v. Winnebago Co.*, 95 Ill. 148; 35 Am. Rep. 151; *Kincaid v. Hardin*, 53 Iowa, 430; 36 Am. Rep. 236.

<sup>7</sup> *Dosdall v. Olmstead*, 30 Minn. 96; 44 Am. Rep. 185.

<sup>8</sup> *Flori v. St. Louis*, 69 Mo. 341; 33 Am. Rep. 505.

<sup>9</sup> *Prather v. Lexington*, 13 B. Mon. 559; 56 Am. Dec. 585.

<sup>10</sup> *Schattner v. City of Kansas*, 53 Mo. 162.



away, and frightened a team fastened to a hitching-post provided by a city, causing them to break the post and run away, and they ran over and injured a person in the street, it was held that the city was not liable in damages to him, the injury being too remote.<sup>1</sup>

§ 4009. **When Liable.**— But, in other cases, a city has been held liable for an injury sustained by the plaintiff falling into a dangerous excavation on the grounds of a city building used in part for municipal purposes, and in part rented to private persons;<sup>2</sup> for the sinking of a vessel in consequence of the city negligently permitting an iron cylinder to remain concealed under water upon one of its wharves;<sup>3</sup> for the loss of a horse, arising from the non-repair of a wharf for the use of which it receives tolls;<sup>4</sup> for the negligence of persons employed by the officers of the corporation in the repair of its public sewers;<sup>5</sup> and for injuries from the breaking away of a dam connected with its water-works.<sup>6</sup> Proof of the omission of a city to avail itself of a power to light its streets is incompetent in an action brought by a person for an injury received by falling into an excavation in the street in the nighttime. It seems, however, that if a city assumes to light a street, and does it so negligently that a person is injured in consequence by falling into an excavation in the nighttime, the negligence may be shown.<sup>7</sup> The corporation is not liable for the repair of a bridge established without authority.<sup>8</sup> In the absence of statutory authority, a city may not erect a dam on a person's land without his consent, to abate a nuisance on other land; and such action being unauthorized, the city is not liable for injury caused

<sup>1</sup> *City of Rockford v. Tripp*, 83 Ill. 247; 25 Am. Rep. 381.

<sup>2</sup> *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485.

<sup>3</sup> *Memphis v. Kimbrough*, 12 Heisk. 133.

<sup>4</sup> *Macauley v. New York*, 67 N. Y. 602.

<sup>5</sup> *Lloyd v. New York*, 5 N. Y. 369;

55 Am. Dec. 347; *Wilson v. Wheeling*, 19 W. Va. 323; 42 Am. Rep. 780.

<sup>6</sup> *Bailey v. New York*, 3 Hill, 531; 2 Denio, 433.

<sup>7</sup> *City of Freeport v. Isbell*, 83 Ill. Ill. 440; 25 Am. Rep. 407.

<sup>8</sup> *Com. v. Charlestown*, 1 Pick. 180; 11 Am. Dec. 161.

a hitching-post  
 at the post and  
 a person in the  
 liable in damages

cases, a city has  
 been held liable by the plaintiff  
 for the grounds of a  
 for public purposes, and in  
 the sinking of a ves-  
 sel, thereby permitting an  
 excess of water upon one  
 side, arising from the  
 fact that it receives tolls;<sup>1</sup>  
 and by the officers of  
 the public sewers;<sup>2</sup> and  
 for a dam connected  
 with the commission of a city to  
 the streets is incompetent  
 to prevent an injury received  
 on a street in the night-  
 time. The city assumes to light  
 the street, and if a person is injured  
 by a fall in the night-  
 time. The corporation is  
 established without  
 any authority, a city  
 and without his con-  
 sent; and such action  
 is liable for injury caused

Dec. 347; *Wilson v. Wheel-*  
*V. Va.* 323; 42 Am. Rep.  
*v. New York*, 3 Hill, 531; 2  
 3.  
*Freeport v. Isbell*, 83 Ill.  
 25 Am. Rep. 407.  
*v. Charlestown*, 1 Pick. 180;  
 etc. 161.

thereby.<sup>1</sup> A direction to an officer to remove obstructions  
 in a certain alley does not make the city liable for the  
 removal of property outside the limits of the alley, though  
 the officer believed it to be inside of those limits.<sup>2</sup> Where  
 a collector of taxes arrests a tax-payer for overpayment of  
 a tax which had already been once paid, and is thereupon  
 paid a second time, to procure a release from the arrest,  
 the town is not liable for the arrest, nor for the money  
 while in the hands of the collector.<sup>3</sup> A city is not liable  
 for the negligence of the superintendent of public grounds  
 while cutting down a tree not on the public grounds, but  
 in a street, and belonging to an abutter, the negligence  
 causing the injury of a workman.<sup>4</sup> Where highway com-  
 missioners of a city made excavations on a private way  
 without the direction of the city council, it was held, in an  
 action against the city by the owner of the way, that the  
 acts of the commissioners were *ultra vires*, and that the  
 city was not liable, and that the case was not affected by  
 the fact that the work had been paid for in the routine of  
 business, the act of the financial officers of the city in  
 making such payment being *ultra vires*.<sup>5</sup>

#### § 4010. Acts Ultra Vires — Corporation not Liable. —

Where the act which produces the injury is outside of the  
 powers conferred on the corporation, the latter cannot be  
 held in damages.<sup>6</sup> A municipal corporation is liable in  
 damages for a lawful and authorized act of its agents done  
 in an unauthorized manner, but not for an unlawful or  
 prohibited act.<sup>7</sup>

<sup>1</sup> *Cavanagh v. Boston*, 139 Mass. 426; 52 Am. Rep. 716.

<sup>2</sup> *Hanvey v. Rochester*, 35 Barb. 177.

<sup>3</sup> *Liberty v. Hurd*, 74 Me. 101.

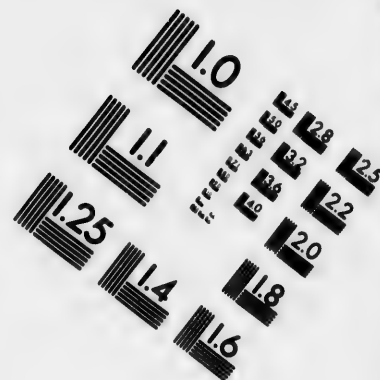
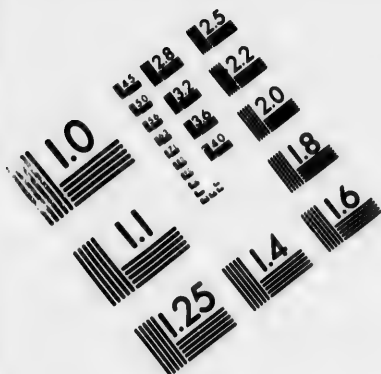
<sup>4</sup> *McCarthy v. Boston*, 135 Mass. 197.

<sup>5</sup> *Pierce v. Tripp*, 13 R. I. 181.

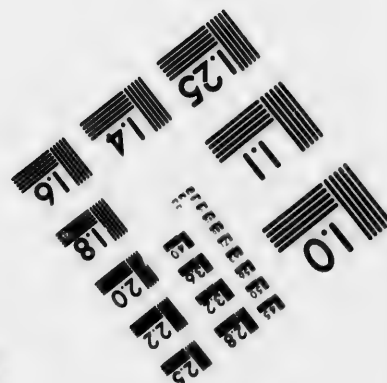
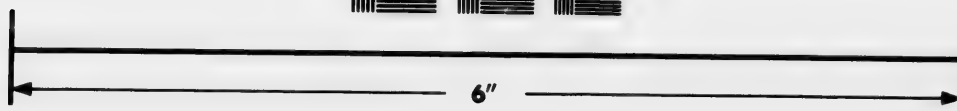
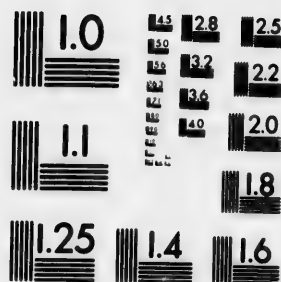
<sup>6</sup> *Schumacher v. St. Louis*, 3 Mo. App. 298; *Anthony v. Adams*, 1 Met. 284, 286; *Albany v. Cunliff*, 2 N. Y. 165; reversing 2 Barb. 190. See

*Stetson v. Kempton*, 13 Mass. 272; 7 Am. Dec. 145; *Norton v. Mansfield*, 16 Mass. 48; *Parsons v. Goshen*, 11 Pick. 396.

<sup>7</sup> *Hunt v. Boonville*, 65 Mo. 620; 27 Am. Rep. 299. But in an Illinois case it was held that a city constructing a road in a different manner from that authorized by law is nevertheless liable for an injury occasioned by a defect in the road as constructed: *Pekin v. Newell*, 26 Ill. 320; 79 Am. Dec. 378.



# IMAGE EVALUATION TEST TARGET (MT-3)



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ILLUSTRATIONS.—In the celebration of a public event, the council of a city directed the fire department to assemble at the city hall at a certain hour. One of the hose-carts on the way there was negligently driven and injured a pedestrian. *Held*, that the calling out of the hose-cart for such a purpose was *ultra vires*, and the city was not liable: *Smith v. Rochester*, 76 N. Y. 506. The selectmen of a town, without a corporate vote, erected an embankment some distance from the highway, for the purpose of turning all the waters of a stream into one channel, to obviate the necessity of building more than one bridge. *Held*, that the town was not liable in damages to a land-owner whose land was flooded thereby: *Anthony v. Adams*, 1 Met. 284. The officers and agents of a corporation assumed to build a bridge under authority of a statute not constitutionally passed for want of a two-thirds vote, and, in consequence of its negligent construction, the bridge fell. *Held*, that the corporation was not liable to a person thereby sustaining injury: *Albany v. Cuntiff*, 2 N. Y. 165. The street commissioner of a city, under direction of the mayor, took earth from the plaintiff's premises and used it in the construction of a street. There was no authority in the charter or elsewhere to warrant such a proceeding. *Held*, that the city was not liable for the trespass: *Rowland v. Gallatin*, 75 Mo. 134; 42 Am. Rep. 395.

§ 4011. **Liable for Maintaining or Permitting Nuisance.**—An action may be maintained against a municipal corporation for injuries occasioned by a nuisance created or maintained by it in any case in which, under like circumstances, an action could be maintained against an individual.<sup>1</sup> So it is responsible for permitting nei-

<sup>1</sup> *Harper v. Milwaukee*, 30 Wis. 365, 372; *Brower v. New York*, 3 Barb. 254; *Lawrence v. Fairhaven*, 5 Gray, 110; *O'Brien v. St. Paul*, 18 Minn. 170; *Kobs v. Minneapolis*, 22 Minn. 159; *Bradt v. Albany*, 5 Hun, 591; *People v. Albany*, 11 Wend. 543; 27 Am. Dec. 95; *Philadelphia v. Collins*, 63 Pa. St. 106; *Brownlow v. Metropolitan Board*, 16 Com. B., N. S., 546; 13 Com. B., N. S., 768; *Brower v. New York*, 3 Barb. 254; *Stone v. Augusta*, 46 Me. 127; *Gilman v. Laconia*, 55 N. H. 130, 131; 20 Am. Rep. 175. In *City of Fort Worth v. Crawford*, 64 Tex. 202, 53 Am. Rep. 753, it was held that where a city, for health purposes, had deposited in one place all the

garbage and carcasses collected it was not liable to an individual for sickness caused thereby. The court said: "In reference to the liability of municipal corporations for creating or failing to remove a nuisance, this distinction is to be observed: If the nuisance grows out of acts done exclusively in the interests of the public, such as the improvement of the sanitary condition of the city, then it would only be liable for a careless or negligent execution of the duty. But if the acts out of which the nuisance originated or is continued were done for the private advantage or emolument of the municipal corporation, then, irrespective of the question of negligence, it would be

public event, the assembly at the arts on the way pedestrian. *Held*, a purpose was *v. Rochester*, 76 a corporate vote, the highway, for m into one chan- than one bridge. s to a land-owner *Adams*, 1 Met. 284. sumed to build a institutionally passed uence of its negli- at the corporation injury: *Albany v.* er of a city, under plaintiff's premises There was no au- such a proceeding. *espas: Rowland v.*

**Permitting Nui-**  
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sances by others upon property over which it has control.<sup>1</sup> A town is liable in damages for maintaining a market-house which is a nuisance.<sup>2</sup> A structure, such as the cornice of a building, projecting over a street in a city in such a manner as to be dangerous to passers-by is a nuisance which the corporate authorities may abate, and if they fail to do so after notice of its dangerous character, the city will be liable to any one injured thereby.<sup>3</sup> But it is not liable for bringing an existing nuisance within a street by widening the street.<sup>4</sup> It is not liable for damages resulting from a horse becoming frightened at an instrument run by steam, to repair a street, and without negligence.<sup>5</sup> An action cannot be maintained against the authorities of a town upon an allegation that a regularly licensed liquor seller was permitted to keep a saloon near the plaintiff's house in such a manner as to constitute it a nuisance.<sup>6</sup>

**ILLUSTRATIONS.**—A ruinous wall on private property in a city, dangerously near a public street, fell and killed a child in a building one foot outside the limits of the street. The city

liable for the injuries resulting therefrom: *Bailey v. New York*, 3 Hill, 531; *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485; *Pittsburgh v. Grier*, 22 Pa. St. 54; *Eastman v. Meredith*, 36 N. H. 296; 72 Am. Dec. 302; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 687. From the record it appears that the city authorities established this as a place for the deposit and burial of the bodies of dead animals, garbage, excrement, etc., for the purpose of improving and maintaining the sanitary condition of the city. This was done for and in the interest of the public, and not for the private advantage or emolument of the municipal corporation. And it also appears that in establishing this deposit or burial-ground the city council, by appropriate ordinances, provided that all deposits should be buried in ditches from four to six feet deep, and made it a misdemeanor punishable by fine for any person to violate these ordinances. And some diligence upon the part of

the city authorities in the enforcement of these ordinances is shown by the evidence."

<sup>1</sup> *Lawrence v. Fairhaven*, 5 Gray, 110; *Aurora v. Reed*, 57 Ill. 29; 11 Am. Rep. 1; *Damour v. Lyons*, 44 Iowa, 276; *Van Pelt v. Davenport*, 42 Iowa, 308, 311; 20 Am. Rep. 622; *Stack v. East St. Louis*, 85 Ill. 377; 28 Am. Rep. 619; *Tallahassee v. Fortune*, 3 Fla. 19; 52 Am. Dec. 358; *Wendel v. Troy*, 4 Keyes, 261; *Baltimore v. Marriott*, 9 Md. 160. *Contra*, *Stackhouse v. Lafayette*, 26 Ind. 17; 89 Am. Dec. 450. *Compare Weeks v. Milwaukee*, 10 Wis. 242; *Smith v. Milwaukee*, 18 Wis. 63.

<sup>2</sup> *Suffolk v. Parker*, 79 Va. 660; 52 Am. Rep. 640.

<sup>3</sup> *Grove v. Fort Wayne*, 45 Ind. 429; 15 Am. Rep. 262.

<sup>4</sup> *McCutcheon v. Homer*, 43 Mich. 483; 38 Am. Rep. 212.

<sup>5</sup> *Sparr v. St. Louis*, 4 Mo. App. 572.

<sup>6</sup> *McCrowell v. Bristol*, 5 Lea, 685.

authorities knew of the condition of the wall, were authorized by the charter to declare and abate nuisances, and there was a city ordinance declaring dangerous buildings and structures nuisances. *Held*, that the city was liable in damages for the death: *Kiley v. Kansas*, 69 Mo. 102; 33 Am. Rep. 491. A city caused open paved gutters to be constructed on the sides of a street, and similar ones to be constructed on other streets leading into it. At the end of the gutters on the principal street were underground drains leading into a culvert, through which flowed a natural watercourse. In consequence of this construction, quantities of sand and filth were carried into the watercourse, causing it to overflow upon plaintiff's land below the culvert, and obstructing the passage of water from a drain which ran from plaintiff's house to the watercourse. *Held*, that if the city had diverted the water from its natural course, and had accumulated it in such quantities as to create a private nuisance to plaintiff, he could maintain tort against the city for the injury: *Manning v. Lowell*, 130 Mass. 21. Plaintiff was gored by a cow running at large in a city street. The city council had passed an ordinance forbidding cattle running at large in the streets, but subsequently suspended it, and the injury occurred during the suspension. *Held*, that there was no cause of action against the city: *Rivers v. Augusta*, 65 Ga. 376; 38 Am. Rep. 787. A city licensed an exhibition of wild animals, without specifying any place. The owner exhibited them in a public street, whereby the plaintiff's wife sustained a personal injury. *Held*, that the city was not liable: *Little v. Madison*, 49 Wis. 605; 35 Am. Rep. 793.

**§ 4012. Liable for Trespasses.**—Likewise, a municipal corporation is liable for trespasses upon the property of others.<sup>1</sup>

<sup>1</sup> *Proprietors of Locks v. Lowell*, 7 Gray, 223; *Haskell v. New Bedford*, 108 Mass. 208; *Emery v. Lowell*, 104 Mass. 13; *Conrad v. Ithaca*, 16 N. Y. 158; *Carman v. New York*, 14 Abb. Pr. 301; *Byrnes v. Cohoes*, 67 N. Y. 204; *Bungard v. Mayor*, 9 La. 119; 29 Am. Dec. 437; *Broadwell v. Kansas City*, 75 Mo. 213; 42 Am. Rep. 407; *City of Delphi v. Evans*, 36 Ind. 90; 10 Am. Rep. 12; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552. In *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552, the court say: "The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no

more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it, without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable and no more an actionable wrong than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives, and never could give, authority to appropriate the

were authorized by and there was a city and structures nui- a damages for the . Rep. 491. A city d on the sides of a n other streets lead- the principal street vert, through which nce of this construc- ried into the water- ff's land below the water from a drain watercourse. *Held*, a its natural course, as to create a private t against the city for . 21. Plaintiff was reet. The city coun- tle running at large d it, and the injury t there was no cause y, 65 Ga. 376; 38 Am. f wild animals, with- bited them in a pub- ained a personal in- *Little v. Madison*, 49

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to trespass upon it than e individual. If the cor- and people with picks and t a street through it, with- uiring the right of way, it a tort; but it is no more li- ch circumstances than it is rs upon his land a flood of ublic sewer so constructed oding must be a necessary e one is no more unjustifi- more an actionable wrong ther. Each is a trespass, instance the city exceeds urisdiction. A municipal er gives, and never could ority to appropriate the

§ 4013. **Duty of Corporation in Executing Public Works — Degree of Care Required.**— In the construction of public works the corporation must use such a degree of care and prudence as competent men in their own affairs would exercise in such a case. The cases, "in speaking of the degree of care and caution required in making these improvements, and what negligence or unskillfulness will render the corporation liable, use such language as follows: 'The city must act cautiously and skillfully in making her grades, or the charter will afford no protection.'<sup>1</sup> 'The negligent or unskillful manner of using or appropriating the property,' etc.<sup>2</sup> 'For injuries occasioned by the negligence or unskillfulness,' etc.<sup>3</sup> 'A preliminary question is, whether all reasonable precaution against possible or contingent injuries was taken, and whether the culvert was built in a manner so skillful as to shield the corporation from the charge of malfeasance in the execution of their duty. In construction of a work like this they were bound to exercise that care and prudence which a discreet and cautious man would and ought to use if the whole risk or loss were to be his alone.' The council having directed the improvement, 'the further prosecution of it is purely of a ministerial character; the agents to perform it are selected by the corporation, and they are bound to see that it is done in a safe and skillful manner.'<sup>4</sup> The words 'due care and caution' are used in *Steele v. Western Inland Lock Navigation Co.*<sup>5</sup> 'The degree of care and foresight which it is necessary to use,' etc.<sup>6</sup> Where the work is purely ministerial, the corporation is subject to the same rules which

freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other."

<sup>1</sup> *Creal v. Keokuk*, 4 G. Greene, 50.

<sup>2</sup> *Wallace v. Muscatine*, 4 G. Greene, 375.

<sup>3</sup> *Ross v. Madison*, 1 Ind. 284.

<sup>4</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 465; 53 Am. Dec. 316.

<sup>5</sup> 2 Johns. 286.

<sup>6</sup> *Bailey v. New York*, 2 Denio, 440.



govern the individual, and is 'liable for damages for the improper and negligent exercise of duty.'<sup>1</sup> 'As a general rule, a man who exercises proper care and skill may do what he will with his own property.'<sup>2</sup> 'A person may render himself liable by using his own property in such a negligent and improper manner as to cause injury to another.'"<sup>3</sup>

#### § 4014. Establishing and Changing Grade of Streets.

—Municipal corporations are not liable at common law for injuries necessarily resulting from grading their streets, or from changing the established grades, even after property owners have built with reference to them, when the work is done in a careful and skillful manner, and in the execution of a statutory power.<sup>4</sup> While acting

<sup>1</sup> *Lacour v. New York*, 3 Duer, 415.

<sup>2</sup> *Radcliff's Ex'rs v. Brooklyn*, 4 N. Y. 198, 199; 53 Am. Dec. 357.

<sup>3</sup> *Wright, J., in Cotes v. Davenport*, 9 Iowa, 235, 236.

<sup>4</sup> 2 Thompson on Negligence, 747, citing *Wilson v. New York*, 1 Denio, 595; 43 Am. Dec. 719; *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; *Pontiac v. Carter*, 32 Mich. 164; *Kavanagh v. Brooklyn*, 38 Barb. 232; *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. St. Louis*, 14 Mo. 20; 55 Am. Dec. 89; *Radcliff's Ex'rs v. Brooklyn*, 4 N. Y. 195; 53 Am. Dec. 357; *Humes v. Knoxville*, 1 Humph. 403; 34 Am. Dec. 657; *Nebraska City v. Lampkin*, 6 Neb. 27; *Schattner v. Kansas City*, 53 Mo. 162; *Wegmann v. Jefferson City*, 61 Mo. 55; *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 645; *Hovey v. Mayo*, 43 Me. 322; *Ellis v. Iowa City*, 29 Iowa, 229; *Cole v. Muscatine*, 14 Iowa, 296; *Creal v. Keokuk*, 4 G. Greene, 47; *Callender v. Marsh*, 1 Pick. 417; *Quinn v. Paterson*, 27 N. J. L. 35; *Tate v. R. R. Co.*, 64 Mo. 149; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Reynolds v. Shreveport*, 13 La. Ann. 426; *Benden v. Nashua*, 17 N. H. 477; *Green v. Reading*, 9 Watts, 382; 36 Am. Dec. 127; *Mayor v. Randolph*, 4 Watts & S. 514; 39 Am. Dec. 102. And see *Keasy v. City of Louisville*, 4 Dana, 154; 29 Am. Dec. 395; *Smith v. Washington*,

20 How. 149; *Meares v. Wilmington*, 9 Ired. 73; 49 Am. Dec. 412; *Dorman v. Jacksonville*, 13 Fla. 538; 7 Am. Rep. 253; *Simmons v. Camden*, 26 Ark. 276; 7 Am. Rep. 620; *Fellows v. New Haven*, 44 Conn. 240; 26 Am. Rep. 447. In Ohio a different rule prevails, and a city is liable to a land-owner for any consequential damage resulting to his land from the grading or changing of the grade of streets, without reference to the question whether or not the work was done with due care and skill: *Goodloe v. Cincinnati*, 4 Ohio, 500; 22 Am. Dec. 764; *Smith v. Cincinnati*, 4 Ohio, 514; *McCombs v. Akron*, 15 Ohio St. 474; *Rhodes v. Cleveland*, 10 Ohio, 159; 36 Am. Dec. 82; *Akron v. McComb*, 18 Ohio, 229; 51 Am. Dec. 453; *Akron v. Chamberlain*, 34 Ohio St. 328; 32 Am. Rep. 367. Compare *Cincinnati v. Penny*, 21 Ohio St. 499; 8 Am. Rep. 73. And see *O'Brien v. St. Paul*, 25 Minn. 331; *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Bloomington v. Brokaw*, 77 Ill. 194; *Aurora v. Gillet*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 29; 11 Am. Rep. 1; *Dixon v. Baker*, 65 Ill. 518; 16 Am. Rep. 591; *Ellis v. Iowa City*, 29 Iowa, 229; *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 656; 9 Am. Rep. 473. Under a constitutional provision that private property shall not be damaged for

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within the scope of their municipal authority in making excavations in streets for the purpose of opening and improving them, they are not liable to the owners of abutting property for injuries to buildings erected thereon, resulting from the removal of the lateral support of the soil.<sup>1</sup> Thus it is held in some cases that it is not liable for the escape of surface water from a change of grade of the street,<sup>2</sup> while in others it is liable where the street is so negligently constructed or graded that water is carried to the adjoining lands.<sup>3</sup> The owner of property adjacent to

public use without just compensation, a city is liable to a lot-owner for injury by raising the street grade: Harmon v. Omaha, 17 Neb. 548; 52 Am. Rep. 420; City of Elgin v. Eaton, 83 Ill. 535; 25 Am. Rep. 412. A power to regulate the grade of streets includes the power to regrade: Creal v. Keokuk, 4 G. Greene, 47. Under a charter provision authorizing a city to cause streets to be "paved, graded, or macadamized," the city is authorized to construct a sidewalk of plank or other material: Burlington etc. R. R. Co. v. Mount Pleasant, 12 Iowa, 112.  
<sup>1</sup> City of Quincy v. Jones, 76 Ill. 231; 20 Am. Rep. 243.

<sup>2</sup> Wakefield v. Newell, 12 R. I. 75; 34 Am. Rep. 598; Freburg v. Davenport, 63 Iowa, 119; 50 Am. Rep. 737; Cumberland v. Willison, 50 Md. 138; 33 Am. Rep. 304; Imler v. Springfield, 55 Mo. 119; 17 Am. Rep. 645; Morris v. Council Bluffs, 67 Iowa, 343; 56 Am. Rep. 343.

<sup>3</sup> Smith v. Alexandria, 33 Gratt. 208; 36 Am. Rep. 789; Weis v. City of Madison, 75 Ind. 241; 39 Am. Rep. 135; West Orange v. Field, 37 N. J. Eq. 600; 45 Am. Rep. 670; City of Aurora v. Rees, 57 Ill. 29; 11 Am. Rep. 1; Barnes v. Hannibal, 71 Mo. 449; O'Brien v. St. Paul, 25 Minn. 333; 33 Am. Rep. 470; Gillison v. Charleston, 16 W. Va. 282; 37 Am. Rep. 763; the court saying: "A number of the authorities we have cited recognize the principle that individuals and municipal corporations have the right to dispose of surface water in any manner they please, to prevent its flow from adjoining lands upon their

premises, although the result may be to flood the adjoining land, or to expel or throw it upon the lands of their neighbors, and in either case are not liable to an action. These cases seem to lose sight entirely of the wholesome principle of ethics as well as law that a man may use his own property in any manner he pleases, provided he does not thereby interfere with the rights of his neighbor. Some of the authorities seem to regard a municipal corporation as a little monarchy acting for the public good, and absolutely without any responsibility for injuries inflicted upon individuals in case of raising or depressing the grade of the streets, and thereby changing the natural course of the surface water; and if by means of its improvements it throws it upon the adjacent property-holder, to his great detriment and loss, and he complains, the answer is, *Salus populi est suprema lex*; and if he still insists that he has been greatly injured and ought to be compensated, the final and crushing answer is, *Dammum absque injuria*, and the poor sufferer, thinking the law is against him, submits with the best grace he can. I see no reason why a municipal corporation should be exempt from liability, where it commits an act in the nature of a trespass to the injury of a citizen in carrying on its works of improvement, even though it has the right to grade its streets in such manner as it determines. It is not necessary to determine in this case whether the municipal corporation would be liable for injuries done to the property of citizens while grading the streets, if

a street has a right to presume that the city will not permit an embankment above the established grade to remain in the street, or that it will provide proper culverts to prevent the embankment from impeding the flow of surface water. He is justified in building with reference to the established grade. And he cannot be charged with negligence in storing articles in his cellar likely to be damaged by an inundation, since he has the right to make any reasonable use of his premises.<sup>1</sup> A city may, in the exercise of its discretion, raise the grade of a street, so as to compel adjacent property owners to raise their buildings, at great expense, and yet will not be answerable to them in damages.<sup>2</sup> But if its officers and agents, in doing the work, act negligently, and thereby inflict damage on a property-owner, it is liable.<sup>3</sup>

**ILLUSTRATIONS.** — A city raised the grade of a street in such a manner as to obstruct the flow of water in a small natural stream, which drained the surface of about four hundred acres of land. The engineer of the city was incompetent to perform his duties, and through his ignorance and want of skill, the culvert which was devised to conduct the water under the highway was made so small that it would not discharge the waters of the stream when swelled by the added surface drainage during heavy rains, by reason of which, during a rain, the water was backed upon the land of the plaintiffs, doing damage. *Held*, that an action lay against the city for such damage: *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; 53 Am. Dec. 316. A complaint stated that a city had raised the grade of an

such grade had been established by the city, and the work was executed with skill and care according to the plan so adopted; but where a city, in grading its streets by cutting ditches and drains, collects surface water, and casts it in a body upon the lot or ground of the proprietor below, unless it is so cast into a natural watercourse, the proprietor sustains a legal injury, and may have his action therefor."

<sup>1</sup> *Damour v. Lyons City*, 44 Iowa, 276.

<sup>2</sup> *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307.

<sup>3</sup> *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Bloomington v. Brokaw*,

77 Ill. 194; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624; *Dixon v. Baker*, 65 Ill. 518; 16 Am. Rep. 591; *Ellis v. Iowa City*, 29 Iowa, 229; *Inman v. Tripp*, 11 R. I. 520; *Cotes v. Davenport*, 9 Iowa, 227; *Templin v. Iowa City*, 14 Iowa, 59; 81 Am. Dec. 455; *Kensington v. Wood*, 10 Pa. St. 93; *Allentown v. Kramer*, 73 Pa. St. 406; *Wegmann v. Jefferson City*, 61 Mo. 55; *Hendershott v. Ottumwa*, 46 Iowa, 658; 26 Am. Rep. 182; *Ross v. Clinton*, 46 Iowa, 606; 26 Am. Rep. 169; *Lacour v. New York*, 3 Duer, 406; *Stone v. Augusta*, 46 Me. 127.

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avenue, and neglected to provide means for carrying off the rain-water which fell on the avenue, or to prevent such water from draining on the adjoining lands, to the injury of the plaintiff's adjacent lot. *Held*, not to state a cause of action, as there was no allegation of the diversion of any stream upon the plaintiff's land, nor of the collecting and throwing surface water upon his land, nor of the causing of any more water to flow than would have flowed if the grade had not been raised: *Lynch v. Mayor*, 76 N. Y. 60; 32 Am. Rep. 271. A city, in making a street, so unskillfully excavated a hillside that the land above slid down upon the lot of the plaintiff, not immediately abutting upon the street. *Held*, that the city was liable for the injury both to land and buildings: *Keating v. Cincinnati*, 38 Ohio St. 141; 43 Am. Rep. 421. By the elevation of the grade of a street in a city, surface water flowed into the basement of plaintiff's building, and thereby the building was injured and the walls cracked. *Held*, that the city was liable for the damage, but that plaintiff could not recover damages for inconvenience to his tenants or injury to their personal property: *City of Dixon v. Baker*, 65 Ill. 518; 16 Am. Rep. 591.

§ 4015. **Drains and Sewers.** — Judge Thompson says:<sup>1</sup>

"It is impossible to state any rule that would hold good in all the states in respect to the civil liability of municipal corporations for failing to construct suitable drains and sewers, or to keep the same in repair. The obligation of a municipal corporation to construct sewers, for the health, comfort, or convenience of its inhabitants, or of the public, is, upon grounds already stated, one of those imperfect obligations for the non-performance of which no action will lie. If it is not liable for a total failure to execute such an obligation, it necessarily follows that it will not be liable for having executed it but partially. Thus it will not be answerable in damages for having failed to construct a sewer of sufficient size to carry off the surface drainage, where the damage to the plaintiff's property is no greater than it would have been if the sewer had not been built.<sup>2</sup> But, upon grounds

<sup>1</sup> 2 Thompson on Negligence, 750.

<sup>2</sup> *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342; *Child v.*

*Boston*, 4 Allen, 41; 81 Am. Dec. 680;

*Mills v. Brooklyn*, 32 N. Y. 489; *Darling v. Bangor*, 68 Me. 108; *City*

already stated, when a sewer is constructed, and citizens have, under license from the city, connected their private drains with it, if the city negligently permits it to get out of repair, it must pay the damages which thereby accrue;<sup>1</sup> though a city will owe no such duty to a mere trespasser who connects with the sewer without license.<sup>2</sup> The distinction upon which the cases rest has been already adverted to. Cities are generally held liable for injuries resulting from negligence in the building and maintaining of sewers, in four instances, elsewhere considered:

1. Where the agents or servants of the city, in constructing the sewer do the work negligently or unskillfully, whereby unnecessary damage happens to adjacent property, as where walls settle, cellars become flooded, and the like.<sup>3</sup> The city would not be liable even for these injuries, if the negligence or unskillfulness was that of an independent contractor or his servants.
2. Where the sewer is so constructed or maintained as to constitute a nuisance, in which case any person sustaining special damage in consequence of it may recover such damage of the city.<sup>4</sup>
3. Where the direct result of the manner in which the sewer is constructed or maintained is the flooding of a person's premises with water. Here the city is liable for the trespass upon his freehold or possession.<sup>5</sup>
4. Where, in digging a sewer in a public street, a dangerous excavation is left open and unguarded, whereby a traveler, without fault on his part, is injured.<sup>6</sup> Here various considerations intervene to determine whether or not the city is liable; as, 1. Whether the work was done by the

of *Madison v. Ross*, 3 Ind. 236; 54 Am. Dec. 481; *City of Denver v. Capelli*, 4 Col. 25; 34 Am. Rep. 62. *Contra*, *Evanville v. Decker*, 84 Ind. 325; 43 Am. Rep. 86.

<sup>1</sup> *Child v. Boston*, 4 Allen, 41; 81 Am. Dec. 680; *Barton v. Syracuse*, 36 N. Y. 54; *Gilluly v. Madison*, 63 Wis. 518; 53 Am. Rep. 299.

<sup>2</sup> *Darling v. Bangor*, 68 Me. 108.

<sup>3</sup> *Montgomery v. Gilmer*, 33 Ala. 116; 70 Am. Dec. 562.

<sup>4</sup> *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316.

<sup>5</sup> *Meek v. Whitechapel Board*, 2 Fost. & F. 144.

<sup>6</sup> *Detroit v. Corey*, 9 Mich. 165; 59 Am. Dec. 78.

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agents of the corporation, or by an independent contractor;  
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left open and unguarded." Although a municipal corpo-  
ration be not required by law to build sewers, yet if it  
have authority to build them, and voluntarily undertake  
to do so, it will be liable for any injury occasioned by its  
negligence or misfeasance, either in building or maintain-  
ing them.<sup>1</sup> A city may not be enjoined from construct-  
ing drains and culverts in streets merely because they  
will increase the flow of surface water upon the land of a  
complainant lot-owner,<sup>2</sup> or are of inadequate size;<sup>3</sup> nor is  
it liable for damage caused by the accumulation of surface  
water on city lots, when owing solely to extraordinary  
floods or the insufficient size of sewers which are not de-  
fective in construction nor out of repair.<sup>4</sup> But it is liable  
in damages if it constructs a sewer in such a manner as  
to throw large quantities of water upon an owner's prem-  
ises, which otherwise would not have flowed there.<sup>5</sup> A  
municipal corporation is not liable to a private action for  
damages accruing for not providing sufficient sewerage  
for draining an owner's premises;<sup>6</sup> nor for damage done  
by necessary blasting of rocks in the work, unless negli-  
gently done by its agents;<sup>7</sup> nor for removing lateral sup-  
port to a house;<sup>8</sup> nor for any depreciation in the rental  
value of property caused by the bad smells of a sewer in

<sup>1</sup> Rowe v. Portsmouth, 56 N. H. 291; 22 Am. Rep. 464; Thurston v. St. Joseph, 51 Mo. 570; 11 Am. Rep. 463; Franklin Wharf Co. v. Portland, 67 Me. 46; 24 Am. Rep. 1; Hardy v. Brooklyn, 90 N. Y. 435; 43 Am. Rep. 182.

<sup>2</sup> Heth v. Fond du Lac, 63 Wis. 228; 53 Am. Rep. 279.

<sup>3</sup> Americus v. Eldridge, 64 Ga. 524; 37 Am. Rep. 89.

<sup>4</sup> Fair v. Philadelphia, 88 Pa. St. 309; 32 Am. Rep. 455; Allen v. Chipewa Falls, 52 Wis. 430; 38 Am. Rep. 748; Collins v. Philadelphia, 93 Pa. St. 272; Van Pelt v. Davenport, 42

Iowa, 308; 20 Am. Rep. 622; Smith v. Mayor, 66 N. Y. 295; 23 Am. Rep. 53; White v. Yazoo, 27 Miss. 357.

<sup>5</sup> Ashley v. Port Huron, 35 Mich. 296; 24 Am. Rep. 552; Noonan v. Albany, 79 N. Y. 470; 35 Am. Rep. 540; Gilluly v. Madison, 63 Wis. 518; 53 Am. Rep. 299.

<sup>6</sup> Mills v. Brooklyn, 32 N. Y. 489; Carr v. Northern Liberties, 35 Pa. St. 304; 78 Am. Dec. 342.

<sup>7</sup> Murphy v. Lowell, 128 Mass. 396; 35 Am. Rep. 381.

<sup>8</sup> Cincinnati v. Penny, 21 Ohio St. 499; 8 Am. Rep. 73.

course of construction, unless it is kept open an unreasonable length of time.<sup>1</sup> A court of equity has no power to compel a city to construct a sewer, nor jurisdiction of a claim of damages for injuries by the improper construction of one, except where the operation of the sewer may be enjoined as a nuisance.<sup>2</sup> In all such cases, if plaintiff could have protected his property at slight expense, he cannot recover beyond what such protection would have cost.<sup>3</sup>

ILLUSTRATIONS.—A city provided gutters sufficient for ordinary rains, which for five years were found sufficient. *Held*, that the city was not liable for damage incurred by reason of the gutters being insufficient on an extraordinary occasion: *Wright v. Wilmington*, 92 N. C. 156. A city charter authorized the keeping in repair of sewers, and the entry for that purpose on private grounds through the common sewers' run. The city utilized a stream as a common sewer for more than twenty years, repairing it, arching it, etc. *Held*, that the city was liable for injuries sustained from its neglect to keep the sewer in repair: *Kranz v. Baltimore*, 64 Md. 491. A city established a system of sewerage, and built a sewer to drain a hitherto undrained district, which proved insufficient to carry off the sewage turned into it, and overflowed upon the plaintiff's land. With knowledge of this, the city continued to attach lateral sewers to the main sewer, increasing the injury to the plaintiff's property. *Held*, that the city was liable: *Seifert v. Brooklyn*, 101 N. Y. 136; 54 Am. Rep. 664. A city ordered certain privy inlets connected with a sewer to be closed, on account of the stench. In doing this the workmen closed an inlet from the plaintiff's house, not connected with a privy, and caused the water to flow back on her premises. *Held*, that the city was liable: *Semple v. Vicksburg*, 62 Miss. 63; 52 Am. Rep. 181. A municipal corporation opened a sewer on a street, and the earth from the excavation was thrown upon the sidewalk, and the obstruction remained there during the night, and there was no signal-light, and no barrier erected around or near it, to warn passengers away from the danger, and a foot-passenger, walking along the pathway by night, in consequence fell into a hole and was injured. *Held*, that it was liable: *Grant v. Brooklyn*, 41 Barb. 381.

<sup>1</sup> *Arn v. Kansas*, 14 Fed. Rep. 226.

<sup>3</sup> *Van Pelt v. Davenport*, 42 Iowa,

<sup>2</sup> *Horton v. Mayor and Council*, 4 308; 20 Am. Rep. 622.  
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§ 4016. **Liability for Non-repair of Highways.**—A municipal corporation is liable in damages to any person specially injured by its failure to keep its streets and alleys in proper repair;<sup>1</sup> for it is bound to keep its streets in repair,<sup>2</sup> and it is liable for want of ordinary care in this respect.<sup>3</sup> In some states this liability is statutory.<sup>4</sup> This duty need not be expressly enjoined by statute, but is implied from a statutory grant of power to open, improve, repair, and keep them in a safe condition for

<sup>1</sup> *Weet v. Brockport*, 16 N. Y. 161, note; *Hines v. Lockport*, 50 N. Y. 236; 5 Lans. 16; 41 How. Pr. 435; *Requa v. Rochester*, 45 N. Y. 129; 6 Am. Rep. 52; *Wilson v. Watertown*, 5 Thomp. & C. 579; 3 Hun, 508; *Peach v. Utica*, 10 Hun, 477; *Conrad v. Ithaca*, 18 N. Y. 158; *Mosey v. Troy*, 61 Barb. 580; *Reinhard v. New York*, 2 Daly, 243; *Wallace v. New York*, 2 Hilt. 440; 18 How. Pr. 169; *Davenport v. Ruckman*, 37 N. Y. 568; *Clemence v. Auburn*, 66 N. Y. 334; *Nims v. Troy*, 59 N. Y. 500; *Ring v. Cohoes County*, 13 Hun, 76; *Weightman v. Washington*, 1 Black, 39; *Chicago v. Robbins*, 2 Black, 418; *Nebraska City v. Campbell*, 2 Black, 591; *Hutson v. New York*, 9 N. Y. 163; 59 Am. Dec. 526; 5 Sand. 287; *Omaha v. Olmstead*, 5 Neb. 446; *Topeka v. Tuttle*, 5 Kan. 311; *Atchison v. King*, 9 Kan. 550; *Ottawa v. Washabaugh*, 11 Kan. 124; *Wyandotte v. White*, 13 Kan. 191; *Smith v. Leavenworth*, 15 Kan. 81; *Baltimore v. Marriott*, 9 Md. 160; *Baltimore v. Pendleton*, 15 Md. 12; *Bell v. West Point*, 51 Miss. 262; *Griffin v. Williamston*, 6 W. Va. 312; *Erie v. Schwingle*, 22 Pa. St. 388; 60 Am. Dec. 87; *Kensington v. Wood*, 10 Pa. St. 93; *McLaughlin v. Corry*, 77 Pa. St. 109; 18 Am. Rep. 432; *Jacobs v. Bangor*, 16 Me. 187; 33 Am. Dec. 652; *O'Neill v. New Orleans*, 30 La. Ann. 220; 31 Am. Rep. 221; *Noble v. Richmond*, 31 Gratt. 271; 31 Am. Rep. 727.

<sup>2</sup> *Bancroft v. Inhabitants*, 18 Pick. 566; 29 Am. Dec. 623; *Lexington v. McQuillan*, 9 Dana, 513; 35 Am. Dec. 159; *Koch v. Edgewater*, 18 Hun, 407.

<sup>3</sup> *Johnson v. Charleston*, 3 S. C. 232; 16 Am. Rep. 721.

<sup>4</sup> 2 *Thompson on Negligence*, 755; *Mootry v. Danbury*, 45 Conn. 550; 29 Am. Rep. 703. In Kansas, in the absence of a statute, a town is not liable: *Eckenbury v. Bazaar*, 22 Kan. 556; 31 Am. Rep. 198. Nor in Minnesota: *Altow v. Sibley*, 30 Minn. 186; 44 Am. Rep. 191. Nor in South Carolina: *Young v. Charleston*, 20 S. C. 116; 47 Am. Rep. 827. In Illinois, towns are not liable for injuries caused by defective highways: *Waltham v. Kemper*, 55 Ill. 346; 8 Am. Rep. 652; the court saying: "The reason which exempts these public bodies from liability to private actions, based upon neglect to perform a public duty, does not apply to villages, boroughs, and cities, which accept special charters from the state. The grant of the corporate franchise in those cases is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers a valuable privilege, and which is held to be a consideration for the duties imposed by the charter. By those charters, larger powers of self-government are conferred than those confided to towns or counties; larger privileges in the acquisition and control of corporate property, and special authority is given them to make use of the public highways for the special and peculiar convenience of the citizens of the municipality in various modes not permissible elsewhere. These grants raise an implied promise on the part of the corporation to perform their corporate duties, and it inures to the benefit of every individual interested in its performance."

*v. Davenport*, 42 Iowa, Rep. 622.



travel, and to raise the necessary funds by taxation or assessment.<sup>1</sup> But such a grant must be coupled with an express or implied condition that it shall be liable for such injuries.<sup>2</sup> The duty being a public one, it has no power, unless authorized by statute, to divest itself, either by contract or ordinance, of its capacity to discharge this duty.<sup>3</sup> The obligation of a city to keep its streets in a safe condition extends to a dangerous wall left standing after a fire on the line of a street.<sup>4</sup> But when it is under no statutory obligation to light its highways at night,<sup>5</sup> it is not liable to one who meets with an accident due to the darkness.<sup>6</sup> For injury sustained by a traveler on a highway from the falling upon him of some object from an adjacent building, as a sign insecurely fastened, a town is not liable,<sup>7</sup> although the insecurity of the sign and its dangerous position had been brought to the notice of the city authorities.<sup>8</sup> The obligation to keep streets in repair is suspended while they are actually undergoing such alterations as for the time makes them dangerous.<sup>9</sup>

ILLUSTRATIONS. — Plaintiff was passing with due care along a street, which defendant was bound to keep in repair. In attempting to avoid the kick of a mule, she fell, or jumped, into an excavation upon the border of the street, and which, to the knowledge of the defendant, rendered the street dangerous. *Held*, that the defendant was liable for the injury received: *Bassett v. St. Joseph*, 53 Mo. 290; 14 Am. Rep. 446. There being a depression in one of the traveled streets of a city, the authorities raised one half in width of the street over the depression, by embankment some six feet high in the middle, and gradually lessening towards each end; and the side of the embankment next to that half of the street which was left in its natural state was precipitous, and without railing or barrier.

<sup>1</sup> *Albrittin v. Huntsville*, 60 Ala. 486; 31 Am. Rep. 46.

<sup>2</sup> *City of Navasota v. Pearce*, 46 Tex. 525; 26 Am. Rep. 279.

<sup>3</sup> *Watson v. Tripp*, 11 R. I. 98; 23 Am. Rep. 420.

<sup>4</sup> *Grogan v. Broadway Foundry Co.*, 87 Mo. 321.

<sup>5</sup> *Randall v. R. R. Co.*, 106 Mass. 276; 8 Am. Rep. 327.

<sup>6</sup> *Gaskins v. Atlanta*, 73 Ga. 746.

<sup>7</sup> *Taylor v. Peckham*, 8 R. I. 349; 5 Am. Rep. 578.

<sup>8</sup> *Jones v. Boston*, 104 Mass. 75; 6 Am. Rep. 194.

<sup>9</sup> *James v. San Francisco*, 6 Cal. 528; 65 Am. Dec. 526.

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v. San Francisco, 6 Cal. 528;  
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*Held*, that the street was unsafe, as a matter of law, even though each half was safe by itself: *Prideaux v. Mineral Point*, 43 Wis. 513.

§ 4017. **Damage must be Special to Plaintiff.**— But it is essential to the party suing that the injury be special to him. If from the obstruction of the highway he suffers only such inconvenience as all the other inhabitants labor under, his action will not lie.<sup>1</sup> One who owns a ferry outside of a city, from which public travel is diverted by the failure of the city to keep a certain street in repair, suffers no injury other than that shared by the general public, and is not entitled to damages therefor.<sup>2</sup> The owner of a wharf upon a tide-water creek cannot maintain an action for an illegal obstruction to the creek, this being a common damage to all who use it; but for an obstruction adjoining the wharf, which prevents vessels from lying at it in the accustomed manner, this being a particular damage, he can maintain an action.<sup>3</sup> Where a municipal corporation, in raising the natural grade of a street, accumulates earth upon the lot of an adjacent owner, and this injures his property, it is liable in damages therefor.<sup>4</sup> So where it changes the grade of a public street, in order to convert it into a levee, to prevent the overflow of a river, and in so doing turns mud and water upon the premises of a citizen, or creates in his neighborhood a stagnant and unhealthful pond, it will be liable for the injury arising therefrom to the property as a whole.<sup>5</sup> Injury to the business of a shop-keeper from prevention of his receiving and delivering goods, and of attendance of

<sup>1</sup> *Tisdale v. Norton*, 8 Met. 388;  
*Holman v. Townshend*, 13 Met. 297;  
*Adams v. Carlisle*, 21 Pick. 146; *Far-  
relly v. Cincinnati*, 2 Disn. 516; *Farnum  
v. Concord*, 2 N. H. 392; *Griffin v.  
Sanbornton*, 44 N. H. 246; *Tomlinson  
v. Derby*, 43 Conn. 562; *Stetson v.  
Faxon*, 19 Pick. 147; 31 Am. Dec. 123;  
*Thayer v. Boston*, 19 Pick. 511; 31  
Am. Dec. 157; *Stack v. East St. Louis*,  
85 Ill. 377; 28 Am. Rep. 619.

<sup>2</sup> *Prosser v. Ottumwa*, 42 Iowa, 509.

<sup>3</sup> *Brayton v. Fall River*, 113 Mass.  
218; 18 Am. Rep. 470.

<sup>4</sup> *Hendershott v. Ottumwa*, 46 Iowa,  
658; 26 Am. Rep. 182; *City of Pekin  
v. Brereton*, 67 Ill. 477; 16 Am. Rep.  
629.

<sup>5</sup> *City of Shawneetown v. Mason*, 82  
Ill. 337; 25 Am. Rep. 321. And see  
*Ross v. Clinton*, 46 Iowa, 606; 26 Am.  
Rep. 169.

customers, caused by obstruction of the street in which his shop stands, is not an injury common to the public, but one peculiar to himself, such as enables him to maintain an action.<sup>1</sup>

**§ 4018. Notice to Corporation of Defect Necessary. —**

Unless the obstruction or defect in the highway causing the injury was produced by the municipal corporation itself, or by some one in privity with it,<sup>2</sup> the corporation will not be liable for the damages produced by the defect, unless it had notice thereof for a sufficient length of time before the happening of the accident to have enabled it, by the exercise of reasonable diligence, to make the necessary repairs.<sup>3</sup> This notice may be either express or implied. Notice is implied where a sufficient length of time has elapsed between the happening of the defect and the accident, for the corporation, using reasonable diligence, to have remedied it,<sup>4</sup> or where the defect is so notorious that the corporation should have known it.<sup>5</sup> In such cases the courts will presume that the city had notice, or charge it with negligence in not knowing.<sup>6</sup> A city

<sup>1</sup> *Williams v. Tripp*, 11 R. I. 447.

<sup>2</sup> Thus where an agent, employed by a city to construct a bridge, put a sappy plank therein, through which a horse broke and was injured, it was held that no notice to the city of the condition of the bridge was necessary to fix its liability: *Brunswick v. Braxton*, 70 Ga. 193. But it is not negligent for a city to allow abutters on one of its streets to construct a coal-vault under the sidewalk; nor is the city chargeable with negligence when the occupant of the premises using such vault leaves the opening of said vault in the sidewalk uncovered for a short time while engaged in putting coal into the vault, and where the city officials have not notice that it is uncovered: *City of Lafayette v. Blood*, 40 Ind. 62.

<sup>3</sup> *Fort Wayne v. De Witt*, 47 Ind. 391; *Heilner v. Union Co.*, 7 Or. 83; 33 Am. Rep. 703; *Whitehead v. Lowell*, 124 Mass. 281; *Warren v. Wright*,

3 Ill. App. 602; *Morse v. Fair Haven*, 43 Conn. 220; *Bartlett v. Kittery*, 68 Me. 358.

<sup>4</sup> *Weisenberg v. Appleton*, 26 Wis. 56; 7 Am. Rep. 39; *McLaughlin v. Corry*, 77 Pa. St. 109; 18 Am. Rep. 433; *Monies v. Lynn*, 124 Mass. 165; *Noble v. Richmond*, 31 Gratt. 27; 31 Am. Rep. 726; *Requa v. Rochester*, 45 N. Y. 129; 6 Am. Rep. 52. As where a defect in a sidewalk had existed for a "number of months": *Chicago v. Crooker*, 2 Ill. App. 279; or a year: *Saulsbury v. Ithaca*, 94 N. Y. 27; 46 Am. Rep. 122; or "several months": *Montgomery v. Wright*, 72 Ala. 411 (a washout).

<sup>5</sup> *Rockwell v. R. R. Co.*, 64 Barb. 438; 53 N. Y. 625; *French v. Brunswick*, 21 Me. 29; 38 Am. Dec. 250.

<sup>6</sup> *Barrett v. St. Joseph*, 53 Mo. 290; *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Doherty v. Waltham*, 4 Gray, 596; *Reed v. Northfield*, 13 Pick. 94; 23 Am. Dec. 662; *Doulon v.*

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**Effect Necessary.**—  
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26; *Requa v. Rochester*, 45  
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Doherty v. Waltham, 4  
; Reed v. Northfield, 13  
23 Am. Dec. 662; *Doulon v.*

is chargeable with knowledge of the natural tendency of  
timber to rot and decay by lapse of time and exposure to  
the weather.<sup>1</sup> But it will not be considered to have notice  
of a defect in a sidewalk which was not such as to put a  
reasonably prudent man, whose business it was to look  
after the repairs, on inquiry to examine its condition.<sup>2</sup>  
Where it appeared that the street commissioners of a city  
well knew that the whole of a certain sidewalk was old,  
rotten, and unsafe, it was held that the fact that the par-  
ticular planks which caused the injury were not known  
to be loose would not protect the city from liability; nor  
is such a defect properly a latent one.<sup>3</sup> A city charter  
declared that the city should not be liable for defects in  
sidewalks, unless it appeared that one of the aldermen of  
the proper ward had knowledge of the defect; and that  
such knowledge should not be presumed, unless the defect  
existed three weeks before the injury, "provided that  
nothing herein shall be construed to mean that knowledge  
is to be presumed because such three weeks had elapsed."  
It was held that knowledge might be presumed where the  
defect had existed three weeks, in any case where such pre-  
sumption would have arisen before the statute.<sup>4</sup> Where,  
under a charter authorizing the city to regulate and super-

Clinton, 33 Iowa, 397; *Rowell v. Wil-*  
liams, 29 Iowa, 210; *Boucher v. New*  
Haven, 40 Conn. 456; *Bill v. Norwich*,  
39 Conn. 222; *Rice v. Des Moines*, 40  
Iowa, 641; *Clark v. Corinth*, 41 Vt.  
449; *Ozier v. Hinesburgh*, 44 Vt. 220;  
*Hume v. New York*, 47 N. Y. 639;  
*Jansen v. Atchison*, 16 Kan. 358; *Chi-*  
cago v. Murphy, 84 Ill. 224; *Fahey v.*  
Harvard, 62 Ill. 28; *Lobllell v. New*  
Bedford, 1 Mass. 153; *Harriman v.*  
Boston, 114 Mass. 241; *Howe v. Plain-*  
field, 41 N. H. 135; *Hubbard v. Con-*  
cord, 35 N. H. 52; *Ward v. Jefferson*,  
24 Wis. 342; *Colby v. Beaver Dam*, 34  
Wis. 285; *Goodnough v. Oshkosh*, 24  
Wis. 549; 28 Wis. 300; *Hall v. Fond*  
du Lac, 42 Wis. 274; *Harper v. Mil-*  
waukee, 30 Wis. 365; *Prideaux v.*  
Mineral Point, 43 Wis. 513; 28 Am.

Rep. 558; *Mack v. Salem*, 6 Or. 275;  
*Dorlon v. Brooklyn*, 46 Barb. 604;  
*Sweet v. Gloversville*, 12 Hun, 302;  
*Wilson v. Watertown*, 3 Hun, 508;  
*Todd v. Troy*, 61 N. Y. 506; *McGinity*  
v. New York, 5 Duer, 674; *Hart v.*  
Brooklyn, 36 Barb. 227; *Seaman v.*  
New York, 3 Daly, 147; *Bush v. Gen-*  
eva, 3 Thomp. & C. 409; *Chicago v.*  
Langlass, 66 Ill. 361; *Peru v. French*,  
55 Ill. 317; *Huntington v. Breen*, 77  
Ind. 29; *Chatsworth v. Ward*, 10 Ill.  
App. 75.

<sup>1</sup> *Indianapolis v. Scott*, 72 Ind.  
196.

<sup>2</sup> *Joliet v. Walker*, 7 Ill. App. 267.  
Compare *Gilman v. Haley*, 7 Ill. App.  
349.

<sup>3</sup> *Ripon v. Bittel*, 30 Wis. 614.

<sup>4</sup> *Studley v. Oshkosh*, 45 Wis. 380.

intend the laying of all gas-pipes, an ordinance required the gas company to keep proper signal-lights burning at holes, etc., but reserved to the city officers no right of supervision, and none was in fact exercised by them, it was held that, to render the city liable for injuries occasioned by one's falling into an unguarded pipe excavation, it must appear not only that the accident resulted from the dangerous manner in which the same was made and left, but also that the city had notice thereof. The fact that an alderman saw the same being made was not, *per se*, evidence that the city was negligent.<sup>1</sup>

Notice to the officers of the city is notice to the city; as notice to the mayor or aldermen.<sup>2</sup> Knowledge by a policeman of a dangerous and unauthorized obstruction in a public street is notice to the city, when the police are charged with the duty of removing nuisances from the streets.<sup>3</sup> But knowledge by a janitor of a public school-house, appointed by the school committee of a city, of the fact that a coal-hole in the sidewalk in front of the school-house is uncovered, is not notice to the city of a defect in the highway.<sup>4</sup> So where a city was under no legal obligation to cause its streets to be lighted for the security of travelers, notice to a lamp-lighter of a defect in a sidewalk does not warrant a finding that the city had notice thereof.<sup>5</sup> The question of notice is one for the jury.<sup>6</sup>

ILLUSTRATIONS.—NOTICE HELD PRESENT AND THE CORPORATION LIABLE.—A woman, in the exercise of due care, fell into a gully twenty-eight inches deep, close by the sidewalk, which the city had suffered to exist for several years: *Halpin v. Kansas*, 76 Mo. 335. The authorities covered a well in a highway, in which there was a public pump, with a wooden

<sup>1</sup> *McDermott v. Kingston*, 19 Hun, 198.

<sup>2</sup> *Salina v. Trosper*, 27 Kan. 544; *Logansport v. Justice*, 74 Ind. 378; 39 Am. Rep. 79. A resolution of a city council, directing repairs of a sidewalk, is competent evidence that the city authorities had notice of the defect: *Erd v. St. Paul*, 22 Minn. 443.

<sup>3</sup> *Rehberg v. New York*, 91 N. Y. 137; 43 Am. Rep. 657.

<sup>4</sup> *Foster v. Boston*, 127 Mass. 290.

<sup>5</sup> *Monies v. Lynn*, 119 Mass. 273.

<sup>6</sup> *Howe v. Plainfield*, 41 N. H. 135; *Springer v. Bowdoinham*, 7 Me. 442; *Bradbury v. Falmouth*, 18 Me. 64; *Colley v. Westbrook*, 57 Me. 181; 2 Am. Rep. 30.

ordinance required lights burning at officers no right of exercised by them, it for injuries occurred pipe excavation accident resulted the same was made notice thereof. The being made was not, gent.<sup>1</sup>

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v. Plainfield, 41 N. H. 135;  
Bowdoinham, 7 Me. 442;  
v. Falmouth, 18 Me. 64;  
Vestbrook, 57 Me. 181; 2  
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platform, and laid on that a brick pavement conforming to the sidewalk. For nine years they made no repairs nor examination. While the plaintiff was using the pump, the platform gave way, and he sustained injury: *Sherwood v. District of Columbia*, 3 Mackey, 276; 51 Am. Rep. 776. A city failed for eight days to remove telephone-wires which had fallen into and were obstructing a public street: *Nichols v. Minneapolis*, 33 Minn. 430; 53 Am. Rep. 56. The stringers on which a plank sidewalk was laid were, and for a long time had been, rotten, so that they would not hold nails, and one walking thereon with a companion was injured by the tipping of a loose board stepped on by the latter. The evidence failed to show affirmatively that it knew of the particular board being loose at the time: *Aurora v. Hillman*, 90 Ill. 61. Plaintiff was injured by falling through a trap-door in the sidewalk, used by a clothing house. It turned on hinges, which were frequently broken, as they were at the time of the accident, and was supported by cleats, which gave way at the time of the accident, in consequence of a clerk of the clothing house stamping upon the door, as was necessary to do to close it. It was on a much-frequented street, and should have been known to policemen on the beat, and to the city engineer: *Grove v. Kansas*, 75 Mo. 672. A city charter gave the common council full power to regulate and superintend the laying of gas-pipes. The council passed a general ordinance authorizing any gas company to lay such pipes. A dangerous excavation was made by a gas company under this ordinance, and it appeared that one of the aldermen witnessed the work without making objection: *McDermott v. Kingston*, 6 Abb. N. C. 246; 57 How. Pr. 196. A, while driving through the streets of S., an incorporated city, struck a water-plug projecting from the ground, in the middle of the street, and he was thrown from his wagon and injured. The plug was placed in the street by a water company that was incorporated prior to the incorporation of the city. As originally placed, it only projected about two inches from the ground, but a few months previous to the accident the street had been lowered, and the plug was thus left to project about six inches. The street commissioners had frequently seen it, and knew of its existence at the time of the accident: *Scranton v. Catterson*, 94 Pa. St. 202.

ILLUSTRATIONS (CONTINUED).—NOTICE HELD ABSENT AND THE CORPORATION NOT LIABLE.—A horse was frightened at a boulder dug out of the side of a city street, and which had lain there several days awaiting removal by a person who had asked for and obtained it for building purposes: *Agnew v. Corunna*, 55 Mich. 428; 54 Am. Rep. 383. A city let certain street repairs

to a contractor. The contractor put up a barrier at the point in question, which remained there at four o'clock, P. M., but it was removed by some stranger, and about nine o'clock of the evening of the same day, the plaintiff, in driving at that point, was injured by the defective condition of the street. Neither the contractor nor the city knew or had any notice of the removal of the barrier: *Klatt v. Milwaukee*, 53 Wis. 196; 40 Am. Rep. 759. A building had been destroyed by fire, and a temporary planking was put up in place of the sidewalk within four days before the time when plaintiff fell into a small hole beyond the line of the street, under the sill of the building, which sill answered all the purposes of a railing. There was no evidence of the notorious existence of the hole as a nuisance, and none of neglect on the part of any one concerned, and the hole presented no dangerous appearance: *McKenna v. New York*, 47 N. Y. Sup. Ct. 541.

**§ 4019. Duty to Remove and Repair Obstructions in Highway—Extent of.**—This duty extends to the whole width of the traveled part of the highway<sup>1</sup> by night as well as by day.<sup>2</sup> It embraces not only the road-bed, but the keeping up of proper guards or railings on the sides wherever necessary,<sup>3</sup> as where there are excavations, precipices, or obstructions so near the traveled path as to be dangerous to travelers.<sup>4</sup> A municipal corporation is

<sup>1</sup> 2 Thompson on Negligence, 766; *Jones v. Whitefield*, 18 Me. 286; 36 Am. Dec. 721.

<sup>2</sup> *Seward v. Milford*, 21 Wis. 485.

<sup>3</sup> *Hyatt v. Rondout*, 44 Barb. 391; *Palmer v. Andover*, 2 Cush. 600; *Hayden v. Attleborough*, 7 Gray, 338; *Norris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546; *Kenworthy v. Ironton*, 41 Wis. 647; *Woods v. Groton*, 111 Mass. 357; *Leicester v. Pittsford*, 6 Vt. 245; *Chapman v. Cook*, 10 R. I. 304; 14 Am. Rep. 686; *Aurora v. Colshire*, 55 Ind. 484; *Cassedy v. Stockbridge*, 21 Vt. 391; *Prideaux v. Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558; *Rice v. Montpelier*, 19 Vt. 470; *Pittston v. Hart*, 89 Pa. St. 389; *Atlanta v. Wilson*, 59 Ga. 544; 27 Am. Rep. 396.

<sup>4</sup> *Hayden v. Attleborough*, 7 Gray, 338; *Burnham v. Boston*, 10 Allen, 290; *Alger v. Lowell*, 3 Allen, 402; *Snow v. Adams*, 1 Cush. 443; *Collins v. Dorchester*, 6 Cush. 396; *Smith v.*

*Wendell*, 7 Cush. 498; *Nichols v. Brunswick*, 3 Cliff. 81; *Palmer v. Andover*, 2 Cush. 600; *Stevens v. Roxford*, 10 Allen, 25; 37 Am. Dec. 616; *Lyman v. Amherst*, 107 Mass. 339; *Babson v. Rockport*, 100 Mass. 63; *Britton v. Cummington*, 107 Mass. 347; *Wiley v. Portsmouth*, 35 N. H. 303; *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733; *Lower Maerangle Township v. Merkhoffer*, 71 Pa. St. 278; *Aurora v. Colshire*, 55 Ind. 484; *Cassedy v. Stockbridge*, 21 Vt. 391; *Hyatt v. Rondout*, 44 Barb. 391; *Norris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546; *Kenworthy v. Ironton*, 41 Wis. 647; *Woods v. Groton*, 111 Mass. 357; *Leicester v. Pittsford*, 6 Vt. 245; *Prideaux v. Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558; *Rice v. Montpelier*, 19 Vt. 470; *Bassett v. St. Joseph*, 53 Mo. 290; 14 Am. Rep. 446; *Perkins v. Fayette*, 68 Me. 152; *Moulton v. Sandford*, 51 Me. 127; *Manderschid v. Dubuque*, 29 Iowa, 73; 4 Am. Rep. 196.

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den, 25; 37 Am. Dec. 616;  
*Amherst*, 107 Mass. 339;  
*Rockport*, 100 Mass. 93;  
*Hummington*, 107 Mass. 347;  
*Portsmouth*, 35 N. H. 303;  
*Philadelphia*, 81 Pa. St. 44; 22  
33; *Lower Macungie Town-*  
*erkhoffer*, 71 Pa. St. 379;  
*Colshire*, 58 Pa. St. 444;  
*Ekbridge*, 21 Vt. 31; *Hyatt*  
*v. 44 Barb.* 9; *Norris v.*  
35 N. H. 271; 38 Am. Dec.  
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v. Pittsford, 6 Vt. 245;  
v. Mineral Point, 43 Wis. 513;  
p. 558; *Rice v. Montpelier*,  
; *Bassett v. St. Joseph*, 53  
4 Am. Rep. 446; *Perkins v.*  
Me. 152; *Moulton v. Sand-*  
e. 127; *Manderschid v. Du-*  
Iowa, 73; 4 Am. Rep. 196.

guilty of negligence in allowing a high and steep embank-  
ment in a street to be left without light, guard, or warn-  
ing to prevent accidents to those passing.<sup>1</sup> It is bound  
to see that a platform, which it permits a private person  
to construct in a public street, and which is used as part  
of the street, is in a safe condition, though it be not in  
the usually traveled part of the street.<sup>2</sup> It is liable for  
leaving a ditch, filled with water, five feet deep, bordering  
on a sidewalk in a public street, without any guards;<sup>3</sup> and  
to persons who fall through cellar doors in the sidewalk  
left open, where the city permits owners to make such  
openings, and has knowledge that the doors are frequently  
left open;<sup>4</sup> and where the grade is unnecessarily raised  
under a railroad bridge so as not to permit the passage of  
an omnibus.<sup>5</sup> A city is liable to a passer through a street  
who is injured by the blowing down of a show-board on  
private land, but so near the street and so defectively  
supported as to be obviously dangerous;<sup>6</sup> and to one who  
falls into a sewer-hole in a street, the cover of which lifts  
off when the hole gets full.<sup>7</sup> A city owning a telegraph-  
wire for the use of its fire department, but negligently  
allowing it to be removed from its position for some other  
use, is liable to a person injured by coming in contact  
with it.<sup>8</sup> If between the sidewalk and the wrought part  
of a city street is a grass-plat, over which a foot-path has  
been worn by persons entering another street abutting on  
but not crossing this, and the path is known to and recog-  
nized by the city as a part of the wrought line of travel,  
and the city has provided no other means of crossing,  
and erected no barrier, and given no warning, it is liable

<sup>1</sup> *Wyandotte v. Gibson*, 25 Kan. 236; *Wilson v. Atlanta*, 60 Ga. 473; *King v. Cleveland*, 28 Fed. Rep. 835.

<sup>2</sup> *Estelle v. Lake Crystal*, 27 Minn. 243.

<sup>3</sup> *Chicago v. Hesing*, 83 Ill. 204; 25 Am. Rep. 378.

<sup>4</sup> *City of Augusta v. Hafers*, 61 Ga. 48; 34 Am. Rep. 94.

<sup>5</sup> *Talbot v. Taunton*, 140 Mass. 552.

<sup>6</sup> *Langan v. Atchison*, 35 Kan. 318; 57 Am. Rep. 165.

<sup>7</sup> *Post v. Boston*, 141 Mass. 189.

<sup>8</sup> *Neuert v. Boston*, 120 Mass. 338.



for an injury sustained by one using the path by reason of a defect in it.<sup>1</sup>

Nevertheless the corporation is not responsible, in ordinary cases, for obstructions outside the highway;<sup>2</sup> nor is it obliged to restrain travelers from straying off the highway, and into dangerous places at a distance.<sup>3</sup> A city is not liable to a pedestrian injured by persons "coasting on the highway;"<sup>4</sup> nor for an injury, received in consequence of a defect in a highway, by a boy who was using the street as a play-ground.<sup>5</sup> Its duty does not extend to matters of mere police regulation and control, like the prevention of violence, or disorderly conduct of individuals, which may temporarily endanger the safety of those who are passing upon the streets.<sup>6</sup> A sleigh standing for ten or fifteen minutes in a village is not an obstruction for which the town is liable.<sup>7</sup> A city is not negligent in permitting the maintenance of a stepping-stone just inside the curb of a sidewalk, for the convenience of those alighting from vehicles in front of a public building.<sup>8</sup> A post maintained at the corner of city streets to protect a shade-tree is not necessarily a negligent obstruction, although partly concealed by grass and weeds.<sup>9</sup> It is not bound to erect a barrier on a highway to protect travelers from falling over a dangerous bank thirty-four feet distant from the traveled part, and nine and a half feet

<sup>1</sup> *Aston v. Newton*, 134 Mass. 507; 45 Am. Rep. 347.

<sup>2</sup> 2 *Thompson on Negligence*, 771; *Marshall v. Ipswich*, 110 Mass. 522; *Farrell v. Oldtown*, 69 Me. 72.

<sup>3</sup> *Puffer v. Orange*, 122 Mass. 389; 23 Am. Rep. 368; *Green v. Bridge Creek*, 38 Wis. 449; 20 Am. Rep. 18; *Chapman v. Cook*, 10 R. I. 304; 14 Am. Rep. 686; *Murphy v. Gloucester*, 105 Mass. 470; *Daily v. Worcester*, 131 Mass. 452; *Burr v. Plymouth*, 48 Conn. 460; *Zettler v. Atlanta*, 66 Ga. 195.

<sup>4</sup> *Binford v. Grand Rapids*, 53 Mich. 98; 52 Am. Rep. 105; *Steele v. City of Boston*, 128 Mass. 583; *Schultz v.*

*Milwaukee*, 49 Wis. 254; 35 Am. Rep. 779; *Pierce v. New Bedford*, 129 Mass. 534; 37 Am. Rep. 387; *Faulkner v. Aurora*, 85 Ind. 130; 44 Am. Rep. 1. *Contra*, *Taylor v. Mayor of Cumberland*, 64 Md. 68; 54 Am. Rep. 759.

<sup>5</sup> *Donoho v. Vulcan Iron Works*, 75 Mo. 401.

<sup>6</sup> *Campbell v. Montgomery*, 53 Ala. 527; 25 Am. Rep. 656.

<sup>7</sup> *Sikes v. Manchester*, 59 Iowa. 65.

<sup>8</sup> *Dubois v. Kingston*, 102 N. Y. 219; 55 Am. Rep. 804.

<sup>9</sup> *Wellington v. Gregson*, 31 Kan. 99; 47 Am. Rep. 482.

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responsible, in ordinary highway;<sup>2</sup> nor is straying off the highway distance.<sup>3</sup> A city is persons "coasting" received in consequence boy who was using does not extend to and control, like the conduct of individuals the safety of those A sleigh standing for is not an obstruction is not negligent in tripping-stone just inconvenience of those public building.<sup>4</sup> A y streets to protect a gent obstruction, and weeds.<sup>5</sup> It is not way to protect travel-bank thirty-four feet nine and a half feet

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bell v. Montgomery, 53 Ala. Am. Rep. 656. v. Manchester, 59 Iowa,

is v. Kingston, 102 N. Y. 219; Rep. 804. ington v. Gregson, 31 Kan. m. Rep. 482.

from the line of the highway as located.<sup>1</sup> An action cannot be maintained against a city because of the fall of a dangerous wall left standing after a fire at a point remote from the public street.<sup>2</sup>

ILLUSTRATIONS. — Plaintiff's sleigh was overturned by a slight mound of dirt suffered to remain in a public street after an excavation. *Held*, evidence of negligence on the part of defendant: *Stafford v. Oskaloosa*, 57 Iowa, 748. A religious corporation made an excavation, inadequately guarded, at the side of a public alley in a city, for entrance to the basement of their church. The plaintiff fell into it in the dark and was injured, while attempting to cross the alley. *Held*, that the city was liable to him for the injury, although the excavation was not on the traveled portion of the alley: *Niblett v. Nashville*, 12 Heisk. 684; 27 Am. Rep. 755. A stairway, parallel to a city street, but outside the limits of the street and sidewalk, led from the sidewalk to a lower level. The opening was properly fenced along the side of the sidewalk. *Held*, that the city was not bound to maintain a barrier or gate at the entrance of the stairway: *Fitzgerald v. Berlin*, 51 Wis. 81; 37 Am. Rep. 814. The driver of a buggy, in turning from one street into another, got one of the lines entangled under the horse's tail, causing the horse to back and fall into a hole in the embankment on which the street was built. *Held*, that the municipality was liable for the consequent injury: *Hull v. City of Kansas*, 54 Mo. 598; 14 Am. Rep. 487. A horse, tied to a post in a city street, became frightened, broke away, and ran along the street, and plunged down an unfenced precipice, crossing the street, and impassable except by a stairway for foot-passengers, and was killed. *Held*, that the city was not liable: *Moss v. Burlington*, 80 Iowa, 438; 46 Am. Rep. 82. A woman, walking after dark along a village street in a sparsely settled locality, left the street to go across the fields, and fell into a hole dug by children by the side of a stump some five feet outside the street line, and was injured. *Held*, that the village was not liable: *Keyes v. Marcellus*, 50 Mich. 439; 45 Am. Rep. 52. A tripped upon a stone improperly upon a highway, and fell into a cellar, which he maintained as a nuisance. *Held*, that the town was liable only for the injury sustained from the tripping, not for that caused by the fall into the cellar: *Lavery v. Manchester*, 58 N. H. 444. The wrought part of a highway was sufficiently smooth and wide for safe transit; a traveler's horse,

<sup>1</sup> *Barnes v. Chicopee*, 138 Mass. 67; 52 Am. Rep. 259. <sup>2</sup> *Cain v. Syracuse*, 29 Hun, 105.

meeting cows with boards on their horns, became frightened, and ran the wagon against a blasted rock lying outside the wrought part, but inside the highway limits. *Held*, that the town was not liable for the consequent injury to the traveler. *Perkins v. Fayette*, 68 Me. 152.

§ 4020. **Notice of Defects must be Posted.** — If there be defects in a road or bridge, the authorities must warn travelers by notices posted where they can be readily seen.<sup>1</sup> To relieve itself from liability for want of repair of a side-track, as accessible and much traveled as the prepared track, the town should give some reasonable notice that its use is unauthorized. This may be either by placing obstructions thereon, or putting up notices, or otherwise sufficiently notifying travelers.<sup>2</sup>

§ 4021. **Objects Which Frighten Horses.** — If the town, city, or other public corporation charged by law with the care of highways permits objects to remain therein which from their nature have a tendency to frighten horses of ordinary gentleness and docility, and the horse of a traveler, himself in the exercise of due care, takes fright at such an object and runs, and, notwithstanding due efforts to restrain him on the part of his driver, damages ensue, the corporation must pay such damages.<sup>3</sup> In some states the roads must be kept safe even for skittish horses;<sup>4</sup> while in others it is enough that it is safe for horses of ordinary docility.<sup>5</sup> One is not precluded from recovering damages for a highway accident, even though some imperfection of vision in his horse contributed to

<sup>1</sup> 2 Thompson on Negligence, 773; *Humphreys v. Armstrong Co.*, 56 Pa. St. 204.

<sup>2</sup> *Cartright v. Belmont*, 58 Wis. 370.

<sup>3</sup> See *ante*, § 1163; *Young v. New Haven*, 39 Conn. 435; *Ayer v. Norwich*, 39 Conn. 376; 12 Am. Rep. 396; *Dimock v. Sutfield*, 30 Conn. 129; *Morse v. Richmond*, 41 Vt. 435; 98 Am. Dec. 600; *Foshay v. Glenn Haven*, 25 Wis. 288; 3 Am. Rep. 73; *Kelly v.*

*Fond du Lac*, 31 Wis. 179; *Card v. Ellsworth*, 65 Me. 547; 20 Am. Rep. 722; *Winship v. Entfield*, 42 N. H. 197; *Chamberlain v. Entfield*, 43 N. H. 356; *Chicago v. Hoy*, 75 Ill. 530; *Merrill v. Hampden*, 26 Me. 234; *Fritsch v. Alleghany*, 91 Pa. St. 226.

<sup>4</sup> *Hey v. Philadelphia*, 81 Pa. St. 50; 22 Am. Rep. 733; *Lower Township v. Merkhoffer*, 71 Pa. St. 276.

<sup>5</sup> *Bliss v. Wilbraham*, 8 Allen, 564.

s, became frightened, and lay outside the limits. *Held*, that the injury to the traveler.

**Posted.** — If there authorities must warn they can be readily for want of repair each traveled as the re some reasonable This may be either putting up notices, or ers.<sup>2</sup>

**Horses.** — If the town, urged by law with to remain therein tendency to frighten ility, and the horse of due care, takes d, notwithstanding of his driver, dam- such damages.<sup>3</sup> In life even for skittish that it is safe for not precluded from ident, even though horse contributed to

ac, 31 Wis. 179; Card v. 35 Me. 547; 20 Am. Rep. ship v. Enfield, 42 N. H. perlain v. Enfield, 43 N. H. go v. Hoy, 75 Ill. 530; Mer- pden, 26 Me. 234; Fritsch y, 91 Pa. St. 226. Philadelphia, 81 Pa. St. 50; o. 733; Lower Township v. 71 Pa. St. 276. Wilbraham, 8 Allen, 564.

the accident, if the horse was a suitable one to drive.<sup>1</sup> It is generally held that if a horse which has taken fright at some ordinary object on the highway runs away and comes in contact with a defect in the highway, the municipal corporation is liable for the damages suffered.<sup>2</sup> On the other hand, in three states, it is held that, to make the corporation responsible, the defect in the highway must be the sole cause of the accident.<sup>3</sup>

**ILLUSTRATIONS.** — A left in a town highway an object calculated to frighten horses. The town negligently suffered it to remain, and the plaintiff's horse was frightened by it and ran away, doing damage. *Held*, that plaintiff might recover against the town: *Bennett v. Fifield*, 13 R. I. 139; 43 Am. Rep. 17. A complaint alleged that the defendant knowingly and carelessly allowed one of its streets to become obstructed by an exhibition of wild animals, to wit, two bears, and that it authorized and sanctioned the same, that such exhibition was calculated to produce injury to persons lawfully using the street, and that plaintiff's horse was frightened thereby, and plaintiff injured. *Held*, good on demurrer: *Little v. Madison*, 42 Wis. 643; 24 Am. Rep. 435. A horse was frightened at a boulder dug out of the side of a city street, and which had lain there several days awaiting removal by a person who had asked for and obtained it for building purposes. *Held*, that the city was not liable for a consequent injury: *Agnew v. Corunna*, 55 Mich. 428; 54 Am. Rep. 383. A city licensed the exhibition of an animal upon a booth in a public square. The owners of the animal were leading him for exercise upon the highway, when the plaintiff's horse took fright at the sight of the animal, and, running away, received injuries. *Held*, that the city was not liable: *Cole v. Newburyport*, 129 Mass. 594; 37 Am. Rep. 394.

<sup>1</sup> *Wright v. Templeton*, 132 Mass. 49.

<sup>2</sup> *Whitcomb v. Fairlee*, 43 Vt. 671; *Baldwin v. Greenwoods Turnpike Co.*, 40 Conn. 238; 16 Am. Rep. 33; *Ward v. North Haven*, 43 Conn. 148, 155; *Lower Macungie Township v. Merkhoffer*, 71 Pa. St. 276; *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733; *Manderschid v. Dubuque*, 25 Iowa, 108; *Dreher v. Fitchburg*, 22 Wis. 675; 99 Am. Dec. 91; *Houfe v. Fulton*, 29 Wis. 296; 9 Am. Rep. 568; *Hawes v. Fox Lake*, 33 Iowa, 438; *Ring v. Cohoes*, 19 Alb. L. J. 472; 13 Hun,

76; *Winship v. Enfield*, 42 N. H. 197; *Clark v. Barrington*, 41 N. H. 52; *Tucker v. Henniker*, 41 N. H. 317; *Hunt v. Pownall*, 9 Vt. 411; *Kelsey v. Glover*, 15 Vt. 708; *Morse v. Richmond*, 41 Vt. 435; 98 Am. Dec. 600; *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733; *McCauley v. New York*, 67 N. Y. 602.

<sup>3</sup> *Rowell v. Lowell*, 7 Gray, 100; 66 Am. Dec. 464; *Stickney v. Salem*, 3 Allen, 374; *Moore v. Abbott*, 32 Me. 46; *Farrar v. Greene*, 32 Me. 574; *Anderson v. Bath*, 42 Me. 346; *Bigelow v. Read*, 51 Me. 325; *Moulton v. Sand-*

§ 4022. **Liability for Defective Sidewalks.**—It is the duty of the municipality to keep the sidewalks and crosswalks in repair, and it is liable for injuries resulting from defects therein.<sup>1</sup> Sidewalks are included in the word "streets."<sup>2</sup> A city is liable to a pedestrian who is injured by falling on a portion of a city sidewalk made of glass and iron, and worn smooth and slippery, solely in consequence of its slipperiness.<sup>3</sup> A wooden awning over a sidewalk, supported on the outside by posts bedded in the street, if insecurely supported and dangerous, is a defect which the city is bound to remove.<sup>4</sup> So a city is liable for an injury from a cornice of a building which projects over a sidewalk, and which is being constructed in such a manner as to be dangerous to persons using the sidewalk.<sup>5</sup> A failure to put a railing or guard on the outer edge of a curved sidewalk leading to a bridge narrower than the street is negligence.<sup>6</sup> Cellar doors opening out on the sidewalks, and frequently and negligently kept or left open,

ford, 51 Me. 127; Jackson v. Bellevue, 30 Wis. 250; Houfe v. Fulton, 29 Wis. 296; 9 Am. Rep. 568; Spaulding v. Winslow, 74 Me. 528; Cook v. Charlestown, 98 Mass. 80.

<sup>1</sup> Chicago v. Robbins, 2 Black, 418; Lombard v. Chicago, 4 Biss. 460; Galesburg v. Higley, 61 Ill. 287; Sterling v. Thomas, 60 Ill. 264; Stinson v. Gardiner, 42 Me. 248; 66 Am. Dec. 281; Bacon v. Boston, 3 Cush. 174; George v. Haverhill, 110 Mass. 506; Loan v. Boston, 106 Mass. 450; Barnes v. Newton, 46 Iowa, 567; Dewey v. Detroit, 15 Mich. 307; Reinhard v. New York, 2 Daly, 243; Johnston v. Charleston, 3 S. C. 232; Nashville v. Brown, 9 Heisk. 1; 24 Am. Rep. 298; Higert v. Greencastle, 43 Ind. 574; Grove v. Fort Wayne, 45 Ind. 429; 15 Am. Rep. 262; Chicago v. Langlass, 66 Ill. 361; Peru v. French, 55 Ill. 317; Marquette v. Cleary, 37 Mich. 296; Providence v. Clapp, 17 How. 161; Colby v. Beaver Dam, 34 Wis. 285; Manchester v. Hartford, 30 Conn. 118; Topeka v. Tuttle, 5 Kan. 311; Atchison v. King, 9 Kan. 550; Smith v. Leavenworth, 15 Kan. 81; Jansen v.

Atchison, 16 Kan. 358; Ottawa v. Washabaugh, 11 Kan. 124; Wyandotte v. White, 13 Kan. 191; Fort Scott v. Brothers, 20 Kan. 455; Hutson v. New York, 9 N. Y. 163; 59 Am. Dec. 526; Conrad v. Ithaca, 16 N. Y. 158; Weet v. Brockport, 16 N. Y. 161; Davenport v. Ruckman, 37 N. Y. 568; Clemence v. Auburn, 66 N. Y. 334; Rowell v. Williams, 29 Iowa, 210; Rockford v. Hildebrand, 61 Ill. 155; Bloomington v. Bay, 42 Ill. 503; Raymond v. Rowell, 6 Cush. 524; 53 Am. Dec. 57. *Contra*, Detroit v. Blakeby, 21 Mich. 84; 4 Am. Rep. 450. A walk crossing a public alley is a "cross-walk," as distinguished from a sidewalk: Pequinot v. Detroit, 16 Fed. Rep. 211.

<sup>2</sup> Wilson v. Watertown, 3 Hun, 508; 5 Thomp. & C. 579.

<sup>3</sup> Cromarty v. Boston, 127 Mass. 329; 34 Am. Rep. 381.

<sup>4</sup> Hume v. New York, 74 N. Y. 264; Bohen v. Waseca, 32 Minn. 176; 50 Am. Rep. 564.

<sup>5</sup> Grove v. Fort Wayne, 45 Ind. 429; 15 Am. Rep. 262.

<sup>6</sup> Chicago v. Gallagher, 44 Ill. 295.

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16 Kan. 358; Ottawa v.  
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 v. Gallagher, 44 Ill.

endanger the use of the sidewalk, and the city is liable to persons falling into them, and injured thereby.<sup>1</sup> Whether a piece of gas apparatus, fixed in a city sidewalk, so shaped and placed, and unprotected, as to trip up a foot-passenger, constitutes a defect in the sidewalk for which the city is liable, is a question of fact for the jury.<sup>2</sup> So is the question whether it is negligence for the city council to allow cellars under its sidewalks in front of shops.<sup>3</sup> A city building a sidewalk on posts, and permitting abutters to excavate areas thereunder, does not become an insurer of its strength and sufficiency, but only undertakes to use reasonable care and diligence commensurate with the danger.<sup>4</sup> A city is not bound to maintain railings about areas in front of the basement offices and shops upon the streets.<sup>5</sup> A city is not liable for an injury suffered by slipping and falling upon a sidewalk, by the combined effect of the unsafe condition of the sidewalk and of the like condition of steps without the limits of the highway.<sup>6</sup> It is not liable to one who falls into a coal-hole in the sidewalk because of the turning of the cover, which the owner should have kept fastened underneath, the difficulty not being known to the city, and not being apparent.<sup>7</sup>

ILLUSTRATIONS.—A city passed an ordinance to construct a sidewalk on a certain street, where the adjacent land-owners had put up a plank walk. This sidewalk was not constructed. *Held*, that the city was liable to one who fell by reason of a defect in the plank walk: *Oliver v. Kansas*, 69 Mo. 79. A city had notice of a defect in a bridge over a drain habitually used by foot-passengers at a street crossing, where there were no stepping-stones. *Held*, liable to one injured therefrom, as if it were in the sidewalk: *Atlanta v. Champe*, 66 Ga. 659. Plaintiff, while in the exercise of due care, stepped into a hole left in a sidewalk, of which the city had notice, and was thereby unavoid-

<sup>1</sup> *Chapman v. Mayor etc. of Macon*, 55 Ga. 566; *Smith v. City of Leavenworth*, 15 Kan. 81.

<sup>2</sup> *Loan v. Boston*, 106 Mass. 450.

<sup>3</sup> *Augusta City Council v. Hapers*, 59 Ga. 151. And see *Bent v. Boston*, 122 Mass. 223.

<sup>4</sup> *Atchison v. Jansen*, 21 Kan. 560.

<sup>5</sup> *Beardsley v. Hartford*, 50 Conn. 529; 47 Am. Rep. 677. But see *McGill v. District of Columbia*, 4 Mackey, 70; 54 Am. Rep. 256.

<sup>6</sup> *Rowell v. Lowell*, 7 Gray, 100; 66 Am. Dec. 464.

<sup>7</sup> *Hanscom v. Boston*, 141 Mass. 242.

ably thrown on a railroad track, and in attempting to get up, caught his clothes on a spike in the sidewalk, and before he could extricate himself was struck by a passing train and killed. *Held*, that the city was liable: *Chicago v. Schmidt*, 107 Ill. 186; 83 Ill. 405. Plaintiff, lawfully using a street of the defendant, stepped to a hydrant on an adjacent lot, one or two feet from the street line, to get a drink of water, and while standing with one foot on the lot and the other on the street, some roofing, negligently suffered by the defendant to stand upon the adjacent sidewalk, fell on him and injured him. *Held*, that he might recover: *Duffy v. Dubuque*, 63 Iowa, 171; 50 Am. Rep. 743. An opening made in a sidewalk to admit light into the basement of the adjoining building was permitted to remain a long time without gratings or other protection, and large goods-boxes were permitted to be piled on the opposite side of the walk, so that a person running along the sidewalk, on a dark, rainy night, fell into the hole. *Held*, that the corporation was liable: *Galesburg v. Higley*, 61 Ill. 287. An excavation was made under the sidewalk by a builder, with the consent of the city, and covered with loose boards, which being removed by a person unknown, the plaintiff fell into the hole, in the dark. *Held*, that the city was liable: *Sterling v. Thomas*, 60 Ill. 264. The city of Chicago constructed a sidewalk but four feet wide, six feet above the level of the street, four feet from the adjacent buildings, and without any railings or guards. A woman fell from it and was injured. *Held*, gross negligence to construct a sidewalk in this manner, and the city was liable in damages: *Chicago v. Langlass*, 66 Ill. 361. Plaintiff, while walking in broad daylight, and looking at a peddler's wagon on the opposite side of the street to discover whether the name thereon was that of an acquaintance, fell through a hatchway in the sidewalk. The door, seven and a half feet long and three feet wide, was open, with no guard to protect passengers. It had, for three years, frequently been left open for several minutes. *Held*, not to justify a non-suit for want of proof of insufficiency in the sidewalk, nor for contributory negligence: *Burston v. Berlin*, 34 Wis. 357. A passage-way from a sidewalk, in a city, into the basement of a building was protected by a removable iron grating covered with boards the iron-work being fitted to the opening in such a way that it could not be left in an insecure condition except by gross carelessness. After being in this condition for forty years, during which time it had never been known to be left out of its place, the passage-way was used by a stranger, who did not replace the grating properly, and a few minutes after, the plaintiff, who was passing on the sidewalk, stepped upon it, and it gave way and she was injured. *Held*, that the city was not liable: *Littlefield v. Norwich*, 40 Conn. 406.

<sup>1</sup> *Stanton v. Springfield*, 12 Cush. 566; *Stone v. Hubbardston*, 100 Mass. 49, 56; *Nason v. Boston*, 14 Allen, 508; *Cook v. Milwaukee*, 24 Wis. 270; 1 Am. Rep. 183; 27 Wis. 191; *Perkins v. Fond du Lac*, 34 Wis. 435; *Landolt v. Norwich*, 37 Conn. 615; *Gilbert v. Roxbury*, 100 Mass. 185; *McLaughlin v. Corry*, 77 Pa. St. 109; 18 Am. Rep. 432; *Chicago v. McGiven*, 78 Ill. 347; *Billings v. Worcester*, 102 Mass. 329; 3 Am. Rep. 460; *Smyth v. Bangor*, 72 Me. 449; *Mason v. Boston*, 14 Allen, 508; *Ballerby v. New York*, 7 Daly, 16; *Blakeley v. Troy*, 18 Hun, 167.

<sup>2</sup> *Williams v. Lawrence*, 113 Mass. 506; *Stone v. Hubbardston*, 100 Mass. 49; *Perkins v. Fond du Lac*, 34 Wis. 435; *Cook v. Milwaukee*, 24 Wis. 270; 1 Am. Rep. 183; 27 Wis. 191; *McLaughlin v. Corry*, 77 Pa. St. 109; 18 Am. Rep. 432; *Collins v. Council Bluffs*, 32 Iowa, 324; 7 Am. Rep. 201;

*Luther v. Worcester*, 97 Mass. 269; *Hutchins v. Boston*, 97 Mass. 272; *Street v. Holyoke*, 105 Mass. 82; 7 Am. Rep. 500; *Fitzgerald v. Woburn*, 109 Mass. 204; *Billings v. Worcester*, 102 Mass. 329; 3 Am. Rep. 460; *Pinkham v. Topsfield*, 104 Mass. 78; *McAuley v. Boston*, 113 Mass. 503; *Morse v. Boston*, 109 Mass. 446; *Dutton v. Weare*, 17 N. H. 34; 43 Am. Dec. 591; *Denwa v. Bailey*, 131 Mass. 169; 41 Am. Rep. 219; *Mosey v. Troy*, 61 Barb. 580.

<sup>3</sup> *Dixon, C. J.*, in *Cook v. Milwaukee*, 24 Wis. 270; 27 Wis. 191; 1 Am. Rep. 183; *Collins v. Council Bluffs*, 32 Iowa, 324; 7 Am. Rep. 200; *Broburg v. Des Moines*, 93 Iowa, 523; 50 Am. Rep. 756; *Cloughessey v. Waterbury*, 51 Conn. 405; 50 Am. Rep. 38.

<sup>4</sup> *Street v. Holyoke*, 105 Mass. 82; 7 Am. Rep. 500.

<sup>5</sup> *Kinney v. Troy*, 38 Hun, 285.



liable for injuries sustained thereby, unless it should appear that it was guilty of some subsequent negligence or default in not repairing the sidewalk thus rendered dangerous; or unless it be shown that the gutter was in such condition that the dangerous consequences to be apprehended from an overflow of the water were apparent.<sup>1</sup> A municipality is not liable for an injury sustained by one by falling on the icy surface of cobble-stones laid between the flat stones of a street cross-walk, and slightly higher.<sup>2</sup> It is not liable for an injury caused to a foot-passenger on a sidewalk, which the city is bound to keep in repair, by the falling of an overhanging mass of snow and ice from the roof of a building not owned by the city, although it has so overhung the highway for more than twenty-four hours before the accident.<sup>3</sup> In several states it is held that a city has no authority to require the owners or occupiers of premises to remove, under a penalty, snow from the adjacent sidewalks.<sup>4</sup>

<sup>1</sup> *Cook v. City of Milwaukee*, 24 Wis. 270; 1 Am. Rep. 183. See *Billings v. Worcester*, 102 Mass. 329; 3 Am. Rep. 460.

<sup>2</sup> *Mauch Chunk v. Kline*, 100 Pa. St. 119; 45 Am. Rep. 364.

<sup>3</sup> *Hixon v. Lowell*, 13 Gray, 59.

<sup>4</sup> *City of Hartford v. Talcott*, 48 Conn. 525; 40 Am. Rep. 189; *Gridley v. Bloomington*, 88 Ill. 554; 30 Am. Rep. 566; affirmed in *City of Chicago v. O'Brien*, 111 Ill. 532; 53 Am. Rep. 640. In *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566, the court say: "The ordinance under which the defendant was prosecuted imposes a fine upon any one who shall permit snow to remain on the sidewalk abutting premises occupied or owned by him longer than a period of six hours after it ceases to fall, or if the cessation is in the nighttime, then longer than six hours after sunrise the next morning. The validity of that ordinance is the only question made on the argument. It was admitted the lot occupied by defendant was one of an addition to Bloomington that was laid out in 1836, and hence it follows, under the decision of

this court, the fee of the street in front of the premises was either in the original proprietor or in the corporation: *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624; *Gebhardt v. Reeves*, 75 Ill. 301. The public had an easement over the street in front of the lot occupied and owned by defendant, and it makes no difference, so far as this decision is concerned, whether the fee of the street passed by the plat and dedication to the corporation, or whether it remained in the original proprietor. It is plain, defendant has no other interest in the street in front of his property than any other citizen of the municipality. The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons traveling on foot, and is as much under the control of the municipal government as the street itself. The owner of the adjacent lot is under no more obligation to keep the sidewalk free from obstructions than he is the street in front of his premises. He may not himself obstruct either so as to impede travel on foot or in car.

**§ 4024. Actions against Third Persons Causing Defects.**—If a municipal corporation has been compelled to pay a judgment for damages recovered by a traveler for injuries sustained by a defect in one of its highways, which defect was created or continued by the willful act or negligence of a third person, it may maintain an action against such third person for reimbursement.<sup>1</sup> And it may recover, not only the amount of the judgment recovered against it, but also the reasonable expenses incurred in defending the action against it, including counsel fees.<sup>2</sup>

riages. It will be conceded the citizen is not bound to keep the street in front of his premises free from snow, or anything else that might impede travel; then, upon what principle can he be fined for not removing snow or other obstruction from the sidewalk in which he has no interest other than what he has in common with all other persons resident in the city? It is certainly not upon the principle under which assessments are made against the owner for building sidewalks in front of his property. The cases are not analogous. Such assessments are maintained on the ground that the sidewalk enhances the value of the property; and to the extent of the special benefits conferred, they are held to be valid. It would be absurd to suppose that assessments for benefits for local improvements could be enforced by fines or penalties, as in the ordinance under which the defendant was fined. Nor do we think this ordinance can be upheld as an exercise of the police power inherent in all municipal governments. It was expressly decided by this court in *City of Ottawa v. Spencer*, 40 Ill. 211, that local improvements of either sidewalks or streets cannot be compelled under the general police power. The legislature must afford the necessary power for constructing all needful improvements, subject to constitutional limitations; and when one mode of making such improvements is sanctioned by the constitution, no other can be adopted. Keeping streets and sidewalks in repair, and free from obstructions that impede travel or render it

dangerous, is referable to the same power as for constructing new improvements. The sidewalk, as was declared in the case cited, is as much a public highway, free to the use of all, as the street itself, and, upon principle, it follows, the citizen cannot be laid under obligations, under our laws, to keep it free from obstructions in front of his property at his own expense, any more than the street itself, either by the exercise of the police power, or by fines and penalties imposed by ordinance, or by direct legislative action."

<sup>1</sup> 2 Thompson on Negligence, 789; *Lowell v. R. R. Co.*, 25 Pick. 24; 34 Am. Dec. 40; *Lowell v. Short*, 4 Cush. 275; *Milford v. Holbrook*, 9 Allen, 17; *Boston v. Worthington*, 10 Gray, 496; 71 Am. Dec. 678; *Woburn v. R. R. Co.*, 109 Mass. 283; *Centreville v. Woods*, 57 Ind. 192; *Portland v. Richardson*, 54 Me. 46; 89 Am. Dec. 720; *Lowell v. Spaulding*, 4 Cush. 277; 50 Am. Dec. 775; *Littleton v. Richardson*, 34 N. H. 179; *Chicago v. Robbins*, 2 Black, 418; *Robbins v. Chicago*, 4 Wall. 657; *Rochester v. Montgomery*, 9 Hun, 394; affirmed 72 N. Y. 65; *Brooklyn v. R. R. Co.*, 47 N. Y. 475; 7 Am. Rep. 469; *Independence v. Jeckel*, 38 Iowa, 427; *Severin v. Eddy*, 52 Ill. 189; *Norwich v. Breed*, 30 Conn. 535; *Troy v. R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177; *Catterlin v. Frankfort*, 79 Ind. 547; 41 Am. Rep. 627.

<sup>2</sup> *Inhabitants of Westfield v. Mayo*, 122 Mass. 100; 23 Am. Rep. 292; *Chesapeake etc. Canal Co. v. County Comm'rs of Alleghany County*, 57 Md. 201; 40 Am. Rep. 430.

A city lot-owner is not liable to the city for injuries caused by the defective condition of the sidewalk in front of his lot for which the city has been held to pay.<sup>1</sup> Where a city, by authority of its charter, maintains shade-trees on the sidewalks, the owner or occupant of a lot is not impliedly bound to trim them, nor liable for injury to a passer by the fall of a neglected rotten limb.<sup>2</sup> The violation of a duty imposed by a municipal ordinance, and sanctioned by a fine, will not support an action on the case for special damages in favor of one injured by the violation and against the violator.<sup>3</sup> A person driving a horse and vehicle through a city street who, by inattention or negligence, allows the horse to run away is liable to the city for damage done to the public property of the city by the running of the animal.<sup>4</sup>

ILLUSTRATIONS. — P. caused a building to be erected on his city lot, the work being done by contract; in the performance of it, the contractors made an excavation in the adjoining sidewalk, into which a traveler fell and was injured, and recovered judgment against the city therefor. In an action by the city against P. on that judgment, *held*, that, as the excavation was necessary in the execution of the contract and within the contemplation of the parties, P. was liable: *Palmer v. Lincoln*, 5 Neb. 136; 25 Am. Rep. 470. A railroad company, in part consideration of certain franchises, gave a bond to a city, wherein they covenanted to keep the pavement of streets through which their road ran "in thorough repair within the tracks, and three feet on each side thereof, with the best water-stone, under the direction of such competent authority as the common council might designate." In an action on the bond for a breach of the covenant, *held*, that the railroad company was bound to keep the pavement in "thorough repair," and that the designation of "competent authority" to superintend such repairs was not a condition precedent; also, that the city could recover of the railroad company the amount of a judgment obtained against it by a traveler who had sustained injuries in consequence of the failure of the railroad company to keep the pavement in repair, as required by bond: *City of Brooklyn v. R. R. Co.*, 47

<sup>1</sup> *Keokuk v. District of Keokuk*, 53 Iowa, 352; 36 Am. Rep. 226.

<sup>2</sup> *Weller v. McCormick*, 47 N. J. L. 397; 54 Am. Rep. 175.

<sup>3</sup> *Heeney v. Sprague*, 11 R. I. 456; 23 Am. Rep. 502.

<sup>4</sup> *New Orleans v. Heres*, 23 La. Ann. 782.

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N. Y. 475; 7 Am. Rep. 469. A city charter provided that in case of injuries from defects in any highway, or from other causes for which the city would be liable, if such defect, etc., was produced by the default or negligence of any person, such person should be primarily liable, and legal remedies be exhausted against him before the city should be liable. *Held*, valid, but not applicable to the negligence of persons making public improvements under contract with the city. Another provision in the same charter exempted the city from liability for injuries incurred where work was being done on streets or sidewalks in consequence of defects arising from the work, and declared the contractors liable for such injuries. *Held*, invalid, as granting to the city a special immunity: *Hincks v. Milwaukee*, 46 Wis. 559; 32 Am. Rep. 735.

### § 4025. Liability for Torts of Officers and Agents.—

Where the negligent officer, agent, or employee is the servant of the municipal corporation, and in the management of its property or franchises for its benefit commits a wrong which damages a third person, the corporation is liable.<sup>1</sup> A city or town which derives an emolument from the exercise of powers conferred upon it is liable for the negligent or unskillful exercise of these powers by its agents, or for the neglect of a duty which is imposed by or results from the exercise of them.<sup>2</sup> It is liable for injuries caused by the negligence of its servants to a person coming on grounds under its control rightfully and by an implied invitation and license;<sup>3</sup> and for the negligence of an agent employed to take care of naphtha used in lighting the street-lamps;<sup>4</sup> and for the negligence of a contractor engaged in repairing the streets of the city;<sup>5</sup> and for the seizure and sale of property by its officers to pay a void assessment.<sup>6</sup> If a city lets rooms in a public building with the services of a janitor, it is responsible

<sup>1</sup> *Maximilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468; *Ross v. City of Madison*, 1 Ind. 281; 48 Am. Dec. 361; *Joliet v. Harwood*, 86 Ill. 110; 29 Am. Rep. 17; *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434.

<sup>2</sup> *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434.

<sup>3</sup> *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485.

<sup>4</sup> *Sullivan v. Holyoke*, 135 Mass. 273.

<sup>5</sup> *Nashville v. Brown*, 9 Heisk. 1; 24 Am. Rep. 289.

<sup>6</sup> *Durkee v. Kenosha*, 59 Wis. 123; 48 Am. Rep. 480.

for a personal injury caused by his negligence in the care of the building to one lawfully there by invitation of the hirer.<sup>1</sup> Vindictive damages are not recoverable against a municipal corporation for the willful and malicious acts of its officers.<sup>2</sup>

ILLUSTRATIONS. — An ordinance provided that a committee be appointed who should advertise for proposals for the construction of new water-works, make contracts subject to the approval of the councils, and employ an engineer to prepare the necessary plans and specifications. The engineer, with the authority of the committee, but without the approval of the councils, entered into a parol contract with a company to make certain connections in the pipes. Through defective machinery and negligent work on the part of the company in performing the contract, an explosion occurred whereby S. was injured and died. *Held*, that the city was responsible: *Harrisburg v. Saylor*, 87 Pa. St. 216. Trustees of water-works ordered the digging of trenches. While the digging was going on, the trustees individually notified the superintendent that they would have nothing further to do with the work. *Held*, that this did not relieve the city from its liability for negligence of the superintendent in conducting the work: *Ironton v. Kelley*, 38 Ohio St. 50.

§ 4026. **When not Liable — Public Officers.** — But on the other hand, where, by law, the municipal corporation is required to appoint or elect an officer to perform a public duty in which it has no private interest, and from which it derives no special benefit, such officer is not the servant of the municipality, and it is not responsible for his torts.<sup>3</sup>

<sup>1</sup> *Worden v. New Bedford*, 131 Mass. 23; 41 Am. Rep. 185.

<sup>2</sup> *McGray v. Lafayette*, 12 Rob. (La.) 674; 43 Am. Dec. 239.

<sup>3</sup> *Richmond v. Long*, 17 Gratt. 375; *Detroit v. Blakeby*, 21 Mich. 84; 4 Am. Rep. 450; *Barney v. Lowell*, 98 Mass. 570; *White v. Phillipson*, 10 Met. 108; *Bigelow v. Randolph*, 14 Gray, 543; *Hafford v. New Bedford*, 16 Gray, 297; *Child v. Boston*, 4 Allen, 52; 81 Am. Dec. 680; *Young v. Yarmouth*, 9 Gray, 386; *Ball v. Winchester*, 32 N. H. 435; *New York etc. Lumber Co. v.*

*Brooklyn*, 71 N. Y. 580; *Maxmilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468; the court saying: "There are two kinds of duties which are imposed upon a municipal corporation. One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private

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As a general rule, a municipal corporation is liable for negligence only in cases where the negligence or non-feasance of its ordinary agents and servants, as distinguished from that of its officers, causes the injury, or where the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immediate benefit of the public, or where the corporation, as a corporation, is exercising its private franchise powers and privileges which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though inuring ultimately to the benefit of the general public;<sup>1</sup> nor is it

purposes; the latter is public, and is used for public purposes: *Lloyd v. Mayor*, 5 N. Y. 374; 55 Am. Dec. 347. The former is not held by the municipality as one of the political divisions of the state; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user nor for misuser by the public agents: *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302. Where the duties which are imposed upon municipalities are of the latter class, they are generally to be performed by officers who, though deriving their appointment from the corporation itself through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers, and hence the servants, of the public at large. They have powers and perform duties for the benefit of all the citizens, and are

not under the control of the municipality, which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents, or servants of the public at large, and the corporation is not responsible for their acts or omissions, nor for the acts or omissions of the subordinates by them appointed: *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196. And where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable. It has appointed or elected him, in pursuance of a duty laid upon it by law, for the general welfare of the inhabitants or of the community: *Hafford v. New Bedford*, 16 Gray, 297. He is the person selected by it as the authority empowered by law to make selections. But when selected, and its power exhausted, he is not its agent; he is the agent of the public, for whom and for whose purposes he was selected."

<sup>1</sup> *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256.

liable for nuisance when the acts complained of are not within the scope of its corporate powers, nor performed by its officers in the execution of any corporate duty imposed upon them.<sup>1</sup> Under this rule, it is held that a municipal corporation is not responsible for the torts of firemen;<sup>2</sup> as, for example, their negligence whereby a citizen's property is destroyed by fire;<sup>3</sup> a city engineer empowered to survey and mark the boundaries of lots within the city when called upon to do so by the owners;<sup>4</sup> an inspector of steam-boilers;<sup>5</sup> health officers;<sup>6</sup> physicians

<sup>1</sup> Seele v. Inhabitants of Deering, 79 Me. 343; 1 Am. St. Rep. 314.

<sup>2</sup> Hafford v. New Bedford, 16 Gray, 297; Heller v. Sedalia, 53 Mo. 159; 14 Am. Rep. 444; Smith v. Rochester, 19 Alb. L. J. 455; 76 N. Y. 506; O'Meara v. New York, 1 Daly, 425; Fisher v. Boston, 104 Mass. 87; 6 Am. Rep. 196; Woolbridge v. New York, 49 How. Pr. 67; Van Wert v. Brooklyn, 28 How. Pr. 451; Torbush v. Norwich, 38 Conn. 225; 9 Am. Rep. 395; Jewett v. New Haven, 38 Conn. 368; 9 Am. Rep. 382; Greenwood v. Louisville, 13 Bush, 226; 26 Am. Rep. 263; Hayes v. Oshkosh, 33 Wis. 314; 14 Am. Rep. 760; Wilcox v. Chicago, 107 Ill. 334; 47 Am. Rep. 424; Welsh v. Rutland, 56 Vt. 228; 48 Am. Rep. 763; Strawbridge v. Philadelphia, 13 Phila. 173. In Jewett v. New Haven, 38 Conn. 368, 9 Am. Rep. 382, the court say: "A burglar enters a building and steals sixpence worth of property and escapes. The officer who goes in pursuit is acting for the public, — is in public employment. This is universally conceded. How much more is the fireman in fact acting for the public when engaged in the performance of his duties? A building within a city is being destroyed by rioters. A corps of police-officers interferes to protect the building, and is successful. Later in the day the building is on fire. A corps of firemen interferes to protect the building, and the fire is extinguished. Where lies the difference in principle in the character of the interference? Each corps is under the direction of the city. Each corps is selected and paid by the city. Each corps saves the building from destruc-

tion, — one from fire, the other from rioters. Where lies the difference? The interest of the city is the same in the two cases. The property is the same. The object of the interference is the same. If unsuccessful, the injury to the owner would be the same. Where lies the difference? There is no difference, except in the mode that threatens the building with destruction, which certainly constitutes no difference in principle. And, furthermore, a house on fire within a city is a public nuisance. The city comes with its fire department and abates it. The act of abatement takes its character from the thing abated. The abatement of a private nuisance is a private act. The abatement of a public nuisance must be a public act. How can it be otherwise?" A municipal corporation is not liable for damages caused by the acts of a voluntary association of firemen while engaged in extinguishing a fire within the corporate limits: Torbush v. City of Norwich, 38 Conn. 225; 9 Am. Rep. 395.

<sup>3</sup> Robinson v. Evansville, 87 Ind. 334; 44 Am. Rep. 770; Wright v. Augusta, 78 Ga. 241; 6 Am. St. Rep. 256. And no action lies against a city for a personal injury caused by collision with a rope stretched across a street, by order of the municipal authorities, in order to allow a parade of the fire department: Simon v. Atlanta, 67 Ga. 618; 44 Am. Rep. 739.

<sup>4</sup> McCarty v. Bauer, 3 Kan. 237.

<sup>5</sup> Mead v. New Haven, 40 Conn. 72; 16 Am. Rep. 14.

<sup>6</sup> Mitchell v. Rockland, 41 Me. 365; 45 Me. 490; 52 Me. 118; Bryant v. St. Paul, 33 Minn. 289; 53 Am. Rep. 31.

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for the poor;<sup>1</sup> police-officers or watchmen;<sup>2</sup> or police magistrates.<sup>3</sup>

A municipal corporation is not liable for an injury sustained by the carelessness of a teamster who was engaged in transporting stone under the direction of the superintendant of streets to macadamize a street in the city;<sup>4</sup> nor for the wrongful acts of one acting as pound-keeper, but who has never qualified by giving bonds, as required by law;<sup>5</sup> nor where its treasurer, upon a tax-warrant, sold the plaintiff's goods by mistake for those of another;<sup>6</sup> nor for the passage of an illegal ordinance by its council, nor for the act of the mayor in issuing a warrant of arrest thereunder, nor for the act of the marshal in executing the warrant;<sup>7</sup> nor for allowing a nurse in a small-pox hospital established by the town to depart without being properly disinfected, whereby plaintiff caught the disease;<sup>8</sup> nor for an injury by the unauthorized firing of a cannon in a street by disorderly persons;<sup>9</sup> nor for an injury caused by a discharge of fireworks in a celebration of the city itself;<sup>10</sup> nor for the increased face value of warrants drawn upon the treasury, which the clerk of its council has fraudulently raised after issuance, although the failure of its officers to draw lines through the blank spaces enabled the alteration to be made so skillfully as to prevent detection by purchasers in good faith.<sup>11</sup> The fact that the

<sup>1</sup> Summers v. Daviess Co., 103 Ind. 262; 53 Am. Rep. 512.

<sup>2</sup> Stewart v. New Orleans, 9 La. Ann. 461; Buttrick v. Lowell, 1 Allen, 172; 79 Am. Dec. 721; Pollack's Adm'r v. Louisville, 13 Bush, 221; 26 Am. Rep. 260; Dargan v. Mobile, 31 Ala. 469; 70 Am. Dec. 505; Grumbine v. Washington, 2 McAr. 578; 29 Am. Rep. 627; Keller v. Corpus Christi, 50 Tex. 614; 32 Am. Rep. 613; Calwell v. Boone, 51 Iowa, 687; 33 Am. Rep. 154; Harman v. Lynchburg, 33 Gratt. 37; Attaway v. Cartersville, 68 Ga. 740. The city is not responsible for the damages which may result to a policeman wounded when in the discharge of his duty: Spalding v. Jefferson, 27 La. Ann. 159.

<sup>3</sup> Grumbine v. Washington, 2 McAr. 578; 29 Am. Rep. 627.

<sup>4</sup> Barney v. Lowell, 98 Mass. 570.

<sup>5</sup> Rounds v. Bangor, 46 Me. 541; 74 Am. Dec. 469.

<sup>6</sup> Wallace v. Menasha, 48 Wis. 79; 33 Am. Rep. 804.

<sup>7</sup> Trammell v. Russellville, 34 Ark.

105; 36 Am. Rep. 1.

<sup>8</sup> Brown v. Vinalhaven, 65 Me. 402; 20 Am. Rep. 709.

<sup>9</sup> Robinson v. Greenville, 42 Ohio St. 625; 51 Am. Rep. 837.

<sup>10</sup> Tindley v. Salem, 137 Mass. 171; 50 Am. Rep. 289.

<sup>11</sup> Chandler v. Bay St. Louis, 57 Miss. 326.



city authorities have licensed the exhibition of a circus does not lay the city under any obligation to furnish a safe and convenient access to the place of exhibition over private property, nor subject the city to any liability for defects in the way of approach that might be selected by the circus or its patrons.<sup>1</sup> A municipal corporation is not liable for a tort committed by one of its convicts on the person of another.<sup>2</sup>

ILLUSTRATIONS.—A servant was driving his master's horse on a street of a city faster than was permitted by the ordinance; he and the horse were taken into custody by the police, by whose negligence the horse escaped and was killed. *Held*, that the city was not liable therefor: *Elliott v. Philadelphia*, 75 Pa. St. 342; 15 Am. Rep. 591. Plaintiff's property was destroyed by means of sparks thrown from a steam fire-engine belonging to a city, and engaged at the time in extinguishing a fire. The injury was occasioned by the negligence of those in charge of the engine, who were employed and paid by the city. *Held*, that the city was not liable for the injury: *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760. A city made a contract with a water company to furnish water at certain places, and in sufficient quantities to extinguish fires when they might occur. *Held*, that one whose house was burned, as no water could be obtained, the pipes being out of repair and full of mud and gravel, could not recover damages, either from the city or the company: *Foster v. Lookout Water Co.*, 3 Lea, 42. The health officers of a city requested and directed plaintiff, a passer-by, to assist them in removing a coffin from the house, which he did. The coffin contained the body of a person who had died of the small-pox, which fact was known to the officers, but was not communicated to plaintiff. Plaintiff caught the disease and communicated it to his children, who died thereof: *Held*, that the plaintiff had no cause of action against the city: *Ogg v. Lansing*, 35 Iowa, 495; 14 Am. Rep. 499.

<sup>1</sup> *Morgan v. Hallowell*, 57 Me. 375.

<sup>2</sup> *Doster v. Atlanta*, 72 Ga. 233.

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## TITLE XL. PUBLIC REMEDIES.



## TITLE XL. PUBLIC REMEDIES.

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### CHAPTER CCVII.

#### MANDAMUS AND QUO WARRANTO.

- § 4027. Mandamus — In general.
- § 4028. Demand and refusal.
- § 4029. When writ will not be issued.
- § 4030. Ministerial duties — Discretionary duties.
- § 4031. Public officers.
- § 4032. Inferior courts.
- § 4033. Municipal corporations.
- § 4034. School officers.
- § 4035. Private corporations.
- § 4036. Parties.
- § 4037. Pleading and practice.
- § 4038. Quo warranto — In general.
- § 4039. Corporate franchises.
- § 4040. Offices.
- § 4041. When writ will not issue.
- § 4042. Who may have writ.
- § 4043. Procedure to obtain leave of court.
- § 4044. Pleading and practice — The plaintiff.
- § 4045. Pleading and practice — The defendant.
- § 4046. The judgment

§ 4027. **Mandamus — In General.** — A writ of *mandamus* is a command issuing from a court of law of competent jurisdiction, in the name of the state or sovereign, directed to some inferior court, officer, corporation, or person, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom it is directed, or from operation of

law.<sup>1</sup> It is an extraordinary legal remedy, which is granted only where without its aid there would be a failure of justice.<sup>2</sup> It is an original proceeding or suit, and not a final process.<sup>3</sup> Though regarded in England, and in some of the states, as a prerogative writ,<sup>4</sup> it is in most of the states regarded in the nature of an ordinary action between the parties, and as being a writ of right to the extent to which the party applying for it shows himself entitled to this particular kind of relief.<sup>5</sup> *Mandamus* is a civil remedy, and not a criminal proceeding.<sup>6</sup> But it is not superseded by the remedy by criminal prosecution, nor by a civil action on the case for neglect of duty.<sup>7</sup> The federal courts in issuing writs of *mandamus* will conform to the state practice in similar cases.<sup>8</sup> The consequences of a failure to make return to the alternative writ are similar to those following a failure to plead to a declaration at law.<sup>9</sup>

<sup>1</sup> 3 Bla. Com. 110; High on Extraordinary Legal Remedies, sec. 1; Dunklin County v. District County Court, 23 Mo. 449.

<sup>2</sup> Rex v. Barker, Burr. 1267; School Inspectors of Peoria v. People, 20 Ill. 525; People v. Hatch, 33 Ill. 9; City of Ottawa v. People, 48 Ill. 233; Lewis v. Whittle, 77 Va. 415.

<sup>3</sup> McBane v. People, 50 Ill. 503; State v. Bailey, 7 Iowa, 390; Judd v. Driver, 1 Kan. 455.

<sup>4</sup> School Inspectors v. People, 20 Ill. 525; People v. Hatch, 33 Ill. 9; Ottawa v. People, 48 Ill. 233; People v. Board of Police, 26 N. Y. 316; People v. Ferris, 76 N. Y. 326; Moody v. Fleming, 4 Ga. 115; 48 Am. Dec. 210.

<sup>5</sup> High on Extraordinary Legal Remedies, sec. 4; Kendall v. United States, 12 Pet. 524; Com. of Kentucky v. Dennison, 24 How. 66; Gilman v. Bassett, 33 Conn. 298; Arberry v. Beavers, 6 Tex. 457; 55 Am. Dec. 791; Fisher v. City of Charleston, 17 W. Va. 595.

<sup>6</sup> State v. Williams, 69 Ala. 311; McBane v. People, 50 Ill. 503; State v. Bailey, 7 Iowa, 390; Judd v. Driver, 1 Kan. 455; State v. Gracey, 11 Nev. 223; Chamberlain v. Warburton, 1 Utah, 267; State v. Jennings, 56 Wis. 113.

<sup>7</sup> Fremont v. Crippen, 10 Cal. 212; 70 Am. Dec. 711; Etheridge v. Hall, 7 Port. 47; In re Trustees of Williamsburgh, 1 Barb. 34; King v. Bank of England, Doug. 524; Queen v. R. R. Co., 10 Ad. & E. 531.

<sup>8</sup> Wisdom v. City of Memphis, 2 Flip. 285, the court saying: "While the federal courts have no general jurisdiction, like the court of queen's bench, or of the circuit courts of the state, to issue writs of *mandamus* for all purposes where applicable at common law or under the state statutes, they do have power to use them when necessary to enforce jurisdiction already acquired, and it is auxiliary to their general jurisdiction. One of the most frequent uses to which the writ is put is to compel a municipal corporation to levy a tax authorized by law to pay a debt on which a judgment has been rendered in this court. When used for that purpose, we think we are not only authorized but required by the act of Congress making the practice in the state and federal courts uniform to conform as much as possible to the state practice in similar cases."

<sup>9</sup> Moore v. Memphis, 8 Cent. L. J. 109.

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uences of a failure  
re similar to those  
tion at law.<sup>9</sup>

*v. Crippen*, 10 Cal. 122;  
711; *Etheridge v. Hall*, 7  
re *Trustees of Williams-*  
rb. 34; *King v. Bank of*  
bug. 524; *Queen v. R. R.*  
& E. 531.  
*v. City of Memphis*, 2  
he court saying: "While  
courts have no general  
like the court of queen's  
of the circuit courts of  
issue writs of *mandamus*  
oses where applicable at  
or under the state stat-  
o have power to use them  
ary to enforce jurisdiction  
ired, and it is auxiliary to  
l jurisdiction. One of the  
at uses to which the writ  
compel a municipal cor-  
levy a tax authorized by  
debt on which a judgment  
rendered in this court,  
or that purpose, we think  
only authorized but re-  
e act of Congress making  
in the state and federal  
orm to conform as much  
to the state practice in  
" *Memphis*, 8 Cent. L. J.

§ 4028. **Demand and Refusal.**—It is held in some cases that the writ will not issue without proof of a demand and a refusal;<sup>1</sup> while in others the rule is established that this is only requisite in cases of a private nature specially affecting the rights of individuals.<sup>2</sup>

§ 4029. **When Writ will not be Issued.**—The writ of *mandamus* will not be issued where there is any other adequate or specific remedy to secure the enforcement of the right or the performance of the duty;<sup>3</sup> or where the party applying has a plain, speedy, and adequate remedy by an ordinary action at law;<sup>4</sup> or to compel the performance of an act that without it would be unlawful;<sup>5</sup> nor where the right is doubtful, and the legal remedy is not clearly established;<sup>6</sup> nor where the statute provides a

<sup>1</sup> *Condit v. Austin Co.*, 25 Ind. 422; *State v. Davis*, 17 Minn. 429; *State v. Lebra*, 7 Rich. 234; *State v. Governor*, 25 N. J. L. 331; *Cort v. Elliott*, 28 Neb. 293; *Kemerer v. State*, 7 Neb. 130.

<sup>2</sup> *Oroville etc. R. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354; *State v. County Judge of Marshall*, 7 Iowa, 186; *State v. Bailey*, 7 Iowa, 390; *Com. v. Comm'rs of Allegheny*, 37 Pa. St. 237.

<sup>3</sup> *Mobile etc. R. R. Co. v. Wisdom*, 5 Heisk. 125; *Arberry v. Beavers*, 6 Tex. 457; 55 Am. Dec. 791; *Taylor v. County Court of Salt Lake Co.*, 2 Utah, 405; *King William Justices v. Munday*, 2 Leigh, 165; 21 Am. Dec. 604; *Ex parte Virginia Comm'rs*, 112 U. S. 177; *King v. Water Works Co.*, 6 Ad. & E. 355; *Tarver v. Commissioners' Court*, 17 Ala. 527; *Ex parte Trapnall*, 6 Ark. 9; 42 Am. Dec. 676; *Basham v. Carroll*, 44 Ark. 284; *People v. Olds*, 3 Cal. 167; 58 Am. Dec. 398; *Balcock v. Goodrich*, 47 Cal. 68; *Peck v. Booth*, 42 Conn. 271; *Territory v. Shearer*, 2 Dak. 332; *Moody v. Fleming*, 4 Ga. 115; 48 Am. Dec. 210.

<sup>4</sup> *Ex parte S. C. N. Ala. R. R. Co.*, 65 Ala. 599; *Ex parte Cheatham*, 6 Ark. 437; *Ex parte Williamson*, 8 Ark. 424; *Peralta v. Adams*, 2 Cal. 594; 594; *Early v. Mannix*, 15 Cal. 149; *People v. Hubbard*, 22 Cal. 34; *People*

*v. McLane*, 62 Cal. 616; *American Asylum v. Phoenix Bank*, 4 Conn. 172; 10 Am. Dec. 112; *People v. Hatch*, 33 Ill. 9; *People v. Salomon*, 46 Ill. 415; *Louisville etc. R. R. Co. v. State*, 25 Ind. 177; *Fogle v. Gregg*, 26 Ind. 245; *Excelsior etc. Ass'n v. Kiddle*, 51 Ind. 84; *State v. County Judge of Floyd*, 3 Iowa, 380; *Marshall v. Sloan*, 35 Iowa, 445; *Succession of Macarty*, 2 La. Ann. 979; *State v. Judge of Fourth District*, 8 La. Ann. 92; *Leland v. Rose*, 10 La. Ann. 415; *State v. Judge of Sixth District*, 12 La. Ann. 342; *State v. Police Jury*, 29 La. Ann. 146; *Inhabitants of Lexington v. Mulliken*, 7 Gray, 280; *Smith v. Burton*, 48 Mich. 643; *Olson v. Muskegon Circuit Court*, 49 Mich. 85; *Byrne v. Harbison*, 1 Mo. 225; *St. Louis County Court v. Sparks*, 10 Mo. 118; *State v. Engleman*, 45 Mo. 27.

<sup>5</sup> *People v. R. R. Co.*, 58 N. Y. 153; *Johnson v. Lucas*, 11 Humph. 396.

<sup>6</sup> *Tarver v. Commissioners' Court of Tallapoosa*, 17 Ala. 527; *Peck v. Booth*, 42 Conn. 271; *Union Church of Africans v. Sanders*, 1 Houst. 100; 63 Am. Dec. 187; *People v. Salomon*, 46 Ill. 415; *People v. Mayor of Chicago*, 51 Ill. 17; *People v. Glann*, 70 Ill. 232; *People v. Masonic B. A.*, 98 Ill. 635; *People v. Johnson*, 100 Ill. 537; 39 Am. Rep. 63; *State v. Herron*, 29 La. Ann. 848; *People v. Auditor-General*.

plain, speedy, and adequate remedy;<sup>1</sup> nor where the court of chancery has already acquired jurisdiction of the subject-matter;<sup>2</sup> nor for the enforcement of mere private contracts;<sup>3</sup> nor contract rights of a private and personal nature, and obligations which rest wholly upon contract, involving no questions of public trust or official duty;<sup>4</sup> nor where the public interests have not been affected;<sup>5</sup> nor to compel the performance of a useless, unlawful, or impossible act, or an act which the respondent is ready to perform.<sup>6</sup>

### § 4030. Ministerial Duties—Discretionary Duties.—

While the writ will lie to compel the performance of mere ministerial duties, it will not lie to compel the performance of acts or duties requiring the exercise of judgment or discretion upon the part of the person or body called upon to act.<sup>7</sup> But in a recent case it is said that it is not

36 Mich. 271; *People v. Supervisors of Presque Isle Co.*, 36 Mich. 377; *Loomis v. Rogers Township*, 53 Mich. 135; *Board of Police v. Grant*, 9 Smedes & M. 77; 47 Am. Dec. 102; *People v. Brooklyn*, 1 Wend. 318; 19 Am. Dec. 502; *People v. Supervisors of Greene*, 64 N. Y. 600; *People v. Hoyt*, 66 N. Y. 606; *Dutton v. Hanover*, 42 Ohio St. 215; *Cook v. Peacham*, 50 Vt. 231; *Com. v. Mitchell*, 82 Pa. St. 343; *Ex parte Barnwell*, 8 S. C. 264.

<sup>1</sup> *Louisville etc. R. R. Co. v. State*, 25 Ind. 177; *Fogle v. Gregg*, 26 Ind. 345; *King William Justices v. Munday*, 2 Leigh, 165; 21 Am. Dec. 604; *State v. Supervisors of Sheboygan*, 29 Wis. 79.

<sup>2</sup> *Queen v. Pitt*, 10 Ad. & E. 272; *People v. Warfield*, 20 Ill. 160; *School Inspectors of Peoria v. People*, 20 Ill. 530; *People v. Wiant*, 48 Ill. 268; *People v. City of Chicago*, 53 Ill. 424; *Hardcastle v. R. R. Co.*, 32 Md. 32.

<sup>3</sup> *People v. Dulaney*, 96 Ill. 503; *State v. County Court of Howard*, 39 Mo. 375; *State v. Zanesville T. Co.*, 16 Ohio St. 308; *Benson v. Paull*, 6 El. & B. 273.

<sup>4</sup> *Tobey v. Hakes*, 54 Conn. 274; 1 Am. St. Rep. 114; *State v. Republican Bridge Co.*, 20 Kan. 404.

<sup>5</sup> *Crane v. R. R. Co.*, 74 Iowa, 330; 7 Am. St. Rep. 479.

<sup>6</sup> *Lamar v. Wilkins*, 28 Ark. 34; *Clark v. Crane*, 57 Cal. 629; *Roberts v. Smith*, 63 Ga. 213; *Lacoste v. Duffy*, 49 Tex. 767; 30 Am. Rep. 122; *State v. Mayor*, 40 N. J. L. 152; *People v. R. R. Co.*, 58 N. Y. 153; *Union Church v. Trustees*, 6 Ohio, 442; 27 Am. Dec. 266.

<sup>7</sup> *United States v. Schurz*, 102 U. S. 378; *United States v. Laurence*, 3 Dall. 42; *Ex parte Davenport*, 6 Pet. 661; *Ex parte Poultney*, 12 Pet. 472; *Ex parte Many*, 14 How. 24; *United States v. Boutwell*, 3 McAr. 172; *United States v. Key*, 3 McAr. 337; *Ex parte Banks*, 28 Ala. 28; *Ex parte Selma etc. R. R. Co.*, 46 Ala. 423; *People v. Sexton*, 37 Cal. 532; *Hamilton v. Tutt*, 65 Cal. 57; *Union Colony v. Elliott*, 5 Col. 371; *Freeman v. Selectmen of New Haven*, 34 Conn. 406; *Barksdale v. Cobb*, 16 Ga. 13; *City of Ottawa v. People*, 48 Ill. 233; *People v. Dental Examiners*, 110 Ill. 180; *State v. Demaree*, 80 Ind. 519; *State v. Robinson*, 1 Kan. 188; *Mayor v. Morgan*, 7 Martin, N. S., 1; 18 Am. Dec. 232; *State v. Board of Liquidators*, 23 La. Ann. 388; *State v. Shaw*, 23 La. Ann. 790; *State v. Police Jury*,

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R. R. Co., 74 Iowa, 330;  
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 63 Ga. 213; Lacoste v.  
 ex. 767; 30 Am. Rep. 122;  
 ayor, 40 N. J. L. 152;  
 R. R. Co., 58 N. Y. 153;  
 rch v. Trustees, 6 Ohio,  
 Dec. 266.

States v. Schurz, 102 U. S.  
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 x parte Davenport, 6 Pet.  
 rte Poultney, 12 Pet. 472;  
 any, 14 How. 24; United  
 Boutwell, 3 McAr. 172;  
 ates v. Key, 3 McAr. 337;  
 anks, 28 Ala. 28; Ex parte  
 R. R. Co., 46 Ala. 423;  
 ington, 37 Cal. 532; Hamil-  
 , 65 Cal. 57; Union Colony  
 5 Col. 371; Freeman v.  
 of New Haven, 34 Conn.  
 sdale v. Cobb, 16 Ga. 13;  
 awa v. People, 48 Ill. 233;  
 Dental Examiners, 110 Ill.  
 v. Demaree, 80 Ind. 519;  
 obinson, 1 Kan. 188; Mayor  
 7 Martin, N. S., 1; 18 Am.  
 State v. Board of Liquida-  
 Ann. 388; State v. Shaw,  
 n. 790; State v. Police Jury,

universally true that this writ will not issue to control  
 judicial action, or to compel a tribunal to whom the ex-  
 amination of a matter is intrusted to act in a particular  
 way. It may properly issue to compel an officer to act in  
 a particular manner, though, in the exercise of a discre-  
 tion conferred on him, he has determined not to so act, if,  
 from an examination of the law, the court is of the opin-  
 ion that the law did not intend his action to be final, and,  
 further, that there is no other "plain, speedy, and ade-  
 quate remedy."<sup>1</sup> The approval of an official bond is a  
 judicial and not a ministerial duty, and not compellable  
 by *mandamus*.<sup>2</sup> While the writ simply requires the judi-  
 cial officer to proceed to do his duty, it not only requires  
 the ministerial officer to proceed to do his duty, but it  
 also indicates what his specific duty is.<sup>3</sup>

§ 4031. **Public Officers.** — Where the law has enjoined  
 upon a public officer the performance of a specific act or  
 duty, and there is no other adequate remedy provided by  
 law, such performance may be enforced by *mandamus*.<sup>4</sup>  
 Thus it will lie against a sheriff to compel him to perform  
 the duties of his office;<sup>5</sup> against an auditor to compel him

29 La. Ann. 146; *Braconier v. Pack-*  
*ard*, 136 Mass. 50; *People v. Bender*,  
 36 Mich. 195; *People v. Auditor-Gen-*  
*eral*, 36 Mich. 271; *Buchoz v. Pray*, 37  
 Mich. 512; *State v. Ames*, 31 Minn.  
 440; *Swan v. Gray*, 44 Miss. 393;  
*State v. Secretary of State*, 33 Mo. 293;  
*State v. Hudson*, 13 Mo. App. 61;  
*Humboldt Co. v. County Commission-*  
*ers*, 6 Nev. 30; *Judges of Oneida C. P.*  
*v. People*, 18 Wend. 79; *People v.*  
*New York C. P.*, 19 Wend. 113; *Peo-*  
*ple v. Judges of Oneida C. P.*, 21 Wend.  
 20; *Ex parte Bacon*, 6 Cow. 392; *Sam-*  
*son v. Mercer*, 68 Tex. 488; 2 Am. St.  
 Rep. 505.

<sup>1</sup> *Wood v. Strother*, 76 Cal. 545; 9  
 Am. St. Rep. 249.

<sup>2</sup> *Ex parte Harris*, 52 Ala. 87; 23  
 Am. Rep. 559.

<sup>3</sup> *State v. Garesche*, 65 Mo. 480.

<sup>4</sup> *Meyer v. Porter*, 65 Cal. 67; *Board*  
*of Supervisors of Will County v. Peo-*  
*ple*, 110 Ill. 511; *United States v.*  
*Commissioners of Dubuque, Morris,*  
*42; Township of Higgins v. Super-*  
*visors of Midland Co.*, 52 Mich. 16;  
*Ramsey v. Everett*, 52 Mich. 344.  
*Common Council of Hudson v. Whit-*  
*ney*, 53 Mich. 158; *State v. Cummings*,  
 17 Neb. 311; *Meadows v. Nesbit*, 12  
 Lea, 486; *Wise v. Bigger*, 79 Va. 269.  
 Except, of course, when the duty is  
 discretionary or judicial in its nature:  
*See ante*. It will lie against a *de facto*  
 officer: *Kelly v. Wimberly*, 61 Miss.  
 548; *Ranon v. Latimer*, 6 Rich. 126;  
*State v. McIntyre*, 3 Ired. 171.

<sup>5</sup> *Fremont v. Crippen*, 10 Cal. 212;  
 70 Am. Dec. 711; *State v. Walker*, 5  
 S. C. 263; *People v. McClay*, 2 Neb.  
 7; *People v. Fleming*, 4 Deno, 137.



to perform his duties;<sup>1</sup> against election officers to compel them to proceed with their duties prescribed by the law;<sup>2</sup> or to compel delivery of books, records, papers, etc., pertaining and belonging to an office, to the person properly entitled to their custody;<sup>3</sup> or to compel the party having custody of records to permit them to be inspected or copied;<sup>4</sup> to compel the commissioner of patents to perform the ministerial acts of preparing and countersigning a patent after he has determined that the patent shall issue;<sup>5</sup> to compel county commissioners to keep a public bridge in repair, or to replace or rebuild it;<sup>6</sup> to compel the collector of a port to grant a clearance to a vessel;<sup>7</sup> to compel a tax collector to collect a tax;<sup>8</sup> to compel a county treasurer to keep his office at the county seat;<sup>9</sup> to compel an assessor to assess property which is subject to taxation;<sup>10</sup> to compel a county treasurer to pay into the state treasury the amount of taxes due the state;<sup>11</sup> to compel the county court to erect a bridge across a public road, when that duty is imposed on it by statute;<sup>12</sup> to compel a clerk of a

<sup>1</sup> *Fowler v. Peirce*, 2 Cal. 165; *People v. Brooks*, 16 Cal. 11; *Babcock v. Goodrich*, 47 Cal. 488; *Cheney v. Newton*, 67 Ga. 477; *Danley v. Whitely*, 14 Ark. 687; *Turner v. Melony*, 13 Cal. 621; *State v. Gamble*, 13 Fla. 9; *People v. Smith*, 43 Ill. 219; *People v. Secretary of State*, 58 Ill. 90; *Bryan v. Cattell*, 15 Iowa, 538; *State v. Bordelon*, 6 La. Ann. 68; *State v. Clinton*, 28 La. Ann. 47; 28 La. Ann. 72.

<sup>2</sup> *Hudmon v. Slaughter*, 70 Ala. 546; *State v. Gibbs*, 13 Fla. 55; 7 Am. Rep. 233; *Kisler v. Cameron*, 39 Ind. 488; *State v. County Judge of Marshall County*, 7 Iowa, 186; *State v. Bailey*, 7 Iowa, 390; *State v. Robinson*, 1 Kan. 17; *Clark v. McKenzie*, 7 Bush, 523; *Barnes v. Gottschalk*, 3 Mo. App. 111; *State v. Houston*, 40 La. Ann. 393; 8 Am. St. Rep. 532.

<sup>3</sup> *Rex v. Clapham*, 1 Wils. 305; *Rex v. Wildman*, *Strange*, 879; *Burr v. Norton*, 25 Conn. 103; *People v. Kilduff*, 15 Ill. 492; 60 Am. Dec. 769; *People v. Head*, 25 Ill. 325; *People v. Hilliard*, 29 Ill. 413; *Delahanty v.*

*Warner*, 75 Ill. 185; *Fasnacht v. German Literary Ass'n*, 99 Ind. 133; *City of Keokuk v. Merriam*, 44 Iowa, 432; *American R. R. F. Co. v. Haven*, 101 Mass. 398; 3 Am. Rep. 377; *Atherton v. Sherwood*, 15 Minn. 221; *State v. Dusman*, 39 N. J. L. 677; *Hooten v. McKinney*, 5 Nev. 194; *Kimball v. Lamprey*, 19 N. H. 215; *Felts v. Mayor*, 2 Head, 650; *Walter v. Belding*, 24 Vt. 658.

<sup>4</sup> *Brown v. County Treasurer*, 54 Mich. 132; 52 Am. Rep. 800; *Ferry v. Williams*, 41 N. J. L. 332; 32 Am. Rep. 219; *Peters v. Auditor*, 33 Gratt. 368.

<sup>5</sup> *Butterworth v. Hoe*, 112 U. S. 50.

<sup>6</sup> *State v. Board of Comm'rs of Gibson Co.*, 80 Ind. 478.

<sup>7</sup> *Gilchrist v. Collector of Charleston*, 5 Hughes, 1.

<sup>8</sup> *State v. Whitworth*, 8 Lea, 594.

<sup>9</sup> *Rice v. Shay*, 43 Mich. 380.

<sup>10</sup> *State v. Buchanan*, 24 W. Va. 362.

<sup>11</sup> *State v. Staley*, 38 Ohio St. 259.

<sup>12</sup> *Brander v. Justices*, 5 Cal. 543; 2 Am. Dec. 606.

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III. 185; *Fasnacht v. Ger-*  
*ry Ass'n*, 99 Ind. 133; *City*  
*v. Merriam*, 44 Iowa, 432;  
*R. R. F. Co. v. Haven*, 101  
3 Am. Rep. 377; *Atherton*  
*d.*, 15 Minn. 221; *State v.*  
*N. J. L.* 677; *Hooten v.*  
5 Nev. 194; *Kimball v.*  
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*Head*, 650; *Walter v. Beld-*  
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*Whitworth*, 8 Lea. 594.

*Shay*, 43 Mich. 380.

*Buchanan*, 24 W. Va. 362.

*Staley*, 38 Ohio St. 259.

*er v. Justices*, 5 Cal. 548; 2

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municipal court to furnish certified copies of its records;<sup>1</sup>  
to compel a county clerk to execute a tax deed;<sup>2</sup> to compel  
an officer to surrender property of the state which he  
holds without any right or authority of law;<sup>3</sup> to compel  
the county court of a new county to adjust its proportion  
of the debt of the parent county, when properly presented  
to it for adjustment;<sup>4</sup> to compel township trustees of  
schools to apply the tuition funds to the payment of the  
township's debt for tuition;<sup>5</sup> to compel appraisers to ap-  
praise property taken for public use, where they refuse to  
do so;<sup>6</sup> to compel police commissioners to draw requis-  
itions upon the comptroller, requiring him to pay the  
salary of a police surgeon.<sup>7</sup> It will lie to restore an officer  
who has been unlawfully removed;<sup>8</sup> and a restoration to  
office should be accompanied by a restoration of all the  
records, instruments, and insignia of office of which he  
has been deprived by the illegal ouster.<sup>9</sup>

It will not lie to try title to an office;<sup>10</sup> but where the  
relator held the proper certificate of his election to an  
office, and had duly qualified, but had been refused pos-  
session by the former officer, whose term had expired, on  
the ground that he was not legally elected, it was held  
that *mandamus* would lie to compel the former officer to  
deliver possession.<sup>11</sup> So in the case of a private corpora-  
tion, a *mandamus* may issue on its petition against per-  
sons claiming to hold its offices.<sup>12</sup> It will not lie against

<sup>1</sup> *State v. Meagher*, 57 Vt. 398.

<sup>2</sup> *Bryson v. Spaulding*, 20 Kan. 427.

<sup>3</sup> *State v. Bacon*, 6 Neb. 286.

<sup>4</sup> *Hempstead Co. v. Grave*, 44 Ark. 317.

<sup>5</sup> *State v. Coopridger*, 96 Ind. 279.

<sup>6</sup> *Ex parte Jennings*, 6 Cow. 518; 16 Am. Dec. 447.

<sup>7</sup> *People v. Board of Police*, 75 N. Y. 38.

<sup>8</sup> *State v. Dunn, Minor*, 46; 12 Am. Dec. 28, note; *Lewis v. Whittle*, 77 Va. 415; *State v. Kenny*, 45 N. J. L. 251.

<sup>9</sup> *Metsker v. Neally*, 41 Kan. 122; 13 Am. St. Rep. 269.

<sup>10</sup> *State v. Dunn, Minor*, 46; 12 Am. Dec. 28, note; *People v. Olds*, 3 Cal. 167; 58 Am. Dec. 398; *St. Louis Co. Court v. Sparks*, 10 Mo. 117; 45 Am. Dec. 355; *Ex parte Harris*, 52 Ala. 87; *Ex parte Wiley*, 54 Ala. 226; *State v. John*, 81 Mo. 13; *State v. Dusmond*, 39 N. J. L. 677. A suit for *mandamus* for an office will not be determined after the term of the office has expired; *Lacoste v. Duffy*, 49 Tex. 767; 30 Am. Rep. 122.

<sup>11</sup> *State v. Sherwood*, 15 Minn. 221; 2 Am. Rep. 116.

<sup>12</sup> *American Railway Frog Co. v. Haven*, 101 Mass. 398; 3 Am. Rep. 377.

the governor or the executive officer of the state.<sup>1</sup> A *mandamus* directed to a public officer does not abate with the expiration of his office, where there is a continuing duty in the office irrespective of the incumbent.<sup>2</sup>

§ 4032. **Inferior Courts.**—*Mandamus* will lie to compel an inferior court to act in a case within its jurisdiction.<sup>3</sup> It is a proper remedy to compel an original hearing in a chancery suit;<sup>4</sup> or to enforce a party's right to an appeal.<sup>5</sup> But *mandamus* will not lie, however, to control the judicial discretion of an inferior court, nor to dictate to it what judgment it shall render in any case.<sup>6</sup>

§ 4033. **Municipal Corporations.**—*Mandamus* will lie against public corporations and their officers in all cases

<sup>1</sup> See *ante*, Title Constitutional Law, Chapter Judicial Power.

<sup>2</sup> *Thompson v. United States*, 103 U. S. 480; the court saying: "But we cannot accede to the proposition that proceedings in *mandamus* abate by expiration of office of the defendant where, as in this case, there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached. The contrary has been held by very high authority: *People v. Champion*, 16 Johns. 61; *People v. Collins*, 19 Wend. 56; High on Extraordinary Legal Remedies, sec. 33. We have had before us many cases in which the writ has, without objection, been directed to the corporation itself, instead of the officers individually; and yet, in case of disobedience to the peremptory *mandamus*, there is no doubt that the officers by whose delinquency it was incurred would have been liable to attachment for contempt. The proceedings may be commenced with one set of officers and terminated with another, the latter being bound by the judgment: *Board of Commissioners of Knox Co. v. Aspinwall*, 24 How. 376; *Supervisors v. United States*, 4 Wall. 425; *Von Hoffman v. Quincy*, 4 Wall. 535; *Benbow v. Iowa City*, 7 Wall. 313; *Butz v. City of Muscatine*, 8 Wall. 575; *Mayor*

*v. Lord*, 9 Wall. 409; *Commissioners v. Sellew*, 99 U. S. 624, and many others.

<sup>3</sup> *Ex parte Mahone*, 30 Ala. 49; 68 Am. Dec. 111; *State v. Williams*, 69 Ala. 311; *McCreary v. Rogers*, 35 Ark. 298; *Beguhl v. Swan*, 39 Cal. 411; *Ex parte Henderson*, 6 Fla. 279; *Branford v. Erant*, 1 N. Mex. 579; *State v. Whittet*, 61 Wis. 351; *Ex parte Morgan*, 114 U. S. 174.

<sup>4</sup> *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 438.

<sup>5</sup> *Ex parte Jordan*, 94 U. S. 243; *Ware v. McDonald*, 62 Ala. 81; *Pettigrew v. Washington Co.*, 43 Ark. 33.

<sup>6</sup> *Hempstead Co. v. Graves*, 44 Ark. 317; *In re Woffenden*, 1 Ariz. 237; *People v. Judge of Superior Court of Detroit*, 41 Mich. 31; *School District v. Circuit Judge of Ingham Co.*, 49 Mich. 432; *Board of Police v. Grant*, 9 Smedes & M. 77; 47 Am. Dec. 102; *Miltenberger v. St. Louis Co. Court*, 50 Mo. 172; *Strahan v. County Court of Audrain Co.*, 65 Mo. 644; *State v. Marshall*, 82 Mo. 484; *Benedict v. Howell*, 39 N. J. L. 221; *Ex parte Chamberlain*, 4 Cow. 49; *People v. Russell*, 46 Barb. 27; *People v. Common Council of City of Troy*, 78 N. Y. 33; *Ewing v. Cohen*, 63 Tex. 482; *Ex parte Schwab*, 98 U. S. 240; *Ex parte R. R. Co.*, 101 U. S. 720; *Ex parte Perry*, 102 U. S. 183; *Ex parte Morgan*, 114 U. S. 174.

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*Mandamus* will lie  
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Wall. 409; Commissioners  
99 U. S. 624, and many

Mahone, 30 Ala. 49; 68  
111; State v. Williams, 69  
McCreary v. Rogers, 35 Ark.  
l v. Swan, 39 Cal. 411; Ex  
lerson, 6 Fla. 279; Branford  
l N. Mex. 579; State v.  
l Wis. 351; Ex parte Mor-  
S. 174.

v. Buck, 75 Mich. 274; 13  
ep. 438.

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Donald, 62 Ala. 81; Petty-  
Washington Co., 43 Ark. 33.

stead Co. v. Graves, 44 Ark.  
re Woffenden, 1 Ariz. 237;

Judge of Superior Court of  
1 Mich. 31; School District

Judge of Ingham Co., 49  
; Board of Police v. Grant,

& M. 77; 47 Am. Dec. 102;

ger v. St. Louis Co. Court,

2; Strahan v. County Court  
n Co., 65 Mo. 644; State v.

82 Mo. 484; Benedict v.

9 N. J. L. 221; Ex parte

ain, 4 Cow. 49; People v.

46 Barb. 27; People v. Com-  
cil of City of Troy, 78 N. Y.

g v. Cohen, 63 Tex. 482; Ex

wab, 98 U. S. 240; Ex parte

, 101 U. S. 720; Ex parte

2 U. S. 183; Ex parte Mor-  
U. S. 174.

where a plain and imperative duty is imposed by law, and  
are merely called upon to act in a ministerial capacity,  
without having to exercise their judgment as to whether  
or not the duty should be performed.<sup>1</sup>

§ 4034. **School Officers.**—*Mandamus* will lie to compel  
school directors to furnish equal school facilities for blacks  
and whites, where the duty of doing so is imposed by stat-  
ute, and they have the necessary funds;<sup>2</sup> to compel the  
admission of a boy to the high school, although he cannot  
pass the examination in grammar, if his father does not  
wish to have him pursue that study;<sup>3</sup> to compel the direc-  
tors to introduce the text-books legally adopted by the  
proper authority;<sup>4</sup> or to admit colored pupils into the  
public schools, where separate schools are not provided  
for them;<sup>5</sup> or to restore a teacher who has been illegally  
dismissed by the trustees.<sup>6</sup>

§ 4035. **Private Corporations.**—Where the law im-  
poses a specific duty upon a private corporation, and  
there is no other specific and adequate remedy provided  
for its enforcement, *mandamus* will lie.<sup>7</sup> The managers  
of a cemetery may be compelled by *mandamus* to permit  
the burial of persons entitled to sepulture therein.<sup>8</sup>

<sup>1</sup> City of Ottawa v. People, 48 Ill. 233; Pumphrey v. Mayor etc. of Balti- more, 47 Md. 145; 28 Am. Rep. 446; Attorney-General v. City Council of Lawrence, 111 Mass. 90; McBride v. City of Grand Rapids, 47 Mich. 236; Hall v. Selectmen of Somersworth, 39 N. H. 511; Hill v. Goodwin, 56 N. H. 441; Humboldt Co. v. Churchill Co., 6 Nev. 30; People v. Collins, 7 Johns. 549; Ex parte Common Council of Albany, 3 Cow. 358; People v. Common Council of New York, 45 Barb. 473; Bank of Utica v. City of Utica, 4 Paige, 399; 27 Am. Dec. 72; State v. Board of Comm'rs of Hamilton Co., 26 Ohio St. 364.

<sup>2</sup> Maddox v. Neal, 45 Ark. 121; 55 Am. Rep. 540.

<sup>3</sup> Trustees of Schools v. People, 87 Ill. 303; 29 Am. Rep. 55.

<sup>4</sup> State v. School Directors of Spring- field, 74 Mo. 21.

<sup>5</sup> State v. Duffy, 7 Nev. 342; 8 Am. Rep. 713.

<sup>6</sup> Gilman v. Bassett, 33 Conn. 298; Morley v. Power, 5 Lea, 691.

<sup>7</sup> State v. Ousatonie Water Co., 51 Conn. 137; Firemen's Ins. Co. v. Mayor of Baltimore, 23 Md. 297; American R. R. F. Co. v. Haven, 101 Mass. 398; 3 Am. Rep. 377; People v. State Ins. Co., 19 Mich. 392; State v. Nebraska Telephone Co., 17 Neb. 126; 52 Am. Rep. 404; State v. Board of Trustees, 4 Nev. 400; Mt. Moriah Cemetery Ass'n v. Commonwealth, 81 Pa. St. 235; 22 Am. Rep. 743; State v. R. R. Co., 9 Rich. 247; 67 Am. Dec. 551. See ante, Title Corporations.

<sup>8</sup> Mt. Moriah Cemetery Ass'n v. Com., 81 Pa. St. 235; 22 Am. Rep. 743.

§ 4036. **Parties.**—The proceeding is usually in the name of the state upon the information of the party actually interested.<sup>1</sup> Where the relief sought is merely private, the relator must show some special interest in the matter; but where the question is one of public right, and the object is the enforcement of a public duty, he need not show that he has any special interest in the result. It is in that case sufficient for him to show that he is a citizen, and, as such, interested in the execution of the laws.<sup>2</sup> Some courts, however, hold that the relator must show a special interest in the subject-matter of the proceedings.<sup>3</sup>

§ 4037. **Pleading and Practice.**—The alternative writ stands in the place of the declaration in an action at common law. But in some states the petition takes the place of the declaration, and becomes the foundation of the subsequent proceedings. The same rules of pleading that apply to the declaration will apply to the alternative writ or petition.<sup>4</sup> The alternating *mandamus* cannot be so amended as to allow the substitution in the same action of a new and wholly different cause of action. It must state a cause of action, and failing to do so, it will not support a judgment. Its legal sufficiency may, by return or answer, be challenged as upon demurrer, and tested under rules of pleading applicable to complaints when

<sup>1</sup> *State v. Perry*, 5 Ohio St. 344; *Chance v. Temple*, 1 Iowa, 179.

<sup>2</sup> *High on Extraordinary Legal Remedies*, sec. 431; *Moses v. Kearney*, 31 Ark. 261; *Hyatt v. Allen*, 54 Cal. 353; *State v. Fyler*, 48 Conn. 145; *County of Pike v. State*, 11 Ill. 202; *City of Ottawa v. People*, 48 Ill. 233; *Hall v. People*, 57 Ill. 307; *Council of Glencoe v. People*, 78 Ill. 382; *Hamilton v. State*, 3 Ind. 452; *State v. County Judge of Marshall*, 7 Iowa, 186; *State v. Gracey*, 11 Nev. 223; *People v. Collins*, 19 Wend. 56; *People v. Halsey*, 37 N. Y. 344; *State v. Kearney*, 25 Neb. 262; 13 Am. St. Rep. 493.

<sup>3</sup> *State v. Inhabitants of Strong*, 25 Me. 291; *Wellington's Case*, 16 Pick. 87; 26 Am. Dec. 631; *People v. Regents of University*, 4 Mich. 98; *Helfner v. Commonwealth*, 28 Pa. St. 108.

<sup>4</sup> *High on Extraordinary Legal Remedies*, sec. 448; *Board of Trustees v. People*, 12 Ill. 248; 52 Am. Dec. 488; *People v. Glann*, 70 Ill. 232; *People v. Loomis*, 94 Ill. 587; *Lavalle v. Soucy*, 96 Ill. 467; *People v. Dulaney*, 96 Ill. 503; *People v. Commissioners of Hamilton Co.*, 3 Neb. 244; *State v. School District*, 8 Neb. 98; *State v. Board of Commissioners*, 10 Neb. 19.

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ll. 587; Lavalley v. Soucy,  
People v. Dulaney, 96 Ill.  
v. Commissioners of Ham-  
Neb. 244; State v. School  
Neb. 98; State v. Board of  
ers, 10 Neb. 19.

assailed by demurrer.<sup>1</sup> The peremptory writ should fol-  
low the alternative writ, and strictly conform thereto.<sup>2</sup>  
But it is not every variation between the two writs that  
will cause the peremptory to be set aside. Where both  
command the same thing, and differ only in immaterial  
matters, it will suffice.<sup>3</sup> When an appeal is taken from a  
judgment awarding the peremptory writ, the alternative  
writ should be set out in the record.<sup>4</sup> A general denial in  
*mandamus* proceedings should be treated as a nullity, and  
entitles plaintiff to judgment on his pleadings, without  
proof. The defendant must plead either a special denial  
to the allegations of the writ, or by way of confession  
and avoidance.<sup>5</sup>

§ 4038. *Quo Warranto* — In General. — The common-law  
writ of *quo warranto* is a writ of right calling upon an indi-  
vidual to show by what right he exercises a franchise which  
can only be lawfully exercised by a grant or authority em-  
anating from the state.<sup>6</sup> A writ of *quo warranto* at common  
law is a writ of right, and issues of course on demand of  
the proper officers.<sup>7</sup> But in modern practice the ancient  
writ has been superseded by an information in the nature  
of a *quo warranto*, which is a civil proceeding, and gov-  
erned by the rules of civil practice.<sup>8</sup> But an information

<sup>1</sup> Wheeler v. Northern Colorado Ir-  
rigation Co., 10 Col. 582; 3 Am. St.  
Rep. 603.

<sup>2</sup> State v. Board of Equalization of  
Johnson Co., 10 Iowa, 157; 74 Am.  
Dec. 381; State v. County Judge of  
Johnson Co., 12 Iowa, 237; State v.  
Holladay, 65 Mo. 76; State v. R. R.  
Co., 77 Mo. 143; School District v.  
Landerbaugh, 80 Mo. 190; State v. R.  
Co., 16 S. C. 524.

<sup>3</sup> People v. R. R. Co., 58 N. Y. 152.

<sup>4</sup> Smith v. Johnson, 69 Ind. 55.

<sup>5</sup> Sansom v. Mercer, 68 Tex. 488; 2  
Am. St. Rep. 505.

<sup>6</sup> State v. Evans, 3 Ark. 585; 36 Am.  
Dec. 468; Commonwealth v. Murray,  
11 Serg. & R. 73; 14 Am. Dec. 615;  
State v. Harris, 3 Ark. 570; 36 Am.

Dec. 460; State v. Curtis, 35 Conn.  
263; 95 Am. Dec. 263.

<sup>7</sup> State v. Stone, 25 Mo. 555; Attor-  
ney-General v. Utica Ins. Co., 2 Johns.  
Ch. 371; Wallace v. Anderson, 5  
Wheat. 291; Robinson v. Jones, 14  
Fla. 256; State v. St. Louis Ins. Co.,  
8 Mo. 330.

<sup>8</sup> People v. Cook, 8 N. Y. 67; 59  
Am. Dec. 471; State v. Kupeferle, 44  
Mo. 154; 100 Am. Dec. 265; People v.  
Clute, 52 N. Y. 45; State v. Messmore,  
14 Wis. 115; People v. Pease, 30 Barb.  
588; 27 N. Y. 45. *Aliter* in Illinois,  
where an information by *quo warranto*  
is a criminal proceeding; and the same  
rules of pleading applicable to indict-  
ments govern it. And all informa-  
tions of this nature must be carried on

in the nature of a *quo warranto* against a private corporation is not a private, but a public, prosecution.<sup>1</sup>

§ 4039. **Corporate Franchises.**—By the writ may be determined the right of individuals to corporate franchises, and the question whether or not franchises originally conferred have been misused or forfeited.<sup>2</sup> So the writ lies to test the constitutionality of a corporate franchise.<sup>3</sup> An information in the nature of *quo warranto* is the proper remedy where a company or corporation exercises a franchise not granted.<sup>4</sup> Thus it lies against an incorporated company for carrying on banking operations without authority from the legislature.<sup>5</sup> It is a proper proceeding to try the right of a foreign corporation to carry on its corporate business in the state.<sup>6</sup> And it will lie against a

"in the name and by the authority of the people of the state of Illinois," and must conclude, "against the peace and dignity of the same"; *Donnelly v. People*, 11 Ill. 552; *People v. R. R. Co.*, 13 Ill. 66; *Wight v. People*, 15 Ill. 417. But see *Ensminger v. People*, 47 Ill. 384; 95 Am. Dec. 495. The old writ having been so long out of use, many of the cases use the term "*quo warranto*" where the information in the nature of a *quo warranto* is clearly meant. In *McBride v. Grand Rapids*, 32 Mich. 360, the court, speaking of the writ as mentioned in the state constitution, says: "The enumeration of the writ of *quo warranto* in this section is somewhat remarkable, as the writ itself long since passed out of use, and it is not at all probable that the constitutional convention designed to restore it. If, as was undoubtedly the case, an information in the nature of a writ of *quo warranto* was intended instead of the writ itself, then it is by no means apparent that it is not a proper process in the exercise of the ordinary jurisdiction of the circuit courts. This information is adapted for the cases of intrusions and usurpations of office, and the unlawful exercise of franchises. It is the ordinary proceeding in which all questions of this nature are disposed of. Public

rights and private rights are concluded by the trials which are had upon it; and whether considered as a 'civil' or a 'criminal matter,' the cases which are disposed of by means of it are among the most important which are known in the law."

<sup>1</sup> *People v. Golden Rule*, 114 Ill. 34.

<sup>2</sup> *People v. Ins. Co.*, 15 Johns. 358; 8 Am. Dec. 243; *Bellport v. Looker*, 21 N. Y. 267; 29 Barb. 256; *People v. Hudson*, 6 Cow. 217; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; *People v. Manhattan Co.*, 9 Wend. 351; *State v. R. R. Co.*, 45 Wis. 759; *State v. Barron*, 57 N. H. 498; *Commonwealth v. Commonwealth Bank*, 28 Pa. St. 383; *People v. R. R. Co.*, 15 Wend. 113; 30 Am. Dec. 33. A corporation which has been guilty of such a breach of the conditions of its existence as to authorize a forfeiture of its charter cannot legally atone for such misconduct and avoid the forfeiture by subsequent good behavior: *People v. Bank of Pontiac*, 12 Mich. 527.

<sup>3</sup> *People v. Marshall*, 1 Gilm. 672.  
<sup>4</sup> *State v. Citizens' Ben. Co.*, 6 Mo. App. 163.

<sup>5</sup> *People v. Utica Ins. Co.*, 15 Johns. 358; 8 Am. Dec. 243.

<sup>6</sup> *State v. Fidelity and Casualty Ins. Co.*, 39 Minn. 538.

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v. Utica Ins. Co., 15 Johns.  
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Fidelity and Casualty Ins.  
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municipal corporation.<sup>1</sup> The object of proceedings by *quo warranto* against a corporation being to protect public interests, to warrant a forfeiture of corporate franchises for misuser, the misuser must be such as to work or threaten a substantial injury to the public.<sup>2</sup>

§ 4040. **Offices.**—An information in the nature of a *quo warranto* is the proper remedy to try the title to a public office.<sup>3</sup> An office, within this rule, is said to be any public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public.<sup>4</sup> But the source of the office must be from the sovereign authority, either by charter or legislative enactment; its tenure must be fixed and permanent, and its duties must be of a public nature.<sup>5</sup> The injunction has been held to lie against a county auditor;<sup>6</sup> a county clerk;<sup>7</sup> a county treasurer;<sup>8</sup> a governor or lieutenant-governor;<sup>9</sup> a jail-keeper;<sup>10</sup> a judge;<sup>11</sup> a mayor;<sup>12</sup> a military officer;<sup>13</sup> a pilot;<sup>14</sup> a presidential elector;<sup>15</sup> a

<sup>1</sup> State v. Bradford, 32 Vt. 50; State v. Miller, 66 Mo. 328.

<sup>2</sup> State v. Minn. Thresher Mfg. Co., 40 Minn. 213.

<sup>3</sup> People v. Olds, 3 Cal. 167; 58 Am. Dec. 398; Newsome v. Cocke, 44 Miss. 352; 7 Am. Rep. 686; Murphy v. Farmers' Bank, 29 Pa. St. 415; People v. Scannell, 7 Cal. 432; People v. Forquer, 1 Ill. 68; Sudbury v. Stearns, 21 Pick. 148; Lindsey v. Attorney-General, 33 Miss. 508; Ex parte Belows, 1 Mo. 115; People v. Van Slyck, 4 Cow. 297; Lewis v. Oliver, 4 Abb. Pr. 121; Mayor etc. of New York v. Conover, 5 Abb. Pr. 171; Commonwealth v. Cullen, 13 Pa. St. 133; Clark v. Commonwealth, 29 Pa. St. 129; Commonwealth v. Dearborn, 15 Mass. 125; Commonwealth v. Fowler, 10 Mass. 290; People v. Pease, 27 N. Y. 45; 84 Am. Dec. 242.

<sup>4</sup> High on Extraordinary Legal Remedies, sec. 625.

<sup>5</sup> High on Extraordinary Legal Remedies, sec. 625. It will not lie where the appointment is for an uncertain

time: State v. Champlin, 2 Bail. 220. Or at the will of the appointor: People v. Hills, 1 Laus. 202.

<sup>6</sup> State v. Parker, 25 Minn. 215.

<sup>7</sup> People v. Miles, 2 Mich. 349; Williams v. State, 69 Tex. 368.

<sup>8</sup> Clark v. People, 15 Ill. 217; State v. Stein, 13 Neb. 529.

<sup>9</sup> Attorney-General v. Barstow, 4 Wis. 657; State v. Gleason, 12 Fla. 265.

<sup>10</sup> State v. Meehan, 45 N. J. L. 189.  
<sup>11</sup> People v. Heaton, 77 N. C. 18; United States v. Lockwood, 1 Pinn. 359; 3 Wall. 236; Commonwealth v. Dunbould, 97 Pa. St. 293; Grant v. Chambers, 34 Tex. 573.

<sup>12</sup> Commonwealth v. Jones, 12 Pa. St. 365; People v. Thatcher, 55 N. Y. 525; 14 Am. Rep. 312.

<sup>13</sup> State v. Brown, 5 R. I. 1; Commonwealth v. Small, 26 Pa. St. 31; State v. Wadkins, 1 Rich. 42; State v. Utter, 14 N. J. L. 84.

<sup>14</sup> Palmer v. Woodbury, 14 Cal. 43; State v. Jones, 16 Fla. 306.

<sup>15</sup> State v. Bowen, 8 S. C. 400.



school director or trustee;<sup>1</sup> a sheriff;<sup>2</sup> a tax collector. So it lies to test the validity of a dram-shop license where, as in Illinois, the writ lies where one holds or claims any "privilege, exemption, or license" improperly issued.<sup>4</sup> So it lies to test the question whether a person has usurped an office, or whether a certain court has a legal existence.<sup>5</sup> *Quo warranto*, and not an injunction by a private person, is the proper mode for determining the result of a contested election.<sup>6</sup> And where the statute providing for contesting an election makes no provision for removal from office, *quo warranto* lies.<sup>7</sup> One duly elected and qualified as county treasurer may recover possession of the office by proceedings in the nature of *quo warranto*.<sup>8</sup> Where two sets of persons, under claims of right, are attempting to hold county offices, *quo warranto*, and not injunction, affords the legal remedy.<sup>9</sup>

It is essential that there should have been a user of the office,<sup>10</sup> and that the term shall have commenced. But the taking of the oath of office without having discharged any of its duties is a sufficient user,<sup>12</sup> or exercising the functions of the office without having qualified.<sup>13</sup>

In the case of private officers, the information will lie in this country wherever a charter has been granted by the state, and the right to exercise an office under that charter is questioned.<sup>14</sup>

ILLUSTRATIONS. — By a state constitution no person who has engaged or shall engage in a duel is allowed to hold office. *Held*, that one who has been so engaged may be removed from

<sup>1</sup> *State v. Boal*, 46 Mo. 528; *Renwick v. Hall*, 84 Ill. 162.

<sup>2</sup> *Commonwealth v. Walter*, 83 Pa. St. 105; 24 Am. Rep. 154.

<sup>3</sup> *Hyde v. State*, 52 Miss. 655; *People v. Callaghan*, 83 Ill. 128.

<sup>4</sup> *Swarth v. People*, 109 Ill. 621.

<sup>5</sup> *Fraser v. Freelon*, 53 Cal. 644.

<sup>6</sup> *Osgood v. Jones*, 60 N. H. 543.

<sup>7</sup> *Tarbox v. Sughrue*, 36 Kan. 225.

<sup>8</sup> *State v. Hamilton County Commissioners*, 39 Kan. 85.

<sup>9</sup> *Neeland v. State*, 39 Kan. 154.

<sup>10</sup> *King v. Whitwell*, 5 Term Rep. 85.

<sup>11</sup> *People v. McCullough*, 11 Abb. Pr. 129.

<sup>12</sup> *People v. Callaghan*, 83 Ill. 128.

<sup>13</sup> *Hyde v. State*, 52 Miss. 665.

<sup>14</sup> *High on Extraordinary Legal Remedies*, sec. 653; *Com. v. Graham*, 64 Pa. St. 339; *Davidson v. State*, 20 Fla. 784; *Com. v. Arrison*, 15 Serg. & R. 127; 16 Am. Dec. 531; *Com. v. Union Ins. Co.*, 5 Mass. 230; 4 Am. Dec. 50.

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office by *quo warranto*, or on information in the nature of *quo warranto*, without a previous conviction of the offense in criminal proceedings: *Royall v. Thomas*, 28 Gratt. 130; 26 Am. Rep. 335. A state constitution provided that any candidate for office who should be guilty of bribery should be disqualified from holding office. *Held*, that an officer might be removed by *quo warranto* for obtaining his election by bribery, without having first been convicted of the offense on an indictment, but *semble*, that the defendant had a right to have the issues of fact raised upon the *quo warranto* tried by a jury: *Commonwealth v. Walter*, 83 Pa. St. 105; 24 Am. Rep. 154.

§ 4041. When Writ will not Issue.—*Quo warranto* will not issue merely for the determination of a private right wherein not the whole community are interested.<sup>1</sup> The writ will not be issued where there is an adequate remedy by ordinary proceedings;<sup>2</sup> nor where it would be of no avail, as where the term of the contested office has expired or will expire before the trial;<sup>3</sup> nor where a particular method of trying the right to an office is prescribed, as where a public body is made the judge of the qualifications of its members.<sup>4</sup> The writ cannot be issued to prohibit or restrain a public officer or person exercising a public franchise from doing any particular act or thing the right of doing which is claimed by virtue of his office or franchise, and constitutes but a portion of the rights, powers, and privileges incident thereto;<sup>5</sup> nor for the pur-

<sup>1</sup> *Ramsey v. Carhart*, 27 Ark. 12.

<sup>2</sup> *State v. Marlow*, 15 Ohio St. 114; *People v. Hinsdale etc. Co.*, 2 Johns. 190; *People v. Olds*, 3 Cal. 167; 58 Am. Dec. 398; *State v. Wilson*, 30 Kan. 661.

<sup>3</sup> *People v. Sweeting*, 2 Johns. 184; *Morris v. Underwood*, 19 Ga. 559; *State v. Jacobs*, 17 Ohio, 143; Com. v. Athern, 3 Mass. 285; *State v. Tudor*, 5 Day, 329; 5 Am. Dec. 162; *People v. Loomis*, 8 Wend. 396; 24 Am. Dec. 33; *State v. Mead*, 56 Vt. 353. But an information in the nature of a *quo warranto* to try the right to a public office may be tried after the term has expired, or the officer holding has resigned, if the information was filed or proceedings begun before the resigna-

tion took place or the term had expired: *Hunter v. Chandler*, 45 Mo. 452. And it may be filed against public officers, after the expiration of their office, where their conviction is necessary to invalidate their acts, if said acts are of public concern, and intended to confer rights on others: *Burton v. Patton*, 2 Jones, 124; 62 Am. Dec. 194. And see *State v. Graham*, 13 Kan. 136.

<sup>4</sup> *Com. v. Henzey*, 81½ Pa. St. 101. The supreme court has no jurisdiction, upon *quo warranto*, to oust a person declared and adjudged by a legislative body to be a member thereof: *State v. Tomlinson*, 20 Kan. 692.

<sup>5</sup> *State v. Evans*, 3 Ark. 585; *State v. Smith*, 55 Tex. 447.

pose of annulling a city ordinance passed in the irregular and improper exercise of a power conferred by law;<sup>1</sup> nor to declare void a license to practice medicine procured by fraud;<sup>2</sup> nor for the recovery of real estate, except where the real estate has escheated or been forfeited to the state for its use.<sup>3</sup> Where another proceeding is pending regarding the right to hold the office, the court will not interfere therewith under the *quo warranto* information.<sup>4</sup>

ILLUSTRATIONS. — During an action of *quo warranto*, in which the relator asked to have defendant ousted from an office to which no fees attached, the term of office expired. *Held*, that the court properly dismissed the cause, there being only an abstract question involved: *State v. Porter*, 58 Iowa, 19. A state constitution declares that "contested elections for governor and lieutenant-governor shall be determined by the general assembly in such manner as may be prescribed by law." *Held*, that an information in the nature of *quo warranto* does not lie at the instance of one claiming the office of lieutenant-governor: *Robertson v. State*, 109 Ind. 79.

§ 4042. **Who may have Writ.**—The attorney-general or other representative of the state must prosecute the proceeding in the name of the state,<sup>5</sup> and the writ cannot issue on the information of a private person without the intervention of such representative.<sup>6</sup> But when individuals, and not the public, are interested, the information

<sup>1</sup> *State v. Lyons*, 31 Iowa, 432.

<sup>2</sup> *State v. Green*, 112 Ind. 462.

<sup>3</sup> *State v. Shields*, 56 Ind. 521; *West's Appeal*, 64 Pa. St. 181.

<sup>4</sup> *State v. Taylor*, 15 Ohio St. 137.

<sup>5</sup> An appeal taken at the instance of the relator in a *quo warranto* proceeding to dissolve a corporation may be dismissed, in the discretion of the district attorney, against the relator's objection. The relator is not a party to the proceeding, and he cannot control it: *State v. Douglas County Road Co.*, 10 Or. 198.

<sup>6</sup> *Commonwealth v. Lexington etc. Turnpike*, 6 B. Mon. 397; *Commonwealth v. Union Ins. Co.*, 5 Mass. 230; *Houston v. Neuse River etc. Co.*, 8 Jones, 476; *Commonwealth v. Burrell*, 7 Pa. St. 34; *Cleary v. Delicesseline*, 1

*McCord*, 35; *State v. Delicesseline*, 1 *McCord*, 52; *State v. Schneirle*, 5 *Rich.* 299; *Wright v. Allen*, 2 *Tex.* 158; *Patterson v. Hubbs*, 65 *N. C.* 119; *Gibbs v. Somers Point*, 49 *N. J. L.* 515; *State v. McConnell*, 3 *Lea*, 332; *Harrison v. Greaves*, 59 *Miss.* 453. It is held in Illinois that a statutory provision that "the attorney-general or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition," etc., "to file an information in the nature of a *quo warranto*," does not allow him to lend his name therefor for the use of a private party; he must act under a sense of official duty: *People v. R. R. Co.*, 88 *Ill.* 537.

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may be filed by a private person, with leave of the court.<sup>1</sup> The court has a discretion to grant or refuse a motion for leave to file an information.<sup>2</sup> And on a petition for leave to file an information, if the case is clear, the court, on motion, may dismiss the petition.<sup>3</sup> But an information may be filed by the attorney-general or a prosecuting attorney, *ex officio*, without leave of court.<sup>4</sup> The attorney-general can bring *quo warranto* for a forfeiture of charter without an express act of the legislature authorizing him to do so.<sup>5</sup> To entitle a private person to act as relator, he must have some interest in the office or franchise.<sup>6</sup> Thus a *quo warranto* to oust one from office claimed by the relator must show that the latter is eligible.<sup>7</sup> It will not lie on the information of a private person having no special interest in the question to try the right of the incumbent of a public office to hold the same.<sup>8</sup> But every citizen of a town has an interest in its municipal officers which will support a *quo warranto* to test the right of an incumbent thereto.<sup>9</sup> Two or more persons claiming different offices cannot unite in the same proceeding.<sup>10</sup> An information in the name of the attorney-general brought at the relation of an individual for the protection of his private interests against the acts of a corporation cannot be maintained for the purpose of restraining the corporation from the further use of its corporate

<sup>1</sup> High on Extraordinary Legal Remedies, 605; *State v. Lawrence*, 38 Mo. 535; *Camman v. Bridgewater Mining Co.*, 12 N. J. L. 84.

<sup>2</sup> *People v. Sweeting*, 2 Johns. 184; *State v. Lehre*, 7 Rich. 234; *Commonwealth v. Cluley*, 56 Pa. St. 270; *People v. Waite*, 70 Ill. 25; *People v. Moore*, 73 Ill. 132; *State v. Toland*, 33 N. J. L. 135. The court may deny an application for a *quo warranto* if the facts show such conduct on the part of the applicants as precludes them from making the inquiry; *Dorsey v. Ansley*, 72 Ga. 460.

<sup>3</sup> *Attorney-General v. R. R. Co.*, 112 Ill. 520; *Gilroy v. Com.*, 105 Pa. St. 434.

<sup>4</sup> *State v. Rose*, 84 Mo. 198; *Com. v. Allen*, 128 Mass. 308; *Com. v. Bank*, 10 Phila. 156; *Attorney-General v. R. R. Co.*, 38 N. J. L. 282.

<sup>5</sup> *State v. R. R. Co.*, 24 Tex. 80.  
<sup>6</sup> *State v. Vail*, 53 Mo. 97; *Com. v. McCarter*, 98 Pa. St. 604; *State v. Tipton*, 109 Ind. 73; *State v. Stein*, 13 Neb. 529; *Demarest v. Wickham*, 63 N. Y. 320; *Robinson v. Jones*, 14 Fla. 256; *Miller v. Palermo*, 12 Kan. 14.

<sup>7</sup> *State v. Bieler*, 87 Ind. 320; *State v. London*, 91 Ind. 351.

<sup>8</sup> *Barnum v. Gilman*, 27 Minn. 466.

<sup>9</sup> *Churchill v. Walker*, 68 Ga. 681; *State v. Jenkins*, 25 Mo. 484; *State v. Hammer*, 42 N. J. L. 435.

<sup>10</sup> *People v. De Mill*, 15 Mich. 164.

powers and from usurping public franchises to which is not entitled.<sup>1</sup>

ILLUSTRATIONS. — A police constable of a city commissioned for one year, having been dismissed during his term by the mayor for unfaithful performance of his duties, petitioned for a writ of *quo warranto* to said mayor to show why he occupied his office, alleging that, though he had taken the oath of office customary in the municipality, he had failed to take that prescribed by the constitution. *Held*, that the petitioner, having no claim to or interest in the office of mayor, and no absolute title to be restored to his position in the event of the ouster of respondent, was not entitled to the writ: *Commonwealth v. McCarty*, 98 Pa. St. 607.

§ 4043. **Procedure to Obtain Leave of Court.** — To obtain the leave of the court to file the information, petition or a motion supported by affidavits must be presented to it. An order will then be directed to the defendant to show cause why the information should not be filed.<sup>2</sup> But leave to file the information may be asked in the first instance, without a rule to show cause, where notice of the motion is given and sufficient time allowed to the defendant to prepare affidavits in opposition to the information.<sup>3</sup> The affidavits of the prosecutor should be positive, and not on information and belief;<sup>4</sup> and should a material fact omitted therein appear from the respondent's affidavit, the prosecutor may avail himself thereof. But affidavits on information and belief will be sufficient where the matter of hearsay and belief goes, not to the validity of the title, but merely to the fact of the party having exercised the office.<sup>5</sup> Upon the hearing of the rule to show cause, the defendant may give counter-affidavits.<sup>7</sup>

<sup>1</sup> *Attorney-General v. Consumers' Gas Co.*, 142 Mass. 417.

<sup>2</sup> *People v. Waite*, 70 Ill. 25; *People v. Richardson*, 4 Cow. 103, and note; *People v. Tibbitts*, 4 Cow. 383; *People v. Shaw*, 14 Ill. 476; *King v. Symons*, 4 Term Rep. 221; *United States v. Lockwood*, 1 Pinn. 365.

<sup>3</sup> *State v. Burnett*, 2 Ala. 140; *State v. Gurnesall*, 24 N. J. L. 529.

<sup>4</sup> *King v. Newling*, 3 Term Rep. 316.

<sup>5</sup> *Rex v. Mein*, 3 Term Rep. 596.

<sup>6</sup> *King v. Slythe*, 6 Barn. & C. 240.

<sup>7</sup> *People v. Waite*, 70 Ill. 25.

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§ 4044. **Pleading and Practice—The Plaintiff.**—Jurisdiction can only be acquired by a service of a writ, the appearance upon an order to show cause not being an appearance upon the information.<sup>1</sup> In most of the states, the information is regarded as in the nature of a civil action, and must be governed by the rules applicable thereto, must be instituted by filing a complaint and issuing a summons, and be proceeded with the same as any other civil action;<sup>2</sup> and the information or complaint should set out with reasonable certainty the facts constituting the relator's title, and specify, as far as practicable, the objections to the defendant's claim of title.<sup>3</sup> In an action to enforce the forfeiture of a corporate franchise on account of non-user and misuser, the complaint must specifically allege that the defendant has a legal existence as a corporation.<sup>4</sup> The attorney-general may disclose in his information the specific ground of forfeiture, and in some states they are required to be set out in a direct and traversable form;<sup>5</sup> or the charge may be general, as a general allegation that defendant intruded into, usurped, and is exercising the functions of the office.<sup>6</sup> So where the complaint to restrain the usurpation of the franchise of a municipal corporation states that defendant is exercising the franchise without being incorporated, it states facts sufficient to constitute a cause of action.<sup>7</sup> The petition, when

<sup>1</sup> *Com. v. Spreiger*, 5 Binn. 353; *Hambleton v. People*, 44 Ill. 458.

<sup>2</sup> *Central etc. Road Co. v. People*, 5 Col. 39; *Atchison etc. R. R. Co. v. People*, 5 Col. 60; *State v. Kuperfle*, 44 Mo. 154; *State v. Com. Bank*, 10 Ohio, 535; *People v. Richardson*, 4 Cow. 97, note; *Com. v. Com. Bank*, 28 Pa. St. 383; *People v. Hall*, 80 N. Y. 117; *People v. Clute*, 52 N. Y. 577. In some states it is held that the forms and pleadings of the criminal law must be strictly adhered to: *United States v. Lockwood*, 3 Wall. 236; *Donnelly v. People*, 11 Ill. 552; *Wright v. People*, 15 Ill. 417; *Lavelle v. People*, 68 Ill. 252. In Ohio the common-law system

of pleading, and not that prescribed by the Ohio Code of Civil Procedure, is to be followed in proceedings in *quo warranto*, and therefore new matter set up in a replication in *quo warranto*, in confession and avoidance of the plea, is taken as confessed, if not denied: *State v. Taylor*, 25 Ohio St. 279.

<sup>3</sup> *State v. Price*, 50 Ala. 568.

<sup>4</sup> *People v. Stanford*, 77 Cal. 360.

<sup>5</sup> *Attorney-General v. R. R. Co.*, 6 Ired. 456; *People v. Manhattan Co.*, 9 Wend. 351; *People v. Kingston Co.*, 23 Wend. 193; *Van Riper v. Parsons*, 40 N. J. L. 1.

<sup>6</sup> *State v. Dahl*, 65 Wis. 510.

<sup>7</sup> *People v. Riverside*, 66 Cal. 288.

prosecuted in behalf of the state by the attorney-general, need not set forth the name of the person claiming the office. This is necessary only where a judgment of induction is sought.<sup>1</sup> The information need not set out the title of the government or of the relator, for, the source of the franchise being in the sovereign, the respondent must at all times be prepared to show how he became entitled thereto.<sup>2</sup> But where the relator himself seeks the possession of the office, allegations of his eligibility and title are necessary.<sup>3</sup> Where the alleged usurpation of the franchise is claimed to result from the fact that the corporation, having once existed, has ceased to exist, it is not sufficient to allege in the complaint that it has ceased to exist, but the facts showing the termination of its existence must be set forth. And so if the claim be that the corporation is acting as such, but the proceedings under which it is acting are defective, the facts showing that it is so claiming to act and the defects claimed to exist must be specifically alleged.<sup>4</sup> The state is not bound to show a demand for the office, nor to establish any fact not tendered by replication or put in issue by rejoinder or other plea.<sup>5</sup> After plea the attorney-general demurs or replies, and the subsequent proceedings are in the same manner as in civil actions.<sup>6</sup> The replication must set out the specific acts or omissions upon which it is supposed the forfeiture has occurred.<sup>7</sup> The state is entitled to amend the information either on or before the trial;<sup>8</sup> and a motion to quash for mere formal defects will not be entertained.<sup>9</sup>

In the case of corporations, if the object of the informa-

<sup>1</sup> *State v. Heinmiller*, 38 Ohio St. 101.

<sup>2</sup> *People v. Ridgby*, 21 Ill. 66; *State v. Gleason*, 12 Fla. 265; *People v. Thacher*, 55 N. Y. 525; 14 Am. Rep. 312.

<sup>3</sup> *State v. Boal*, 46 Mo. 528; *State v. Bieler*, 87 Ind. 320; *State v. London*, 91 Ind. 351.

<sup>4</sup> *People v. Stanford*, 77 Cal. 360.

<sup>5</sup> *State v. McDiarmid*, 27 Ark. 176.

<sup>6</sup> *People v. Richardson*, 4 Cow. 118.

<sup>7</sup> *Com. v. Com. Bank*, 28 Pa. St. 383; *State v. Commercial Bank*, 10 Ohio, 535.

<sup>8</sup> *Com. v. Com. Bank*, 28 Pa. St. 383.

<sup>9</sup> *Com. v. Com. Bank*, 28 Pa. St. 383; *People v. Richardson*, 4 Cow. 109, note.

the attorney-general, person claiming the judgment of inducement not set out the attorney, for, the source of the information, the respondent how he became entitled to himself seeks the question of his eligibility and the usurpation of the fact that the corporation ceased to exist, it is not that it has ceased the termination of its claim be that the proceedings, the facts showing defects claimed to the state is not bound to establish any fact on issue by rejoinder the attorney-general demurs or the facts are in the same replication must set out on which it is supported. The state is entitled to answer before the trial;<sup>3</sup> and all defects will not be

subject of the information.

*People v. Stanford*, 77 Cal. 360.  
*People v. McDiarmid*, 27 Ark. 176.  
*People v. Richardson*, 4 Cow. 118.  
*People v. Com. Bank*, 28 Pa. St. 383;  
*People v. Commercial Bank*, 10 Ohio, 100.  
*People v. Com. Bank*, 28 Pa. St. 383.  
*People v. Com. Bank*, 28 Pa. St. 383;  
*People v. Richardson*, 4 Cow. 109, note.

tion is to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it should be filed against the individuals; if the object is to effect the dissolution of a corporation which has had an actual existence, or to oust such corporation of some franchise which it has unlawfully exercised, then the information is correctly filed against the corporation.<sup>1</sup> If the information is against the defendant by a corporate name, that involves the admission that it was once legally incorporated; and the prosecution is then confined to showing grounds of forfeiture arising subsequent to the grant of incorporation.<sup>2</sup> An action to restrain proceedings to incorporate a village and corporate acts of officers should be brought, not against the signers of the certificate of incorporation, but against the supposed corporation and its trustees exercising the franchise.<sup>3</sup> An information which charges a corporation with usurping certain franchises by acting through other parties calls in question only the authority of the usurping corporation, and cannot be extended so as to include authority not derivable from the corporation, and which such parties exercise in their own right.<sup>4</sup> All the contestants to an office may be joined as parties defendant.<sup>5</sup>

#### § 4045. Pleading and Practice — The Defendant. —

The defendant must either justify or disclaim. Not guilty and *non usurpavit* are not good pleas, they being no answer to the charge to show by what warrant or authority.<sup>6</sup> And if he seeks to justify, he must set forth facts, which, if true, would vest the legal title in him,<sup>7</sup> and the plea

<sup>1</sup> *People v. R. R. Co.*, 15 Wend. 113; 30 Am. Dec. 33; *State v. Barron*, 57 N. H. 498; *Scrafford v. Gladwin Co. Supervisors*, 41 Mich. 647; *People v. Clark*, 70 N. Y. 518; *People v. Stanford*, 77 Cal. 369; *State v. Taylor*, 25 Ohio St. 280.

<sup>2</sup> *State v. Gas Co.*, 18 Ohio St. 262.

<sup>3</sup> *People v. Clark*, 70 N. Y. 518.

<sup>4</sup> *State v. Cincinnati*, 23 Ohio St. 445.

<sup>5</sup> See note to *People v. R. R. Co.*, 30 Am. Dec. 50.

<sup>6</sup> *State v. Utter*, 14 N. J. L. 84; *State v. Barron*, 57 N. H. 498; *Illinois R. R. Co. v. People*, 84 Ill. 426; *Attorney-General v. Foote*, 11 Wis. 14; 78 Am. Dec. 689.

<sup>7</sup> *State v. Harris*, 3 Ark. 570; *Clark v. People*, 15 Ill. 217; *State v. Jones*, 16 Fla. 306; *People v. Richardson*, 4 Cow. 120.



must conclude with a verification; and the burden of maintaining it is on the respondent.<sup>1</sup> The plea need not adopt the words of any law prescribing the qualification for exercising the office or franchise, but only set up facts sufficient to show clearly the right to exercise the same.<sup>2</sup> An answer which denies that the individual defendants are claiming or exercising the corporate franchise states a complete defense as to them.<sup>3</sup> By statutes in some of the states he may set forth as many defenses as he has.<sup>4</sup> For insufficiency of the allegations, the defendant ought to demur.<sup>5</sup> The inquiry in proceedings by information in the nature of *quo warranto* is limited to the charges in the information; and matter set up by way of plea is only material in so far as it shows warrant in law for the exercise of the authority alleged in the information to be usurped.<sup>6</sup>

§ 4046. **The Judgment.**—The judgment, if for the defendant, is simply that he is entitled to the office or franchise. Upon an information brought on the relation of a claimant of an office to determine the right of the respondent to occupy it, the court, if it decides in favor of the relator, may order the respondent to immediately vacate the office.<sup>7</sup> Where either individuals or a corporation are found guilty of usurping or intruding into any office or franchise, or unlawfully holding them, the judgment is simply one of ouster, and a fine may be imposed; but on a conviction of a corporation for misuser, non-user, or surrender, judgment both of ouster and dissolution is rendered equivalent to a judgment of seizure at

<sup>1</sup> *Larke v. Crawford*, 28 Mich. 88; *State v. McCann*, 88 Mo. 386. But see *State v. Kupferle*, 44 Mo. 154; *Attorney-General v. McIvor*, 58 Mich. 516.

<sup>2</sup> *State v. Jones*, 16 Fla. 306.

<sup>3</sup> *People v. Stanford*, 77 Cal. 360.

<sup>4</sup> *People v. Stratton*, 28 Cal. 382.

<sup>5</sup> *State v. Boal*, 46 Mo. 528; *People*

*v. Palmer*, 14 Cal. 43; *Commonwealth v. Commercial Bank*, 28 Pa. St. 333; *Territory v. Lockwood*, 3 Wall. 236.

<sup>6</sup> *State v. Cincinnati*, 23 Ohio St. 445.

<sup>7</sup> *People v. Banvard*, 27 Cal. 470; *People v. Connor*, 13 Mich. 238; *People v. Snedeker*, 3 Abb. Pr. 233; *Gano v. State*, 10 Ohio St. 237.

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common law.<sup>1</sup> Judgment of ouster against one holding an office does not, *per se*, entitle the relator to be admitted; he must also prove his title thereto.<sup>2</sup> There should be judgment of ouster upon *quo warranto*, notwithstanding the usurpation is not continued to the trial.<sup>3</sup> If, in an action in the nature of *quo warranto*, no issue of law or fact is taken upon pleas, it is error for the court, without any trial, to find the defendants guilty of usurping an office, and to render judgment of ouster.<sup>4</sup> In an action to have it determined that certain persons are unlawfully claiming to be and are exercising the functions of a private corporation which never had an existence, a judgment decreeing that the plaintiff recover the powers and franchise exercised and claimed by the defendants, and enjoining them from exercising the same, will be reversed, where the question of the non-existence of the corporation is left wholly undetermined.<sup>5</sup>

Costs follow the event of the suit, but their award usually depends upon the local statutes.<sup>6</sup> If the defendant is adjudged to have unlawfully intruded himself into the office, costs must be awarded to the relator, even if he fails to establish his own right to the office,<sup>7</sup> or even although the judgment also determines that the relator is not entitled to the office.<sup>8</sup>

<sup>1</sup> People v. R. R. Co., 15 Wend. 113; 30 Am. Dec. 33; State v. Bradford, 32 Vt. 50; People v. Richardson, 4 Cow. 120. Judgment of ouster of a particular franchise may be rendered without seizing the charter: People v. R. R. Co., 15 Wend. 113; 30 Am. Dec. 33.  
<sup>2</sup> People v. Thatcher, 55 N. Y. 525; State v. Boal, 46 Mo. 528.

<sup>3</sup> Hammer v. State, 44 N. J. L. 667.

<sup>4</sup> Paul v. People, 82 Ill. 82.

<sup>5</sup> People v. Stanford, 77 Cal. 360.

<sup>6</sup> Rex v. Wallis, 5 Term Rep. 375; State v. Jenkins, 46 Wis. 616.

<sup>7</sup> State v. Jenkins, 46 Wis. 616.

<sup>8</sup> People v. Clute, 52 N. Y. 577.



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